FEDERAL COMMUNICATIONS COMMISSION REPORTS

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

JULY 1, 1966 TO SEPTEMBER 23, 1966

VOLUME 4, SECOND SERIES

REPORTED BY THE COMMISSION

(DIGESTS HAVE BEEN ADDED FOR CONVENIENCE BUT ARE NOT PART OF THE DECISIONS OR REPORTS)

UNITED STATES GOVERNMENT PRINTING OFFICE • WASHINGTON • 1967

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

FEDERAL COMMUNICATIONS COMMISSION

JULY 1, 1966 TO SEPTEMBER 23, 1966

ROSEL H. HYDE, *Chairman*

ROBERT T. BARTLEY
ROBERT E. LEE
KENNETH A. COX
LEE LOEVINGER
JAMES J. WADSWORTH
NICHOLAS JOHNSON (a)

(a) Term of office commenced July 1, 1966.

CONTENTS

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 Antenna Television
Col B/cing Sys.—Columbia Broadcasting System
ComSat Corp.—Communications Satellite Corporation
Co.—Company
Corp—Corporation
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

TABLE OF DOCUMENTS BY TITLE AND MAIN PARTIES

FEDERAL COMMUNICATIONS COMMISSION REPORTS

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

JULY 1, 1966 TO SEPTEMBER 23, 1966

VOLUME 4, SECOND SERIES

REPORTED BY THE COMMISSION

(DIGESTS HAVE BEEN ADDED FOR CONVENIENCE BUT ARE NOT PART OF THE DECISIONS OR REPORTS)

UNITED STATES GOVERNMENT PRINTING OFFICE • WASHINGTON • 1967

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

FEDERAL COMMUNICATIONS COMMISSION

JULY 1, 1966 TO SEPTEMBER 23, 1966

ROSEL H. HYDE, *Chairman*

ROBERT T. BARTLEY
ROBERT E. LEE
KENNETH A. COX
LEE LOEVINGER
JAMES J. WADSWORTH
NICHOLAS JOHNSON (a)

(a) Term of office commenced July 1, 1966.

CONTENTS

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 Antenna Television
Col B/cing Sys.—Columbia Broadcasting System
ComSat Corp.—Communications Satellite Corporation
Co.—Company
Corp—Corporation
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

TABLE OF DOCUMENTS BY TITLE AND MAIN PARTIES

TABLE OF CALL LETTERS

245-843—68——2

TABLE OF LOCALITIES

FCC 66–508

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 2, 21, 87, 89, 91, AND 93 OF THE COMMISSION'S RULES TO REALLOCATE, IN HAWAII ONLY, THE 6525–6575 MC/S BAND FROM THE MOBILE TO THE FIXED SERVICE AND TO PERMIT ACCESS TO THE FREQUENCY BANDS 6525–6575 AND 6575–6875 MC/S BY STATIONS IN THE DOMESTIC PUBLIC RADIO SERVICE IN THAT STATE	Docket No. 16406 RM–836

REPORT AND ORDER

(Adopted June 14, 1966)

BY THE COMMISSION:

1. The Commission, on January 5, 1966, adopted a notice of proposed rulemaking in this matter (FCC 66–8) which was published in the Federal Register on January 12, 1966 (31 F.R. 353). The time for filing comments and reply comments has now expired and no requests for extension of those times have been received. Comments and reply comments in the proceeding were filed by each of the following parties: Hawaiian Telephone Company (Hawaiian); Central Committee on Communication Facilities of the American Petroleum Institute (API); National Committee for Utilities Radio (NCUR); Hawaiian Electric Company, Inc. (Hawaiian Electric); Board of Water Supply of the City and County of Honolulu (Honolulu).

On April 18, 1966, Honolulu also filed a petition for leave to file further reply comments accompanied by said further reply comments. In response, Hawaiian, on April 29, 1966, filed an answer and alternative response to the aforementioned petition and further reply comments. These filings have been carefully considered by the Commission in arriving at conclusions contained herein.

2. The notice of proposed rulemaking was issued in response to a petition for rulemaking (RM–836) which was filed on August 11, 1965, by Hawaiian to provide alternate spectrum availability in those areas of the State of Hawaii where operation of the earth station of the Communications Satellite Corp. (Comsat) would, on the basis of calculations, constitute a source of potential interference to existing or proposed fixed stations in the Domestic Public Radio Services operating in the presently allocated frequency band 5925–6425 Mc/s. The Commission proposed to reallocate, in Hawaii only, the 6525–6575 Mc/s band from the mobile to the fixed service and to make that band and the 6575–6875 Mc/s band available to stations in the Domestic

106–500—66——1

Fixed Public Service on a coequal shared basis with those classes stations to which the bands are currently allocated. In other wor sharing in the two bands would be between operational fixed statio and stations in the Domestic Fixed Public Service, with internatio control stations also sharing the 6575–6875 Mc/s band. Use of t two bands by stations in the Domestic Fixed Public Service would permitted, however, only in those cases where it was demonstrated th shared use of the frequency band 5925–6425 Mc/s between stations the Domestic Public Radio Services and the Communication-Satell Service was not feasible.

3. In their comments, NCUR, Honolulu, and Hawaiian Elect opposed the shared use of the 6575–6875 Mc/s band, alleging prin pally that petitioner (Hawaiian) had not shown that other means meeting its common carrier communication requirements were i practical. Further, they believed, assuming arguendo that all alterna avenues of approach have been examined and found to be impractic an allocation of the frequencies as was proposed is not necessary a would establish an undesirable precedent, particularly in view of t limited applicablity of the intended relief. API, while favoring t requested relief, also opposed the proposed method of obtaining th relief. NCUR, Honolulu, Hawaiian Electric, and API suggested th a case-by-case approach to the problem with a view toward providi the relief on a rule waiver basis would be more appropriate. The views were reiterated in reply comments filed by the same four entiti Hawaiian, of course, supported the proposal and, in addition, offer a frequency assignment plan which, it was purported, would minimi coordination problems and maximize frequency utilization in t proposed bands.

4. In response to the statement advanced in the Hawaiian petiti that little use is presently being made of the 6575–6875 Mc/s ban Hawaiian Electric and Honolulu each submitted plans for expansi of their present microwave systems and of other foreseeable needs f radio channels in this order of the spectrum to meet requirements n yet finalized.

5. With respect to the proposal to reallocate the 6525–6575 Mc band from the mobile to the fixed service, NCUR and API noted t concurring statement of Commissioner Cox, wherein he would ha preferred to retain the band for mobile operation. Significant, ho ever, was the complete lack of opposition to the proposal and t absence of any indication of foreseeable mobile demands.

6. In their reply comments, Hawaiian purported to show: (1) W a waiver of the rules would not provide sufficient protection to t facilities which Hawaiian intends to establish; and (2) why alterna frequencies or methods of providing relief are not available practicable.

7. It appears probable that harmful interference will occur betwe the Comsat earth station at Paumalu, Oahu, Hawaii, and existing proposed point-to-point microwave stations operating in its proximi in the 5925–6425 Mc/s band. This has been recognized not only Comsat in its application for the Paumalu site (FCC file No. 5–CS P–66) and by the Commission (report and order, docket No. 157

FCC 65–416; 30 F.R. 7153), but also by API, which "* * * favors granting the relief requested by the Hawaiian Telephone Co." Depending upon the nature of the ultimate satellite system, the possibility of interference may be increased—particularly if other than a synchronous system is established, thereby necessitating tracking over a large arc of the sky. It is also apparent that Comsat will, in the not too distant future, require access to all, or nearly all, of the two 500 Mc/s segments provided in the 3700–4200 Mc/s and 5925–6425 Mc/s bands.

8. In view of the terrain limitations of Oahu, adequate geographical separation is not feasible; therefore, it is necessary to consider other means of providing protection from harmful interference possibilities. NCUR, Hawaiian Electric, and Honolulu suggest the use of the 2000 Mc/s or 11,000 Mc/s domestic fixed public bands or consideration of the sparsely occupied 6875–7125 Mc/s broadcast auxiliary band in Hawaii.

9. The Commission, in docket No. 14712, divided the 2110–2200 Mc/s band between Domestic Fixed Public Service and operational fixed stations primarily to meet demands for "skinny" route microwave systems. In order to provide the facilities necessary to meet the circuit demands envisioned, it would not only be necessary to waive the 800 kc/s band width limitation imposed on assignments in the 2110–2200 Mc/s band, but it would also be necessary to occupy nearly all of the two segments now allocated to operational fixed stations. In view of the probable needs for "skinny" route systems by both domestic fixed public and operational fixed entities, particularly in Hawaii, and the fact that presently available type accepted equipment is not capable of providing more than 120 circuits per pair of R.F. channels, the 2000 Mc/s band does not appear to provide an adequate alternative.

10. The Commission agrees with Honolulu and NCUR that the Broadcast Auxiliary Services in Hawaii are making little use of the 6875–7125 Mc/s band at present. It should be noted, however, that the band is allocated for both fixed and mobile operations. Under the suggested use, necessary coordination between domestic fixed public stations and the mobile broadcast remote pickup stations would be extremely difficult, if not impossible and, in order to provide assurance of relatively interference-free operation, a reallocation of a large portion of the band to exclusively fixed services would be necessary. In view of the limited requirement demonstrated by Hawaiian, consideration of such a reallocation does not appear to be justified.

11. The Commission, therefore, appears to have three possible solutions to the problem. They are: (*a*) Require Hawaiian to use the 10,700–11,700 Mc/s common carrier band; (*b*) require Hawaiian to operate in cross-band (6525–6875 Mc/s to 10,700–11,700 Mc/s) diversity mode, or (*c*) restrict Hawaiian's operation to the 6525–6875 Mc/s band as was originally proposed or to a portion thereof. The Commission concurs with NCUR, Honolulu, and Hawaiian Electric that the showing made by Hawaiian of outage calculations based simply on rainfall predictions in the area of proposed operation is not conclusive proof that the 10,700–11,700 Mc/s common carrier band is unsuitable.

We do, however, believe that such operation may be marginal, particularly during periods of high rainfall.

12. The concept and use of crossband diversity has only recently been authorized by the Commission for common carrier operations. In this connection, all authorizations for crossband diversity have been conditioned upon determinations to be made as a result of proceedings in docket No. 15130 which is currently outstanding. This proceeding—a notice of inquiry entitled, "In the Matter of Reliability and Related Design Parameters of Microwave Radio Relay Communication Systems and Resultant Impact on Spectrum Utilization" (FCC 63–682; 28 F.R. 7869)—was instituted to obtain data regarding propagation effects in the microwave bands and to determine the effect each of various methods of protection has against those effects in trying to achieve a higher degree of reliability. One of the topics under consideration and analysis in that proceeding is the effect of rainfall on attenuation and reliability at 11,000 Mc/s.

13. In the Commission's opinion, the above considerations and uncertainties detract from using either the 10,700–11,700 Mc/s band exclusively or of using crossband diversity in order to meet Hawaiian's needs. Further, because the communication-satellite system requires the highest degree of reliability with minimal introduction of noise at any one point in the system and because the terrestrial facilities in question must be used to accommodate all types of communications carried by the Comsat system, the Commission believes that it should provide a higher degree of reliability than appears possible at 11 Gc/s.

14. Although reallocation of the 6525–6575 Mc/s band from the mobile to the fixed service in Hawaii only was, except as indicated in paragraph 5, supra, not opposed nor was any indication of foreseeable mobile demands expressed, neither was there a need expressed for additional fixed spectrum at this time by the private users. Accordingly, that portion of the proposal is not being considered further in this proceeding.

15. In view of the above, the Commission has determined that, all things considered, relief should be provided from within the 6575–6875 Mc/s band, at least pending determinations to be made as a result of docket No. 15130 proceedings and all authorizations to the domestic fixed public service in those bands will be so conditioned. At such time as determinations pertinent to, and affecting Hawaiian's need for, access to the 6575–6875 Mc/s band have been made in docket No. 15130, the Commission may reexamine its decision in this matter. While it is recognized that demands by operational fixed stations will increase, the application of judicious engineering and close coordination and cooperation should permit accommodation of those demands for some time to come. Should those demands exceed the capacity of the present spectrum, however, the Commission will consider appropriate measures for relief. In this connection, Honolulu raised the possibility that Hawaiian would require frequency diversity, thus doubling the number of frequencies required. It should be pointed out that any expansion of the proposed operations would be conducted on a module basis; i.e., one protection channel for up to three working

channels in the 6 Gc/s band. Therefore, frequency demands should not be as heavy as Honolulu fears.

16. Having decided to provide the necessary relief for the Domestic Fixed Public Service from within the 6575–6875 Mc/s band as was originally requested by Hawaiian in their petition, the means by which access to the band should be provided (i.e., footnote to the table of frequency allocations or on a case-by-case rule waiver basis) is the sole remaining question. Although ample precedent has been established for amending Commission rules to permit special access to frequency bands not allocated to a particular service, the restricted area in which frequency relief is required coupled with the two conditions imposed upon use of the 6575–6875 Mc/s band (showing of probable interference from Comsat and determinations from docket 15130) typify the case in which the waiver approach to solution of the problem appears most appropriate. This is particularly true in view of the possible outcome of docket 15130 which could nullify any gain in posture which a reallocation might bring. Contrary to Hawaiian's fears, assignments by rule waiver do not necessarily impose a secondary status upon their assignment, unless they are so conditioned, nor would such procedures impose additional administrative burdens upon the applicant in view of the showing required under either method when applying for a frequency authorization.

17. Hawaiian, in their reply comments, opposed the waiver approach because, it was alleged, a lack of notice of a pending application for a 6 Gc/s frequency assignment would ensue. It should be pointed out, however, that all applications for new or modified microwave facilities in the band are placed on public notice, thereby affording an opportunity for comment by any party who feels he may be injured by a grant of the application. Accordingly, this argument must be rejected.

18. In view of the above, the Commission believes the limited requirement for access to the 6575–6875 Mc/s operational fixed band on a geographical basis, the indeterminate traffic handling requirements, the uncertainty with respect to a future need to accommodate other than synchronous satellites, and the uncertainty with respect to potential use of the 11 Gc/s band combine to militate against a reallocation of the 6575–6875 Mc/s band at this time. The Commission will, however, continue to consider requests for rule waiver on case-by-case bases similar to those for which authorizations are presently outstanding.

19. The Commission, therefore, believes the public interest will not be served by adopting the rules as were proposed. Accordingly, *It is ordered*, This 14th day of June 1966, that the petition (RM–836) filed by the Hawaiian Telephone Co. *Is hereby denied* and this proceeding is hereby *Terminated*.

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

FCC 66-5

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF SECTION 73.202, TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS. (GULFPORT, MISS. AND NEW ORLEANS, LA.) } RM-962

MEMORANDUM OPINION AND ORDER

(Adopted June 15, 1966)

BY THE COMMISSION: COMMISSIONER COX ABSENT.

1. The Commission has before it for consideration a petition f rulemaking filed on May 17, 1966, by E. O. Roden, W. I. Dove, James Reese, and Zane D. Roden, d/b as E. O. Roden and Associat (Associates), licensee of station WGCM (AM), Gulfport, Miss., r questing the deletion of channel 270 from New Orleans and its assig ment to Gulfport, Miss., as follows:

City	Channel No.	
	Present	Proposed
Gulfport, Miss.	272A, 296A	270, 2
New Orleans, La.	222, 227, 239, 246, 253, 258, 266, 270	222, 227, 239, 253, 258,

2. New Orleans has assigned to it eight class C assignments.[1] Fi of these have been authorized and applications are on file for the r maining three (258, 266, and 270). Under the criteria used in settii up the FM table of assignments a city the size of New Orlea (627,525) was assigned from 6 to 10 assignments, where possib Gulfport has a population of 30,204 and is the county seat of Harris County but not the largest community in that county. It has be assigned two class A channels, channel 272A, for which no applicati has been filed, and channel 296A, which has been authorized to licensee, WROA-FM. There are two AM stations in Gulfport, class IV, WGCM, licensed to petitioner, and a daytime-only static

3. Associates states that there is little flexibility available in t selection of a site for use of channel 272A at Gulfport in view of t fact that New Orleans (where channel 270 is assigned) and Gulfpo are only 65 miles apart and the required separation for stations tv channels removed is also 65 miles. Petitioner urges that the assig

[1] Petitioner apparently was unaware that in docket No. 16535, FCC 66-446, one of New Orleans assignments was deleted, effective June 27, 1966.

ment of a class C channel is needed in Gulfport because it is a growing community; it is known as the cultural capital of South Mississippi, and because it is an important industrial, fishing, and import and export trade center. Associates asserts that many people in Harrison, Jackson, and Stone Counties are socially and economically dependent on Gulfport, that the deletion of channel 270 and its assignment to Gulfport would lead to a far more equitable and efficient distribution of frequencies than the present allocations, and that a class C station "can adequately serve Gulfport's national market area."

4. We have carefully considered petitioner's request and the FM broadcast situation in both New Orleans and Gulfport, and conclude that the proposed deletion of channel 270 from New Orleans and its assignment to Gulfport would not serve the public interest. New Orleans, one of the major markets in the country, has been assigned the median number of channels for a city its size. One of its assignments is in operation in La Place, La. Applications are on file for the three remaining assignments, including channel 270, the one proposed to be moved to Gulfport. Gulfport has only 30,204 persons (1960 U.S. census) and has been assigned two class A channels. We do not believe that the reduction to seven assignments in New Orleans in order to make a class C assignment available to the relatively smaller market of Gulfport would be a fair and equitable distribution of available assignments. Further, the assignment of channel 270 to Gulfport would result in the mixture of a class C and class A assignment in the same community, a result we have attempted to avoid wherever practicable, in order to maintain some measure of technical parity between facilities in the same community. Biloxi, the largest community in Harrison County, also has a class A assignment. As for the class A (channel 272A) presently assigned and available at Gulfport, Associates has questioned the utility of this assignment in view of the spacing to New Orleans. Since the two communities are 65 miles apart and only 65 miles are needed for stations removed by two channels, there should be no problem in finding suitable locations. The distance between the site specified in the application for channel 270 at New Orleans and the location of the WGCM transmitter, for example, is over 71 miles. With respect to FM service in the three counties mentioned by Associates it should be noted that, in addition to the class A assignments available in Gulfport and Biloxi, class C assignments have been made to Pascagoula and Hattiesburg, all of which have been authorized.

5. In view of the foregoing, *It is ordered*, That the petition of E. O. Roden and Associates, RM–962, *Is denied*.

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

FCC 66-562

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Application of COMMUNICATIONS SATELLITE CORP. For Authority To Construct Six Synchronous Communication Satellites and for Approval of the Technical Characteristics Thereof	File No. 5-CSS-P-66

ORDER

(Adopted June 22, 1966)

BY THE COMMISSION: COMMISSIONER COX CONCURRING AND ISSUING A STATEMENT.

At a session of the Federal Communications Commission held at its offices in Washington, D.C., on the 22d day of June 1966;

1. The Commission, having under consideration the above-entitled application, filed on February 25, 1966, pursuant to section 214, 308, 309, and 319 of the Communications Act of 1934 and sections 201(c)(4) and 201(c)(6) of the Communications Satellite Act, and all communications and data received in connection therewith;

2. *It appearing*, That applicant (*a*) requests authority to participate in the construction of six synchronous communication satellites, to be owned by members of an international consortium (Intelsat) consisting of applicant and other signatories to the special agreement annexed to the Agreement Establishing Arrangements for a Global Communications Satellite System (TIAS 5646), and further, (*b*) requests approval of the technical characteristics of such spacecraft insofar as its participation in the construction thereof is concerned;

3. *It further appearing*, That such satellites, having a construction cost of about $41,000,000, are to be deployed, commencing in 1968, in a synchronous orbital configuration in such manner as to provide a communication satellite capability on a global basis in furtherance of the policy and objectives of the Communications Satellite Act and the above international agreements;

4. *It further appearing*, That the satellites are intended to be used in conjunction with previously approved satellites and with existing and planned earth stations in such manner as to meet satellite communications requirements on a global basis, and that each satellite, with a design life of 5 years, will provide up to 1,200 equivalent voice-grade telephone circuits when used with earth stations having 85-foot diameter antennas and 50° K. receivers, and will have the capability of relaying all types of communications simultaneously between a number of earth stations;

5. *It further appearing*, That the National Aeronautics and Space Administration (NASA) has advised the Commission, pursuant to section 201(b) of the Satellite Act, that the satellites for which approval is sought are technically feasible to render the service proposed;

6. *It further appearing*, That, although Intelsat has already authorized the construction of the satellites herein involved, applicant, the entity representing the United States on Intelsat, failed to file or perfect its application in a timely manner so as to permit orderly processing and consideration, before the approval required by national law, for its participation in such construction prior to the above action of Intelsat:

7. *It further appearing*, That while certain questions respecting the economic aspects of the proposal have not been resolved at this time, the Commission, upon consideration of the foreign policy considerations called to its attention by the Department of State, should act promptly in this matter and defer resolution of the aforementioned questions until later in an appropriate context;

8. *It further appearing*, That our action herein, subject to the conditions set forth below, will enable applicant to promptly proceed with its participation in such construction;

9. *It is ordered*, That approval is hereby given to applicant's participation in the construction of six communications satellites as proposed in its application, subject to technical specifications set forth in the attachment hereto, and that further participation by applicant shall be in accordance with appropriate approval as required by the provisions of the Communications Satellite Act of 1962;

10. *It is further ordered*, That applicant shall not furnish any services or facilities via such satellites unless and until specific authorization therefor shall have been granted by this Commission upon appropriate application, and that applicant, at least 60 days prior to the filing of an application for such authorization, shall file a schedule of the charges, practices, regulations, classifications, terms, and conditions under which it proposes to furnish such services or facilities;

11. *It is further ordered*, That the approval granted herein shall in no way be construed as approving, for rate-making or accounting purposes, the costs to be borne by the applicant with respect to the satellites to be constructed, but that such costs or any portion thereof which may be allowed applicant as part of its rate base, and such expenses of operating and maintaining such satellites, including depreciation, which may be allowable expenses for rate-making purposes, shall be considered de novo in the context of appropriate rate or accounting proceedings, and that in the course of such proceedings, applicant shall, among other things, demonstrate that such investment and expenses for the type and number of satellites specified in the application now under consideration are reasonable and prudent in light of all relevant circumstances;

12. *It is further ordered*, That Comsat shall not apply to the Interim Communications Satellite Committee for any units of satellite utilization, nor use any units it may obtain, except in accordance with an

instrument of authorization issued by the Commission upon consideration of an appropriate application duly filed by Comsat;

13. *It is further ordered*, That the approval herein is not intended to prejudge, and should not be construed as in any way prejudging, any pending or future applications for underseas cables or United States earth stations;

14. *It is further ordered*, That within 5 days from the date of this approval, applicant shall notify this Commission of its acceptance of the conditions associated therewith.

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

TECHNICAL SPECIFICATIONS

Nature of service: Communication-Satellite Service.
Class of station: Communication-Satellite Space Station.
Proposed area of coverage: North and South America; Western Europe; Africa; Australia; Eastern Asia; Atlantic, Pacific, and Indian Ocean regions. (Specific points of communication to be subsequently authorized upon submission of appropriate application pursuant to section 214 of the Communications Act.)
Space craft identification: Intelsat III, TRW Global System.
Orbit: Synchronous and circular.
Inclination to equator: ±.03°.
Station keeping: Two independent mono propellant hydrazine systems with axial and radial thrusters.
Stabilization: Spin.
Communications transmitter:
Frequency: 3705–3930 MHz and 3970–4195 MHz (2–225 MHz transponders).
Emission: 30,000 F9 (each carrier).
Power: 25 dbW max. ERP at 90°.
Communications capacity: Approximately 1,200 voice-grade channels.
Telemetry transmitters: Same as communication transmitter.
Beacon transmitters:
Frequency: 3933–3967 MHz.
Emission: 30 F9.
Received frequencies within the bands 5930–6155 MHz and 6195–6420 MHz.
Antennas, communications, beacon/telemetry:
Type: Electronically despun, with on-board or ground control.
Gain: 13.4 db.
Beamwidth: 20.3°.
Polarization: Circular.
Maximum flux density at earth's surface, one carrier, maximum power, minimum range: −152.0 dbW/m²/4 kHz.

CONCURRING STATEMENT OF COMMISSIONER KENNETH A. COX

I do not wish to regulate the affairs of Intelsat any more than my colleagues do. However, I think we are charged by Congress to regulate certain of the activities of Comsat, and this may have an impact from time to time on the international consortium. Comsat, first of all, is a domestic common carrier for profit and not an agency or establishment of the United States Government. Secondly, it is this country's representative to the international consortium, and in that capacity it must act in such a way as to give full effect to our domestic regulatory scheme—a fact recognized by article II(a) of the inter-

national interim agreement which provides that applicable domestic law shall control relations between each signatory country and its designated representative. Finally, Comsat is the manager of the consortium. Obviously its triple role poses problems for Comsat, but that does not excuse it from observing the domestic law which binds all our international communications carriers.

There are established procedures which, if Comsat had followed them, would have permitted the Commission and other agencies of our Government to discharge our respective statutory responsibilities as to this application without becoming involved with the international aspects of the matter. Instead, Comsat made a proposal to Intelsat which it had not cleared with its own Government, and now seeks to speed acceptance of this fait accompli without the checks and procedures we would normally require. While these processes take time, I am satisfied that the record will show that the Commission has been much more expeditious in disposing of Comsat's applications than the latter has been in filing them.

The order adopted herein recites that certain questions respecting the economic aspects of the proposal have not been resolved, and specifies that the approval granted does not mean that the expenses incident to these satellites will be accepted for domestic ratemaking purposes. While this may safeguard the interests of the rate-paying public, I think it authorizes the expenditure of funds invested in Comsat by the public for a purpose which may not be prudent when compared with alternative methods of achieving the prompt development of an adequate international satellite communications system. Section 201(c)(9) of the Communications Satellite Act requires the Commission to "insure that no substantial additions are made by the corporation or carriers with respect to facilities of the system or satellite terminal stations unless such additions are required by the public interest, convenience, and necessity." I do not believe we have done that, or are in fact able to do so at this time. I am also concerned that the action here taken may pose problems for the Commission in its efforts to build a diversified, competitive international communications system. It is regrettable that so much time has passed without clear and final decision with respect to this whole matter, and that other members of the consortium have been induced to take a position which now seems to require review by this Commission. However, this situation exists by reason of the conduct of parties other than the Commission. We are now given assurances that this will not occur again. In reliance on these representations, out of deference to the other parties of the consortium, and in the interest of prompt development of the international satellite communications system, I am reluctantly concurring in this action. I expect that in the future Comsat will conduct its affairs in such a way that the governmental agencies concerned can discharge their obligations to Congress and the public without repetition of the difficulties which have faced us here.

FCC 66-563

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

PUBLIC NOTICE

COMSAT MAY FURNISH SATELLITE SERVICES AND CHANNELS ONLY TO OTHER COMMON CARRIERS EXCEPT IN UNIQUE CIRCUMSTANCES

(Adopted June 23, 1966)

The Commission announced today that other than communications common carriers, persons, and entities, including the United States Government, may obtain telecommunications channels or services directly from the Communications Satellite Corporation (Comsat) only in those instances where appropriate authorization has been issued by the Commission upon a finding that there are unique or exceptional circumstances warranting such authorization.

The Commission reached this determination at a special meeting relating to its proceeding, In the Matter of Authorized Entities and Authorized Users Under the Communications Satellite Act of 1962 (docket No. 16058).

In reaching its decision, the Commission considered the provisions of the Communications Satellite Act of 1962, its legislative history, and the various briefs and comments filed in the proceeding. The Commission concluded that, in keeping with the intent of Congress, Comsat, which was established pursuant to the act, was to have as its principal operating function the furnishing, for hire, of communication satellite channels and services to communications common carriers, who in turn would employ such facilities to furnish service to the public and the Government. The Commission further concluded that it would be in derogation of the policy of the act, destructive of fair competition, and incompatible with the maintenance of a sound commercial telecommunications system for Comsat to compete with carriers that are required to secure international circuits from it in furnishing communications services to the public and the Government; and, therefore, that Comsat should be limited to furnishing services to others than carriers in only those cases where there are unique or exceptional circumstances warranting the authorization.

The Commission noted that the Communications Satellite Act permits Comsat to contract with authorized users, including the Government, for the services of the satellite system. The crucial question to be determined, therefore, is how and under what circumstances such contracts may be entered into. In this connection, the Commission noted that a controlling factor is the express policy of the act that the Commission should "insure that any economies made possible by a communications satellite system are appropriately reflected in rates for public communication services."

The Commission believes that if the Government or others were

to obtain all services and, particularly, individual channels or groups of channels in the satellite system, without any restriction, directly from Comsat, there would be serious adverse effects upon the well-being of the commercial telecommunications industry and the general public it serves. Thus, the Commission pointed out that because the Government is a principal source of oversea traffic and revenues to the common carriers, substantial diversion of Government telecommunications business to Comsat could seriously jeopardize the viability of those carriers who are expected to maintain and operate an efficient network of both cables and satellite circuits serving the general public at reasonable rates. Accordingly, it will be the policy of the Commission to authorize Comsat to furnish the services in the system, or to lease channels directly to the Government only when it is clearly established that there are unique and exceptional circumstances. A current example of such circumstances is the authorization given to Comsat to provide the services of a specially created system directly to the Government to meet the unique needs of NASA's Apollo program.

The Commission also announced that, in furtherance of the aforementioned statutory policy with respect to rates, it expects the common carriers promptly to give further review to their current rate schedules and file revisions which fully reflect the economies made available through the leasing of circuits in the satellite system. Failure of the carriers to do so promptly and effectively, the Commission stated, will require the Commission to take such actions as are appropriate.

The Commission made this announcement in advance of issuing the text of its formal decision because of the great importance of this matter and the desirability of early clarification which it deemed to be in the public interest.

FCC 66R-237

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
LESLIE L. STERLING AND WILLIAM H. PATTERSON, D/B AS FLATHEAD VALLEY BROADCASTERS (KOFI), KALISPELL, MONT.	Docket No. 15815 File No. BP-16369
GARDEN CITY BROADCASTING, INC. (KYSS), MISSOULA, MONT.	Docket No. 15816 File No. BP-16400
For Construction Permits	

APPEARANCES

William P. Bernton, on behalf of Flathead Valley Broadcasters (KOFI); *Andrew G. Haley* and *William J. Potts, Jr.*, on behalf of Garden City Broadcasting, Inc. (KYSS); *Stanley B. Cohen* and *Stanley Neustadt*, on behalf of Rust Broadcasting Co., Inc. (WHAM); and *Irwin S. Elyn* and *Edward J. Reilly*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted June 17, 1966)

BY THE REVIEW BOARD: NELSON, PINCOCK, AND KESSLER.

1. Flathead Valley Broadcasters (KOFI), Kalispell, Mont., and Garden City Broadcasting, Inc. (KYSS) Missolua, Mont., are mutually exclusive applicants for a class II-A facility on 1180 kc in Montana. Both presently operate class III daytime only facilities: station KOFI operates on 930 kc with a power of 5 kw and KYSS on 910 kc with a power of 1 kw. Both class II-A applications specify unlimited time operation, directionalized nighttime. KOFI would operate with a power of 10 kw both day and night; KYSS proposes 50 kw daytime and 25 kw nighttime. The applications were designated for hearing (FCC 65-56, released Jan. 29, 1965) on a standard coverage issue; a section 307(b) issue: an air hazard issue as to KYSS; and an issue to determine whether KYSS' nighttime directional array would afford adequate protection to the dominant class I station on the channel, WHAM, Rochester, N.Y. The air hazard issue was obviated before hearing. Hearing Examiner H. Gifford Irion by his initial decision (FCC 65D-52, released Nov. 23, 1965), resolved the directional antenna issue in favor of KYSS. His findings and conclusions on this issue are supported by the record and are undisputed by any of the parties. By his initial decision the hearing examiner resolved the section 307(b) issue in favor of KOFI and proposed a grant of the KOFI application.

2. KYSS has excepted to the findings and conclusions of the examiner relating to the section 307(b) issue, requesting reversal and a decision in its favor. The initial decision is also appealed by Rust Broadcasting Co., Inc., licensee of station WHAM. In March 1965, WHAM became a party to this proceeding (order, FCC 65M–363, released Mar. 24, 1965) on the basis of an allegation that it would receive excessive interference if any class II–A grant were made on 1180 kc in Montana in view of the concurrent operation of a Voice of America station on 1180 kc in Florida. WHAM contended, in the alternative, that no 1180 kc allocation should be made in Montana and that any grant of either application should be conditioned on cessation of the co-channel Voice of America operation. Accordingly, WHAM petitioned the Board to enlarge the issues in this proceeding; the matter was certified to the Commission (FCC 65R–144, released Apr. 16, 1965). The Commission (FCC 65–511, released June 11, 1965) denied the petition. WHAM has now excepted to the initial decision insofar as it proposed grant of either application. WHAM requests that the Board certify the matter to the Commission at this time.

3. Oral argument was held on the exceptions of KYSS and WHAM [1] before a panel of the Review Board on April 26, 1966. The Board has considered the record, the briefs and exceptions of the parties, and the oral arguments. We agree with the examiner's findings of fact and, accordingly, they are adopted with the modifications noted in our rulings on the exceptions contained in the attached appendix. The Board also agrees with the examiner's basic conclusions resolving the section 307(b) issue, and his ultimate determination that section 307(b) would be better served by a grant of the application of KOFI, than of KYSS' application. However, in affirming the examiner's initial decision, we believe that some of the exceptions advanced by KYSS at the oral argument merit further discussion. Thus, the Board's views set forth below and in our rulings on exceptions are in amplification of or supplementary to those of the hearing examiner. To the extent that there is merit to KYSS' position that the examiner omitted, in his weighing process, cumulative consideration of the favorable features of KYSS' proposal, the Board, as will be shown below by our discussion, has considered together all of the significant differences favoring the KYSS proposal in accordance with the substantive standards of section 307(b) requiring a "fair, efficient, and equitable distribution of radio service"; however, on balance, the Board, like the examiner, (*a*) has accorded determinative weight to the Commission's underlying objective—of providing a first nighttime primary service to the largest number of people now without such service—in the allocation of class II–A stations, such as the proposals here; and (*b*) has deemed the need of the substantially larger white area population proposed to be served by KOFI for a first nighttime primary service to be an acute and immediate need, outweighing all of the favorable benefits of KYSS' proposal.

[1] Since the examiner was without authority to rule on WHAM's contentions, they were not considered in the initial decision and will be treated separately in this decision (see par. 18, infra).

THE INITIAL DECISION

4. The examiner's findings of fact relating to the communities of Kalispell and Missoula, and to the respective coverage proposals of the applicants, are set forth in paragraphs 4–23 of his findings of fact and are summarized in paragraphs 4–6 of the conclusions of his initial decision, and therefore need not be repeated here. Briefly, these are the decisionally significant factors reflected by the examiner's initial decision:

(*a*) KOFI's proposal would result in a daytime white area population net loss of 286 people (population gain of 181, loss of 426); KYSS in a gain of 3,395 persons.

(*b*) KOFI's proposal would result in a nighttime white area gain of 15,085 people; KYSS's in a gain of 7,226.

(*c*) KOFI's proposal would result in a nighttime gray area gain of 11,980 people (KYSS offered no figures on gray area).

(*d*) KOFI would serve a 1,136-square-mile nighttime white area; KYSS a 1,576-square-mile nighttime white area.

(*e*) KOFI would operate with 10 kw day and night; KYSS proposes maximum power day and night (50 kw daytime, 25 kw nighttime).

(*f*) KOFI would serve 46,071 persons within its proposed daytime 0.5-mv/m contour, and 27,065 nighttime; KYSS would serve 77,331 persons daytime, and 44,948 nighttime.

(*g*) KOFI would bring a second nighttime transmission and reception service to Kalispell; KYSS would bring a fourth such service to Missoula.

5. In reaching his ultimate section 307(b) determination, the examiner weighed separately each of the benefits to be derived from a grant of the KYSS application, but concluded in each instance that the substantially greater nighttime white area population—15,085 persons—of the KOFI proposal outweighed such KYSS benefits as (*a*) use of maximum power, (*b*) greater overall coverage, (*c*) greater daytime white area population coverage, (*d*) service to larger white areas, in terms of square mile coverage, day and night, and (*e*) service to a nighttime white area population of 7,226 persons. The examiner, like the Commission's Broadcast Bureau, found the specific language of the Commission's clear channel report set forth below to be dispositive of the instant case.

> Indeed, prospective applicants should be aware that we intend, absent decisive countervailing circumstances, that as between fully qualified applicants complying with all our rules, the one who will serve the largest white area population will receive the grant. Parties are thus forewarned that white area population served rather than total population served is of prime importance herein. *Report and Order: In the Matter of Clear Channel Broadcasting in the Standard Broadcast Band*, 31 FCC 565, 580, 21 R.R. 1801, 1817 (1961).

In preferring KOFI's proposal, the examiner also attached importance to the fact that KOFI would bring a second nighttime transmission and reception service to Kalispell, whereas KYSS would bring a fourth such service to Missoula.

KYSS' Exceptions

6. Although KYSS' chief objection to the initial decision appears to be the separate, rather than cumulative, treatment accorded by the examiner to the decisionally significant factors favoring KYSS, its major complaint resolves itself into a question concerning the validity of the determinative weight accorded by the examiner to the Commission's objective of providing a first nighttime service to the largest number of persons now without such service. In response to a question what would have been KYSS' position had the examiner considered the factors in KYSS' favor cumulatively, KYSS stated at the oral argument of this proceeding, "that [such] judgment made on a cumulative weighing of all the elements would have been wrong in that it misread the Commission's purpose and intent in the report and order in the clear channel proceeding."

7. The Board disagrees. Without retracing the lengthy history of the clear channel proceeding, it is sufficient to point out that the proceeding was instituted to insure an equitable distribution of radio service in accordance with the provision of sections 1, 303, and 307(b) of the Communications Act, in an effort to formulate a solution to the vexing, long-time, and continuing problem of providing nighttime radio service to those people in this country who reside in white areas. As a first step in its effort to find a solution to this problem which has extended over a few decades of the history of broadcasting, the Commission determined in its clear channel report that 13 class I–A clear channels heretofore used full time exclusively by class I–A stations should be duplicated by allowing one full-time station west of the Mississippi to share each such channel. By its report, the Commission further (*a*) amended its rules relating to the classification, location, and use of class I–A channels, and particularly rule 73.22, by assigning 1 class II–A station to each of the 13 clear channels (including 1180 kc, the frequency involved in the subject proceeding), and (*b*) established a table of assignments locating these channels in certain Western States, leaving for case-to-case determination in licensing proceedings, such as this, the resolution of the question concerning the specific location of each such station.

8. In addition to the explicit language of the clear channel report relied upon by the examiner set forth at paragraph 5 above, it is of significance that the report is replete with statements concerning the acute need (*a*) toward reduction of vast areas which lack nighttime service, and (*b*) for some immediate solution to this nighttime problem. It is in connection with this need for some immediate solution that the Commission took this first step of creating these new class II–A stations. In doing so, the Commission recognized that this first step constituted only a partial solution to the problem, and that other proposed methods of providing such white area nighttime primary service remained for future determination. It is of further significance that in the clear channel report, the Commission spelled out its intention with respect to the establishment of these new class II–A stations "to give preference to those applications which most fully serve * * * to the greatest possible extent the prime objective of the

new unlimited time stations," in subsequent licensing proceedings, such as the instant one, involving competing applications.

9. With these background facts in mind concerning the history of the clear channel proceeding, its purpose, and the Commission's stated objectives set forth in the clear channel report with respect to these newly created class II–A stations, it is clear that the report is designed to implement the Communications Act and to prescribe policy on a nationwide basis which will govern the licensing of class II–A stations. It is further evident that in section 307(b) proceedings relating to the establishment and specific in-State location of these class II–A stations, such as this, where a choice must be made between competing proposals, the determinative weight accorded by the examiner to the substantially greater nighttime white area population proposed to be served by KOFI fits with the Commission's intent. In view of this fact, the Board finds no merit to KYSS' further contention that after weighing all relevant factors, determinative weight cannot be accorded to this one comparative factor because it constitutes, in effect, an a priori determination of this proceeding interdicted by Commission and by judicial decisions. While the Board agrees with KYSS that all significant comparative factors are required to be weighed in terms of the substantive standards of section 307(b), past decisions by the Commission and by the courts afford no support for KYSS' position that after weighing all such comparative differences, the acute and immediate need of a substantially greater existing white area population for a first nighttime service cannot bear determinative weight in the outcome of this proceeding.

10. For these reasons, the Board finds no merit in KYSS' contentions that the examiner should have accorded more substantial weight to the facts that (*a*) Missoula is a far more important center of regional interest and activity than is Kalispell; (*b*) Missoula has a more rapid growth rate; and (*c*) KYSS' proposed service area has a greater population potential than KOFI's. Contrary to KYSS' assertion, these class II–A stations were not allocated primarily to provide wide area service, per se; nor were they intended to provide service to geographical or cultural centers. Rather, their purpose is a specific, limited, acute, and immediate one, viz, to provide a first nighttime service to the largest number of persons now without such service.

11. Likewise, the Board rejects KYSS' view that the Commission's clear channel report should be read, generally speaking, as advocating inauguration of standard broadcast service to white areas on the basis of their geographical size rather than their population. KYSS attaches great significance to what it characterizes as the repetitious use of the term "white area" used throughout the report, and, accordingly, urges, in effect, that in a section 307(b) proceeding where a choice must be made between competing proposals, the size of geographical white areas should take precedence over the population within such white areas. While it is true, as stated by KYSS, that the report in some portions does speak in terms of white area without specifying that the significant aspect of white area is its people therein, the Board believes that the manifest intention of the Commission cannot be derived by mere reference to a term, such as white area, standing

alone, and without regard (*a*) to its accepted usage—which includes people, or (*b*) to the purpose of the clear channel proceeding, which was instituted in an effort to formulate a solution to this long-time problem of providing nighttime radio service to those people residing in white areas; or (*c*) to a fair reading of the report which makes clear that the Commission's prime objective in the allocation of these class II–A stations is to provide a first nighttime service to the largest number of persons now without such service.

12. Despite our refusal to accept KYSS' argument that where a choice must be made between competing applicants seeking a class II–A station, geographical area should take precedence over population, the Board has considered carefully the acute and immediate need of (*a*) 3,395 persons constituting KYSS' daytime white area population, and (*b*) 7,226 persons constituting KYSS' nighttime white area population for a first radio service. However, there is this same acute and immediate need of 15,085 persons in KOFI's nighttime white area service proposal. Unfortunately, in the instant case, a choice must be made between two competing applicants seeking the same facilities, and the choice is a difficult one because, so to speak, qualitatively the need in both areas for a first primary service is the same. Nevertheless, KOFI's substantially larger white area population constitutes a greater quantitative need for a first primary service than the KYSS proposal. As shown above, in terms of total white area population, day and night, KOFI would serve 4,824 more persons than KYSS, or 4,563 persons more than KYSS, after deducting KOFI's daytime white area net loss of 286 persons. And when due recognition is given to the Commission's stated objective in the creation of these class II–A stations of providing nighttime, rather than daytime, service to the largest number of persons now without such service, KOFI must prevail because it would serve a nighttime white area population almost twice that of KYSS.

13. Although it is not necessary to this case to speculate on what the outcome would have been absent the Commission's stated class II–A station objectives, there can be no doubt that, under such circumstance, KOFI's substantially larger white area population gains would in any event be relevant to a determination, and that in competition with KYSS' competing proposal, this acute need for service by such a substantially larger population would be evaluated in determining whether a fair, efficient, and equitable assignment of the frequency required that a grant be made to KOFI rather than to KYSS. For it is clear that through long precedent—apart from its more recently declared class II–A station objectives—the Commission has held that as between qualified and competing applicants, the applicant proposing a service which will serve a substantially greater white area population will generally prevail because such an acute need for service is of paramount importance in making the allocation of facilities required by section 307(b). *Frank R. Gibson*, 11 FCC 547, 555, 3 R.R. 529, 537 (1946); *Newark Broadcasting Corp.*, 11 FCC 965, 3 R.R. 839 (1947); *WJIM, Inc.* (*WJIM*), 12 FCC 406, 3 R.R. 1962 (1947), affirmed sub nom. *Radio Cincinnati, Inc.* v. *FCC*, 85 U.S. App. D.C. 292, 117 F. 2d 92, 5 R.R. 2035 (1949); *Ark-Valley Broadcasting*

Co., Inc., 7 R.R. 1136, 1152 (1953); *Scripps-Howard Radio, Inc. (WCPO)*, 12 FCC 701, 705, 3 R.R. 1796, 1802 (1948); *East Texas Broadcasting Co.*, 5 R.R. 413, 435 (1949); *Tupelo Broadcasting Co., Inc.*, 12 R.R. 1233, 1247 (1956); *The Monocacy Broadcasting Co.*, 28 FCC 301, 306, 19 R.R. 137, 138d (1960). Cf. *Third Notice of Further Proposed Rule Making (TV)*, FCC 51-244, 16 Fed. Reg. 3072 (1951); *Sixth Report on Television Allocations*, 1 R.R. (Part 3) 91:599 (1952).

14. Similarly, we need not, and do not, reach the question in this case, involving competing proposals for a class II–A station, of the weight, on balance, to be accorded KOFI's proposal to provide (*a*) a second primary nighttime service to a substantial population (known as gray area service), or (*b*) a second nighttime transmission facility to the city of Kalispell, which has a substantial population, as compared with all of the favorable features of the KYSS proposal. Our decision herein rests primarily on the determinative weight of the Commission's prime objective of allocating the 1180 kc frequency here as a class II–A station, to provide nighttime, rather than daytime, white area service to the largest population now without such service. We again, nevertheless, believe it pertinent to point out that through long precedent, the Commission has regarded a second primary service and a second transmission facility as a showing of a compelling need for broadcast service, constituting paramount factors in the allocation of facilities under section 307(b). *Leonard A. Versluis (WLAV)*, 12 FCC 342, 356, 3 R.R. 1562, 1578 (1947); *Torrington Broadcasting Co., Inc.*, 12 FCC 1086, 3 R.R. 1394, 1402 (1947); *Northwestern Ohio Broadcasting Corporation*, 13 FCC 231, 240, 3 R.R. 1945, 1953 (1948), affirmed sub nom. *Sky Way Broadcasting Corp* v. *FCC*, 176 F. 2d 951, 5 R.R. 2026 (D.C. Cir. 1949) (per curiam); *Lake Huron Broadcasting Corporation (WKNX)*, 6 R.R. 1185, 1210–11 (1951); *Easton Publishing Company*, 8 R.R. 31, 68 (1953); cf. third notice of further proposed rulemaking, supra. Thus, although the Board, like the examiner, does not attach determinative weight to these factors, it is clear that such substantial additional public interest benefits are entitled, at the least, to plus-bonus values in support of KOFI's proposal.

15. KYSS further asserts erroneously that the combination of the favorable features of its proposal—utilization of maximum power; service to more people; greater daytime white area population coverage; and service to a geographically larger white area day and night—constitutes the decisive countervailing circumstances which the Commission had reference to in its declaration that "absent decisive countervailing circumstances," as between fully qualified applicants, the one who will serve the largest white area population will receive the grant. The language "decisive countervailing circumstances" which KYSS relies upon has been taken out of context. The Commission's use of this language is limited by its own further statement which has been ignored totally by KYSS. As set forth at paragraph 45 of the clear channel report, following the Commission's declared policy to favor applicants serving the largest white area population, the Commission stated "we can foresee at this time *only one circumstance* in which it may be anticipated that the grant should not go to the qualified competing applicant proposing the first primary service to the

largest number of people." [Emphasis supplied.] As is evident from the quote given below [2] the one limited exception prescribed by the Commission is totally unrelated and does not support the proposition here advanced by KYSS.

16. KYSS also claims that the examiner gave inadequate consideration to the fact that it proposes longer hours of operation. KYSS argues that because it would broadcast 39 hours more per week than KOFI, its use of the frequency is preferable on grounds of efficiency. In support of this proposition KYSS cites *The Monocacy Broadcasting Co.*, supra, wherein the Commission granted section 307(b) preferences to proposals which would serve one community unlimited time as against a daytime-only proposal for another community. Section 307(b) preference of a full-time service over a daytime-only service provides no precedent for the preference requested here of one unlimited time operation over another unlimited time operation which would broadcast fewer hours. It was not total broadcast hours which the Commission found significant in *Monocacy* but the fact that one applicant would provide no service during the crucial nighttime hours. KOFI would not only provide service during those hours, but it would also provide it to 15,085 persons presently receiving none, bringing a first nighttime service to 7,859 more people than would the KYSS proposal. On such facts the examiner properly regarded hours of operation as not germane to the section 307(b) issue in this case, either alone or in combination with other factors.

17. In sum, the Board believes that its decision herein demonstrates that it is aware of and has weighed cumulatively all of the favorable benefits of the KYSS proposal vis-a-vis the KOFI proposal. However, with due recognition to the Commission's objectives set forth above relating to the allocation of class II–A stations, the acute and immediate need of approximately twice the number of persons to be served by KOFI for a first nighttime primary service as compared with KYSS transcends all of the benefits of the KYSS proposal, including its more efficient utilization of the frequency in terms of its use of maximum power and resultant wider area coverage proposal.

WHAM's Exceptions

18. Resolution of the section 307(b) portion of this proceeding leaves unanswered the arguments of WHAM, the intervenor herein,

[2] The Commission explained this one limited exception, as follows: "Under sec. 3.182(g) [now sec. 73.182(g)] of the rules, primary service is not considered to exist in towns with a population from 2,500 to 10,000 if available groundwave service has a field intensity of less than 2 mv/m. It is possible that one applicant for an unlimited-time class II station may be in a position to show that he would provide a first nighttime primary service to more people than a competing applicant, in reliance upon his provision of groundwave service with a field intensity of 2 mv/m or better to persons living near enough to an existing unlimited-time station, so that they now receive service of 0.5 mv/m or better, although less than 2 mv/m. Some usable groundwave signals, although not of the standard contemplated in sec. 3.182(g), are thus available to persons so situated. A competing applicant, on the other hand, may be in a position to demonstrate that he proposes a first groundwave service to a larger number of people who do not now have an 0.5-mv/m groundwave signal or better available to them. Considering the objectives of our rule changes herein, it would be appropriate, in reaching our decision in such case, to take this circumstance into account and not necessarily to grant perfunctorily an application which reflects a first primary service to the largest number of people by virtue of including in the count persons who, although they do not receive the 2-mv/m signal prescribed in sec. 3.182(g), are nevertheless able to receive a signal of at least 0.5 mv/m." *Clear Channel Report*, supra, 31 FCC 565, 580–81, 21 R.R. 1801, 1817.

which would have the Board deny both applications; condition any grant upon cessation of the Voice of America's 1180 kc operation in Florida; or certify this proceeding to the Commission in light of developments subsequent to the Commission's April 1965 denial of its motion to enlarge issues (see par. 2, supra). For the reasons stated in the Commission's memorandum opinion and order (FCC 65–511, released June 11, 1965) denying WHAM's petition to enlarge issues, the exceptions filed by WHAM will be denied. WHAM's right to now seek review by the full Commission of our denial of its exceptions on the basis of the Commission's prior action accords full protection to its position.

Accordingly, it is ordered, This 17th day of June 1966, that the application of Flathead Valley Broadcasters (KOFI) (BP–16369) for an improvement of facilities of station KOFI, Kalispell, Mont., *Is granted* and that the application of Garden City Broadcasting, Inc. (KYSS) (BP–16400), *Is denied.*

SYLVIA D. KESSLER, *Member.*

APPENDIX

RULINGS ON EXCEPTIONS TO THE INITIAL DECISION

Exceptions of Rust Broadcasting Co., Inc. (WHAM)

The exceptions of Rust Broadcasting Co., Inc. (WHAM), are denied for the reasons stated in the Commission's memorandum opinion and order (FCC 65–511, released June 11, 1965). See paragraph 18 of the decision.

Exceptions of Garden City Broadcasting, Inc. (KYSS) [1]

Exception No.	*Ruling*
1	Granted. The examiner's findings are amended as requested.
2, 4, 5, 10–13	Denied as not of decisional significance. The considerations which require grant of the KOFI application are unaffected by these data. See par. 10 of the decision.
3, 6–9, 17	Granted. While the suggested findings are somewhat cumulative, they have been considered; the examiner's findings are amended as requested.
14, 15	Denied. KYSS' untimely proffer of exhibit I–D was properly rejected by the examiner. As noted by the examiner the figures reflected in the exhibit, even assuming arguendo their admissibility and accuracy, would not have been determinative. The differences in the figures as to geographical white area are minor and the KOFI nighttime white area population coverage advantage reflected in the rejected KYSS exhibit, while less than that reflected in the present record, would still be decisive.
16	Denied. See *Service Broadcasting Corp.*, 36 FCC 1085, 2 R.R. 2d 539, review denied FCC 64–813 (1964), and cases cited therein.

[1] KYSS has in several instances failed to conform its exceptions to the particularity requirement of rule 1.277(a) in that the location of alleged errors in the initial decision is not noted. In view of the brevity of the initial decision, KYSS' references are all identifiable, however, and rulings will accordingly be made on all exceptions.

Exceptions of Garden City Broadcasting, Inc. (KYSS)—Continued

Exception No.	*Ruling*
18	Denied. KYSS mischaracterizes the examiner's conclusion; the examiner did not conclude that there is far greater need for new transmission and reception service in Kalispell than in Missoula. He did, however, properly find a greater need therefor.
19, 20	Denied. The facts that KOFI would create a daytime white area of 133 square miles with a population of 467 persons and that KYSS would serve a daytime white area of 1,930 square miles with a population of 3,395 persons were considered adequately by the examiner and are concluded by the Board not to outweigh the positive service features of KOFI's proposal. See pars. 12, 15 of the decision.
21, 24	Denied for the reasons stated in the decision.
22	Denied for the reasons stated in par. 16 of the decision.
23	Granted to the extent that the examiner may have failed to give cumulative consideration to all of KYSS' points of preference. See par 3 of the decision. Denied in all other respects for the reasons stated in the decision.

FCC 65D-52

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of LESLIE L. STERLING AND WILLIAM H. PATTERSON, D/B AS FLATHEAD VALLEY BROADCASTERS (KOFI), KALISPELL, MONT.	Docket No. 15815 File No. BP-16369
GARDEN CITY BROADCASTING, INC. (KYSS), MISSOULA, MONT.	Docket No. 15816 File No. BP-16400
For Construction Permits	

APPEARANCES

William P. Bernton, on behalf of Flathead Valley Broadcasters (KOFI); *Andrew G. Haley* and *William J. Potts, Jr.*, on behalf of Garden City Broadcasting, Inc. (KYSS); *Stanley B. Cohen* and *Stanley Neustadt*, on behalf of Rust Broadcasting Co., Inc. (WHAM); and *Irwin S. Elyn*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER H. GIFFORD IRION

(Adopted November 22, 1965)

PRELIMINARY STATEMENT

1. Both of the applicants in this proceeding are seeking to establish a class II–A facility on 1180 kc and, since they are mutually exclusive, the Commission designated them for hearing in a consolidated proceeding by order released January 29, 1965. Flathead Valley now operates station KOFI at Kalispell, Mont., using 5 kw, daytime only, on 930 kc. It proposes to operate a station on 1180 kc with 10 kw, unlimited time, using a directional antenna at night. Garden City now operates station KYSS at Missoula, Mont., using 1 kw, daytime only, on 910 kc. Its proposal is to operate on 1180 kc with 50 kw during daytime hours and 25 kw at night. A directionalized antenna would be used for nighttime operation only. Each proposes a new transmitter site. Station WHAM, Rochester, N.Y., is the dominant class I station on the channel, using 50 kw, nondirectional, unlimited time.

2. The order of designation found both applicants to be legally, technically, financially, and otherwise qualified except as indicated by the issues. There is the standard coverage issue and an issue to determine which of the proposals would better provide a fair, efficient, and equitable distribution of service under section 307(b) of the Communications Act of 1934, as amended. Issues 2 and 3 read as follows:

> 2. To determine whether Garden City Broadcasting, Inc., will be able to adjust and maintain the directional antenna system as proposed and whether

adequate nighttime protection will be afforded station WHAM, Rochester, N.Y.

3. To determine whether there is a reasonable possibility that the tower height and location proposed by KYSS would constitute a menace to air navigation.

Issue No. 5 calls for a determination in the light of evidence adduced under all other issues.

3. On March 23, 1965, the hearing examiner granted a petition from Rust Broadcasting Co., Inc., licensee of station WHAM, Rochester, N.Y., by which action that party became an intervenor. An initial prehearing conference was held on February 26, 1965, and hearings were held from May 11 to July 13, 1965, at which time the record was closed. Proposed findings and conclusions were filed by Garden City, Rust, and the Broadcast Bureau. Flathead Valley filed a statement in which it adopted the proposed findings of the Bureau except in certain matters which were specified therein. No reply findings were filed.

FINDINGS OF FACT

The Communities Involved

Kalispell

4. The city of Kalispell has a population of 10,151 and is both the principal city and county seat of Flathead County, which has a population of 32,965.[1] The city is located in western Montana and is the eighth largest city in the State.

5. The major employer in Flathead Valley is Anaconda Aluminum Co., which employs nearly 600 workers in its plant near Columbia Falls, Mont. Another major employer is Great Northern Ry., which has a large maintenance plant at Whitefish. Kalispell has its own city government with the usual municipal departments. It has a daily newspaper and also a weekly newspaper. Lumber is a significant industry in Flathead Valley and most of the 1,100 farms in the county are located in this valley. The majority of these farms are from small to medium size, and farm income is derived mainly from beef cattle, dairying, wheat, barley, hay, and sweet cherries. The livestock industry is a recent growth.

6. In the area which would gain its first nighttime primary service there are summer resort homes, ranches, nonfarming rural population, and a section of national forest. In other portions of the white area there are lumber mills and farms. It appears from the evidence that a considerable portion of the area is devoted to tourism both summer and winter.

7. In addition to station KOFI, Kalispell has one other standard broadcast station, KGEZ (600 kc/s, 1 kw, DA-2, U, III). It has no FM nor TV facilities.

Missoula

8. Missoula, Mont., is the principal city and county seat of Missoula County. The city had a 1960 population of 27,090 and an estimated

[1] All population figures are taken from the 1960 U.S. census unless otherwise noted.

1965 population of 32,000. The county had a 1960 population of 44,665 with an estimated 1965 population of over 50,000. Montana State University is located in Missoula and the city is also the headquarters for Region No. 1 of the United States Forest Service. Located in Missoula are the base for the Forest Service Area Fire Depot, headquarters of the Lolo National Forest, the National Forest Fire Laboratory, the Missoula Research Center, the Forest Service Warehouse, and the New Equipment Development Center. Local industry includes sugar, lumber products, and cattle.

9. Missoula has a daily newspaper with morning and evening editions as well as a weekly newspaper. It is a transportation center for an area which is characterized by farming, lumbering, and mining. Heavily forested areas and recreational facilities are located in the environs of Missoula.

10. The following standard broadcast stations are assigned to Missoula: KYSS (910 kc/s, 1 kw, D, III); KGVO (1290 kc/s, 5 kw, DA–1, U, III); KYLT (1340 kc/s, 250 w, U, IV); and KGMY (1450 kc/s, 250 w, U, IV). There is also an educational FM station as well as one commercial television station in the city.

11. According to the 1963 Census of Manufactures, Missoula County led the remaining counties in the State of Montana in industrial growth for the period 1958 through 1963, with a gain of 60 percent in "value added" manufactures, as compared with a gain of 23 percent for the State as a whole. The city of Missoula has also experienced a considerable growth in retail sales and in personal income.

Coverage

KOFI

12. Station KOFI now operates daytime only and provides the primary service to 46,208 persons in 7,442 square miles. A comparison of coverage under the existing operation with that which is now proposed during daytime hours is shown by the following table:

Contour (mv/m)	Existing daytime		Proposed daytime	
	Population	Area (sq. mi.)	Population	Area (sq. mi.)
2.0	29,135	2,162	28,043	2,117
0.5	46,208	7,442	46,071	7,974

13. As these figures indicate, there will be a loss of population receiving the KOFI daytime service with respect to both the 2.0-mv/m and 0.5-mv/m contours. There will, however, be a gain of area within the latter contour. The proposal will bring KOFI service for the first time to 1,002 persons in an area of 700 square miles, but the same service will be withdrawn from 1,033 persons residing in an area of 212 square miles.

14. The proposed operation will bring a primary service to a white area but this will be somewhat offset by a loss of the only existing pri-

mary service. The gain and loss data, with reference to white and gray areas, is shown by the following table:

	Population		Area	
	Gain	Loss	Gain	Loss
White area	181	467	202	133
Gray area	784	511	456	70

A third service will be made available to 37 persons residing in 42 square miles but will be lost by 55 persons in 9 square miles. A change in daytime operation would not entail a gain or loss of service within any urban community.

15. KOFI's present and proposed daytime primary service areas are essentially circular in shape with radii of approximately 49.5 miles and 52 miles, respectively.

16. Inasmuch as station KOFI now operates daytime only, its proposed nighttime service will be entirely a matter of gain. In the first place it will provide a second nighttime primary service and second local outlet for Kalispell. Within the 2.25-mv/m limitation contour there are 1,328 square miles containing the population of 27,065. A first nighttime primary service will be provided to 15,085 persons residing in 1,136 square miles, and a second such service will be available to 11,980 persons residing in 192 square miles. The only other primary service in the general area is now furnished by station KGEZ in Kalispell. The proposed operation would also bring a first nighttime primary signal to the communities of Whitefish and Columbia Falls, which are the only other communities in Flathead County. According to the 1960 census, Whitefish has a population of 2,965 and Columbia Falls has a population of 2,132.

17. No station serves the entire daytime gain area. Two stations provide primary service to between 25 and 50 percent of the area while a third serves less than 25 percent. The maximum number of services to any one portion is two. In the daytime loss area there is likewise no single primary signal to the entire area. Three stations provide primary service to less than 25 percent and a maximum of two services is available to any one portion.

18. Station KGEZ in Kalispell provides the only existing nighttime primary signal to any portion of the proposed nighttime service area. This covers approximately 17 percent of the entire area.

KYSS

19. Station KYSS at the present time operates daytime only and its normally protected 0.5-mv/m contour encompasses a circular area which extends approximately 37 miles from the transmitter location. The proposed daytime 0.5-mv/m contour would likewise encompass a circular area, which in this instance would extend 61 miles from the new transmitter location and would include all of the present service area.

20. The following table reflects the present and proposed coverage:

Contour (mv/m)	Existing daytime		Proposed daytime	
	Population	Area (sq. mi.)	Population	Area (sq. mi.)
0.5	52,826	4,230	77,331	12,290

There will be no loss of existing KYSS service but the proposed operation will bring that service for the first time to an area of 8,060 square miles which has a population of 24,505 persons. Of this number, a population of 3,395 residing in 2 unequal areas which total 1,930 square miles are at the present time without any daytime primary service. This white area is 24 percent of the entire area of gain and includes 13.9 percent of the gained population. A new primary service will also be brought to a gray area composed of 1,855 square miles with a population of 3,020.

21. At night the KYSS operation will be limited to its 2.26-mv/m contour which is cardioid in shape. Within the interference-free nighttime contour there is a population of 44,948 persons residing in an area of 2,008 square miles. Included in this is an existing white area of 1,576 square miles wherein reside 7,226 persons. The white area constitutes slightly more than 78 percent of the entire nighttime service area and contains 16 percent of the population therein.

22. Nine stations provide service to portions of the daytime gain area and the maximum number of existing services in any one portion is four. No existing station gives coverage to the entire gain area and only two provide primary service to portions constituting as much as 25 and 50 percent of that area.

23. Within the proposed KYSS nighttime interference-free area there are only three existing primary services and each of these serves less than 25 percent of the area in question.

Air Hazard Issue

24. The Federal Aviation Agency in a letter to KYSS dated March 11, 1965, found that the antenna towers of proposed KYSS would not constitute a hazard to air navigation provided the towers are marked and lighted in accordance with Federal standards.

Protection Afforded to Station WHAM, Rochester, N.Y.

25. Neither of the proposed operations would receive interference daytime within its normally protected 0.5-mv/m contour. The dominant station on this clear channel frequency is station WHAM, Rochester, N.Y. The issues pose no question as to whether the proposed KOFI operation would afford adequate nighttime protection to WHAM but issue No. 2 does raise this question with respect to KYSS. As will presently be shown, the proposed KYSS operation would afford adequate nighttime protection to WHAM.

26. Rust Broadcasting Co., Inc., which is the licensee of station WHAM, was permitted to intervene in this proceeding by order of the hearing examiner. Earlier in the proceeding Rust filed a petition with the Review Board to enlarge issues. The purpose of this petition was to seek a determination of the amount of interference which would occur if either of the two present applicants commenced operations while the cochannel operation of Voice of America at Marathon Key, Fla., continued.[2] The petition was certified to the Commission en banc and was there denied by memorandum opinion and order released June 11, 1965 (5 R.R. 2d 550). Rust continued to pursue its contention that no operation by either of the present applicants ought to be permitted for the duration of the Voice of America operation. Nevertheless, Rust concedes that in the present posture of the case the hearing examiner is without authority to grant its contention. The matter, therefore, will receive no further consideration in this opinion.

KYSS Directional Antenna System

27. Issue No. 2 requires a determination as to whether the directional antenna system proposed by KYSS can be adjusted and maintained and whether adequate nighttime protection will be afforded station WHAM, Rochester, N.Y. The system will consist of two vertical, guyed, and base insulated steel towers each arranged on a line bearing 92° true and spaced 316 feet (135° electrical). Each tower will have a height of 207 feet above insulator and 212 feet above ground level. The effective current in the east tower will lead that in the west tower by 48°. For the daytime 50 kw nondirectional operation the west tower will be utilized with the east tower floating above ground. The ground system will consist of 120 buried copper radials 207 feet long for each tower except where such wires overlap at a ground screen which will be located at the base of each tower.

28. In order to secure stable operation of the array, the consultant for KYSS testified that the installation will be in accordance with good engineering practice and that antenna coupling and phasing equipment will be installed utilizing 50 kw components. All capacitors will be of the vacuum and high pressure gas type. All coaxial cable, including that for the phase monitor, will be of air dielectric type and the main cables will be rigid with diameters of 3⅛ inches. Calculations show that the west tower will have a base resistance of 59.8 ohms; the east tower will have 31.1 ohms. The reactance values are approximately 80 and 70 ohms, respectively.

29. The directional antenna is designed to give what is essentially a symmetrical pattern with the major radiation directed roughly toward the north and toward the south. The major suppression is toward the east in order to afford protection to WHAM, and in this direction the pattern shows a minor lobe along the line of towers with a calculated maximum value of 33.9 mv/m. Nulls appear on either side of the minor lobe at 80° and 104° true. Maximum expected operating values (MEOV) are specified toward WHAM over an arc from 72°

[2] This station, of course, is not licensed by the Commission and details of its technical mode of operation are not contained in this record.

true to 112° true. The magnitude of the MEOV decreases from 92 mv/m at 72° true to 50 mv/m at 80° true, it increases to 75 mv/m at 92° true, decreases again to 50 mv/m at 104° true, and thereafter increases to 92 mv/m at the terminal of the arc which is 112° true. Maximum permissible operating values of radiation for the same arc follow a smooth curve through 110 mv/m at 75° true, 93 mv/m at 92° true (line of towers), and 160 mv/m at 107° true. These values represent the maximum that can be radiated toward WHAM without causing objectionable skywave interference to that station.

30. The 0.5 mv/m-50 percent skywave contour of WHAM extends 730 miles in all directions. The distance to the proposed KYSS 0.025 mv/m-10 percent skywave contour varies with azimuth because of the contemplated directionalized operation. These distances based on the specified MEOV radiation along several azimuths are set forth in the following table:

Azimuth		*Distance to 0.025 mv/m-10 percent (miles)*
92°		975
86°	98°	955
82°	102°	900
80°	104°	975
78°	106°	1000
76°	108°	1030
74°	110°	1060
72°	112°	1090

On a line between the respective transmitter sites the proposed KYSS 0.025 mv/m-10 percent skywave contour falls short of the WHAM 0.5 mv/m-50 percent skywave contour. The buffer area between these two contours ranges from 80 miles to approximately 100 miles. Protection is thus afforded to the class I station in accordance with the requirements of section 73.22(d) of the Commission's rules inasmuch as the proposed 0.025 mv/m-10 percent skywave contour would not overlap the 0.5 mv/m-50 percent skywave contour of WHAM at night.

31. The KYSS consulting engineer initially expects to adjust the radiation pattern toward WHAM within +20 mv/m of the theoretical or calculated values of radiation. It is proposed to maintain the relative phase ratio within ±1° and the current ratio within ±2 percent. In this connection a Nems-Clarke type 112 phase monitor with an accuracy of 1° and resolution of 0.5° will be used. Calculations were made on specific critical azimuths to show what would result from the aforementioned variations to the design field ratios and relative phase. These calculations make it apparent that even if the deviations in field ratios and relative phase were to reach the set limits, there would still be more than 20 mv/m under the specified MEOV on each azimuth over the critical arc toward WHAM. The KYSS engineering consultant was of the opinion that practical consideration of other factors, including terrain, would not add more than 10 mv/m to the theoretical value of radiation. Taken altogether, the variations in radiation would not exceed the specified MEOV and accordingly the service area bounded by the WHAM 0.5 mv/m-50 percent skywave contour would be adequately protected.

32. The adjustment of the directional antenna system and proof

of its performance will be carried out pursuant to sections 73.151 and 73.186 of the Commission's rules [3] together with any requirements that may be contained in the construction permit. The applicant's consultant proposes to make nondirectional measurements for determining effective conductivity from the antenna site before commencing adjustment. Field strength measurements will be made along seven radials bearing 27, 137, 188, 255, 297, 327, and 355 degrees true in order to establish the major pattern lobe. Toward the WHAM service area it is proposed to take measurements along radials bearing 76, 92, and 108 degrees true. Additional radials will be measured if so required by the Commission. Monitor points will be established at accessible locations on or near roads that cross the radials toward WHAM or any other monitor point radials at distances of 1.0 to 1.5 miles from the antenna site.

33. Terrain in the area is described as somewhat rugged but the proposed antenna site is not unique in this respect. The area is rolling rather than precipitous in character, and is accessible for the taking of field intensity measurements. Reflection from hills is not expected to be of serious consequence. Profile graphs toward WHAM out to 10 miles disclose that the terrain varies from 3,425 feet to 3,600 feet above mean sea level over a distance of 1.1 miles from the proposed site. Thereafter, the terrain rises irregularly and in the 10-mile interval there is no point of elevation above 6,350 feet on the radials shown on the graphs. Miller Peak, with an elevation of 7,018 feet, is the highest promontory in the area; it is 8.2 miles on a bearing of 103.5° from the site and its elevation is 3,468 feet above the site. A vertical angle not exceeding 6.5° will clear all natural obstructions to the east of the site.

34. Use of a four-wheel-drive vehicle which is owned by KYSS together with a helicopter and light airplane which are available in Missoula would permit access to any desired measuring location on any of the radials. Measurements within 2 miles of the proposed site will be made on foot where necessary. Measurement locations will be accurately established by utilizing standard surveying methods, accurately calibrated speedometers in vehicles, and by terrain, roadway, or other landmarks. Field strength measurements at all locations will be made at ground level, clear of obstructions, vehicles, and aircraft. In view of the reduction in nighttime power to 25 kw,[4] the considerably enlarged MEOV, the inherent electrical stability of the directional antenna system, and other factors above mentioned, it is the opinion of the KYSS consulting engineer that adequate operating tolerance is available to him. He further believes that under the changed circumstances (owing to the amendment referred to in footnote 4) the need for setting up a test transmitter for a survey prior to grant of the application is not longer necessary.[5] It should further be

[3] These relate to intensity measurements for establishing performance of directional antennas and field intensity measurements in allocation.

[4] The reduction in power from 50 kw to 25 kw was accomplished by an amendment which was allowed by the hearing examiner on Apr. 6, 1965 (4 R.R. 2d 840).

[5] In the order of designation there was mention of terrain irregularities which might result in signal scatter and reradiation. The applicant had not submitted a site survey at that time so that the Commission could not determine on the basis of information then present whether the antenna system could be adjusted and maintained as proposed.

noted that none of the parties adduced any rebuttal information which challenged the soundness of the proposed directional antenna system or its ability to perform.

Ruling on KYSS Exhibit 1–D

35. On July 13, 1965, which was the last hearing session, KYSS tendered an exhibit marked 1–D as rebuttal evidence. The exhibit consists of a page of engineering text, an affidavit, and a map. The testimony comes from the KYSS engineering consultant and it purports to show that the KOFI nighttime 2.25-mv/m contour encloses an area of 1,328 square miles with a population of 25,896. It further asserts that the KOFI white area contains a population of 12,329 and consists of 1,110 square miles. The showing made by KOFI, which has been relied upon herein, shows that the white area consists of 1,136 square miles with a population of 15,085.

36. Objection to KYSS exhibit 1–D was made by counsel for KOFI and the Broadcast Bureau, and these objections were sustained by the examiner. While KYSS is correct in claiming that it is entitled to submit relevant and material evidence, there are some ground rules which are essential for the orderly conduct of hearings. The direct cases of the two applicants were placed in evidence at a hearing session on May 11 and during that session KOFI exchanged a rebuttal exhibit which was identified but not offered. It was subsequently offered at the session of July 2 and was rejected at the final session on July 13. At no session prior to July 13 did KYSS indicate that it contemplated any rebuttal nor did it do so during an off-the-record conference which was held on July 9. Counsel for KYSS offered to make his client's consulting engineer available for cross examination on July 23, but this would obviously have protracted the hearing with the possible consequence that other parties might have demanded the right to surrebuttal. Under these circumstances the examiner has concluded that it was a sound exercise of discretion to reject the exhibit in question on the grounds that KYSS was dilatory in advising the examiner and the other parties of its intention to offer rebuttal evidence. In any event it must be noted that the differences in the figures representing white area and populations therein to be served at night by the KOFI proposal are not sufficiently different from those relied on herein to alter the result of the case.

CONCLUSIONS

1. This is a contest between two mutually exclusive applications for class II–A facilities on the clear channel frequency 1180 kc. Each of the applicants at the present time operates a class III station. KOFI in Kalispell, Mont., now operates on 930 kc with 5 kw, daytime only, and seeks to operate on 1180 kc with 10 kw, using a directional antenna at night. KYSS in Missoula, Mont., now operates on 910 kc with 1 kw, daytime only, and proposes an operation on 1180 kc with daytime power of 50 kw and nighttime power of 25 kw, using a directional antenna at night.

2. The Commission's order of designation found each applicant to be qualified in all essential respects except that KYSS was confronted with two technical issues. As shown in the findings of fact, it has been determined that the proposed KYSS towers would not constitute a menace to air navigation (issue No. 3). It has also been resolved that the proposed directional antenna system of KYSS can be adjusted and maintained so as to protect the dominant class I–A station on the channel (issue No. 2).[6] As a result of these conclusions, it is apparent that the pivotal issue is the one which calls for determination under section 307(b) of the Communications Act of 1934, as amended. In deciding which proposal would better provide a fair, efficient, and equitable distribution of radio service, it is important to examine the way in which the frequency 1180 kc was opened for applications.

3. In 1961 the Commission issued a report and order on *Clear Channel Broadcasting in the Standard Broadcast Band*, 21 R.R. 1801 (1961). Among other things it contemplated opening the frequency 1180 kc to applications for a class II station in the western part of the United States. Station WHAM, Rochester, N.Y., is at present the dominant class I–A station on this frequency. The report and order in several places stressed the fact that a major objective was to provide service to white areas and it was estimated that approximately one-half the total land area of the United States and perhaps more than 25,000,000 people are still without a usable nighttime ground wave signal. (21 R.R. 1806.) In view of this, the important and immediate objective of providing such service at night was emphasized in the following language:

> Indeed, prospective applicants should be aware that we intend, absent decisive countervailing circumstances, that as between fully qualified applicants complying with all our rules, the one who will serve the largest white area population will receive the grant. Parties are thus forewarned that white area population served rather than total population served is of prime importance herein. 21 R.R. 1817.

4. In appraising the two proposals in this proceeding it is undeniable that certain advantages and disadvantages accrue to each. First let us examine the two communities involved. Each is a county seat and the principal city in its county. Kalispell has a population of approximately 10,000, while Missoula has a population over 27,000. In Kalispell there is only one other AM outlet while Missoula has three, in addition to a television station and an educational FM station. The KOFI proposal will provide Kalispell with its second outlet and second service at night, whereas the KYSS operation would provide a fourth nighttime outlet for Missoula and a fourth service for that city. It is thus clear that Kalispell has a greater need for both a local outlet and for new service than Missoula.

5. Turning to the total gains and losses of service, it is evident that that the KYSS proposal would bring a new primary signal to considerably more persons both day and night and it would also extend its service in terms of both area and population without losing any of its existing service. In this respect the KOFI proposal suffers

[6] See par. 2 of the preliminary statement and pars. 27 through 34 of the findings.

106-500—66——3

a distinct disadvantage inasmuch as its existing service will be lost during daytime by more than 1,000 persons in over 200 square miles. Even though KOFI would bring a new daytime service to more than 1,000 persons in 700 square miles, the figures show that there would be a net loss of 31 persons in 488 square miles. These figures may appear small but it must be remembered that these regions of Montana are somewhat sparsely settled, so that the addition or elimination of primary service is of cardinal importance. This, of course, is especially true when we are considering white areas.

6. In order to see at a glance the relative gains and losses the following table is provided:

Service	KOFI		KYSS	
	Area (sq. mi.)	Population	Area (sq. mi.)	Population
Daytime:				
Total gain	700	1,002	8,060	24,505
Total loss	212	1,033	None	None
Net gain (loss)	488	(31)	8,060	24,505
First service:				
Gain	202	181	1,930	3,395
Loss	133	467	None	None
Second service:				
Gain	456	784	1,855	3,020
Loss	70	511	None	None
Nighttime:				
Total gain	1,328	27,065	2,008	44,948
First	1,136	15,085	1,576	7,226
Second	192	11,980	Not shown	

7. As has already been shown, the major objective in allocating a class II station on this frequency is to provide service to white areas at night. The nighttime service proposed by both of these applicants would represent a gain because each now operates a daytime-only station. The critical factor, however, is not the total populations to be served but those residing within white areas. KYSS has developed at some length the theory that the Commission has been concerned with "white area" as area and has minimized the importance of populations living therein. It is true that it has been customary to speak of white area without repeatedly associating it with people, but it would be a narrow view which chose to ignore the fact that radio signals are meant for human ears. There is some merit, however, in the KYSS argument, inasmuch as service to sparsely settled regions is of primary importance and the size of such regions is obviously not to be overlooked. The relatively few inhabitants of vast areas, such as the national forests, have real need for service, perhaps greater than persons in more closely settled farm regions. Nevertheless, the KYSS theory is not persuasive here, because even in terms of area one cannot find those countervailing circumstances to which the Commission referred above. The KYSS nighttime white area consists of 1,576 square miles as contrasted with 1,136 square miles for KOFI. This is not such a substantial difference that it would offset the larger potential audience in the KOFI white area where 15,085 persons will

receive their first nighttime service as contrasted with the comparable figure of 7,226 persons for KYSS.

8. Two other contentions of KYSS deserve mention. This applicant requests official notice of facts contained in the respective applications with respect to the number of hours per week that each station proposes to operate. KYSS proposes weekly operation of 163 hours as contrasted with 124 for KOFI. No relevance, however, has been shown for using this fact under any of the issues. Another contention is of more significance. By proposing an operation with 50 kw power daytime and 25 kw at night, it is argued that the Missoula facility will make the maximum use of this frequency consistent with terrain limitations and protection requirements. This is claimed to be a more efficient use of the channel than the 10 kw operation proposed by KOFI. While there is some merit in this position, it does not outweigh the superior white area coverage by KOFI at night. It follows that the KOFI operation would more fully meet the mandate of section 307(b) and would better serve the public interest.

It is ordered, This 22d day of November 1965, that, unless an appeal from this initial decision is taken by any of the parties or unless 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 Leslie L. Sterling and William H. Patterson, d/b as Flathead Valley Broadcasters (KOFI), for a construction permit (BP-16369) to change its present operation as a class III station operating on 930 kc with 5 kw, daytime only, to a class II-A facility on 1180 kc with 10 kw, unlimited time, using a directional antenna at night, in Kalispell, Mont., *Is granted*, subject to the following condition:

> Pending a final decision in docket No. 14419 with respect to presunrise operation with daytime facilities, the present provisions of section 73.87 of the Commission's rules are not extended to this authorization, and such operation is precluded.

and that the application of Garden City Broadcasting, Inc. (KYSS), for a construction permit (BP-16400) to change its present operation as a class III station operating on 910 kc with 1 kw, daytime only, to a class II-A facility on 1180 kc with 50 kw during daytime hours and 25 kw at night, using a directional antenna at night, in Missoula, Mont., *Is denied*.

FCC 66R-238

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of EDINA CORP., EDINA, MINN.,	Docket No. 14739 File No. BP-14018
TEDESCO, INC., BLOOMINGTON, MINN. For Construction Permits	Docket No. 14740 File No. BP-15272

APPEARANCES

Fred H. Walton, Jr., *William J. Dempsey*, *William C. Koplovitz*, and *Milton D. Price, Jr.*, on behalf of Edina Corp.; *Vincent A. Pepper* and *Thomas W. Fletcher*, on behalf of Tedesco, Inc.; *Bernard Koteen*, *Alan Y. Naftalin*, and *Rainer K. Kraus*, on behalf of Swanco Broadcasting, Inc., of Iowa (KIOA); *George O. Sutton*, on behalf of People's Broadcasting Co. (WPBC); and *John B. Letterman*, *Earl C. Walck*, and *Walter C. Miller*, on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted June 17, 1966)

BY THE REVIEW BOARD: BERKEMEYER AND SLONE. BOARD MEMBER NELSON CONCURRING IN PART AND DISSENTING IN PART WITH STATEMENT.

I. PRELIMINARY STATEMENT

1. Edina Corp. seeks authorization to establish a new unlimited time class II station on 1080 kc/s in Edina, Minn., operating with 10 kw of power, employing the same directionalized pattern day and night. Tedesco, Inc., seeks authorization to establish a new class II station on the same frequency in Bloomington, Minn.; its proposed station would operate directionally with a power of 50 kw, day, and 10 kw, night. Each of the two cities lies to the south of Minneapolis; each of the applicants would directionalize its radiation pattern to the north, with the result that, daytime, virtually all, and, at night, substantially more than one-half of the Minneapolis-St. Paul urbanized area would fall within the proposed coverage contours. The applications are mutually exclusive, and they were heard on the issues normally incident to such proceedings, as well as on a large number of special issues warranted by the respective proposals and associated circumstances. Among the special issues were one (No. 13) to determine whether Edina Corp.'s proposed antenna site would be available to it for the intended usage; three (Nos. 14–16) to determine whether Tedesco, Inc., unlawfully assumed control of another broadcast station, and whether the relevant

facts warrant disqualification of Tedesco, Inc., on character grounds; and one (No. 17) to determine whether Tedesco, Inc. (or its principal stockholders), have trafficked in broadcast authorizations. The ultimate issue is which, if either, of the applications should be granted.

2. In the initial decision herein, the hearing examiner recommended denial of both applications.[1] With respect to the Edina applicant, he concluded (among other things) that "Edina Corp. has not shown a reasonable expectancy of obtaining zoning clearance for its proposed antenna site."[2] Tedesco, Inc., was concluded to have (*a*) unlawfully assumed control of station KBLO, Hot Springs, Ark.; (*b*) attempted to mislead and deceive the Commission with respect to the foregoing matter to a point precluding a finding of requisite character qualifications; and (*c*) engaged in trafficking in connection with the acquisition of the license of station KFNF, Shenandoah, Iowa. In general, each of the applicants urges grant of its own application and a denial of the other; the Commission's Broadcast Bureau recommends denial of both applications; and Swanco Broadcasting, Inc., of Iowa (KIOA), contends for a denial as to Tedesco, Inc.[3]

3. The Board is in accord with the examiner's conclusions summarized above, and agrees that both applications should be denied. Our principal point of departure from the holdings in the initial decision lies with respect to the trafficking issue: Where the examiner concluded that the principals involved under the issue had engaged in but one act of trafficking, the Board believes (*a*) that such principals' trafficking activity has been substantially more extensive; and (*b*) that the total evidence under the issue—independently of the assumption-of-control issue—precludes the public interest finding required by section 309(a) of the Communications Act. In light of the procedural background of the trafficking issue specified herein, and because the disposition of the issue may have significance in other proceedings involving Tedesco, Inc., or its principals, the Board will hereinafter state in detail its rationale as to that issue.[4] First, however, the matters pertaining to the Edina Corp. application will be disposed of.

---

[1] See initial decision of Hearing Examiner Chester F. Naumowicz, Jr., FCC 64D–47, released Aug. 5, 1964. Oral argument on the parties' exceptions and other pleadings was held before a panel of the Review Board on Oct. 14, 1965; rulings on the 329 exceptions to the initial decision are contained in the appendix hereto. The Board has found it necessary to substantially expand upon the findings of fact contained in the initial decision. This has been necessary to provide a complete and sufficient basis for the ultimate findings and conclusions required by the hearing record.

[2] Additionally, the examiner disqualified Edina Corp. on two other technical grounds related to the applicant's proposed coverage of Edina, its specified community. In light of the Board's disposition of the issues identified above, it is unnecessary to resolve either the coverage issues or the other issues involving Edina Corp. or Tedesco, Inc.

[3] Swanco Broadcasting, Inc., of Iowa (KIOA), and People's Broadcasting Co. (WPBC) were designated as respondents in the proceeding (as to issues 14–17) by Review Board order of Feb. 21, 1963 (FCC 63R–101, released Feb. 27, 1963). See par. 44, infra. On Oct. 27, 1965, 2 weeks after the oral argument herein, the Commission granted an application (BAL–5536, filed July 28, 1965) requesting assignment of the license for station KIOA (Des Moines, Iowa) from Swanco to Radio Moline, Inc., the assignment to be effective on Jan. 30, 1966. To avoid confusion, the respondent station will continue to be referred to herein as "Swanco." People's Broadcasting Co. filed no exceptions to the initial decision, and it does not appear to have participated extensively in the proceeding.

[4] The background of the trafficking issue and its relationship to other pending proceedings are set forth in pars. 37–44, infra.

II. THE SITE-AVAILABILITY ISSUE

4. At the time that its application was designated for hearing,[5] Edina Corp. specified as an antenna site a parcel of land, owned by the applicant, in Bloomington, Minn. By memorandum opinion and order of October 17, 1962,[6] the Board added a site-availability issue to the proceeding in the following terms:

> To determine whether Edina Corp. has a reasonable expectancy of obtaining permission from the appropriate authorities for the construction of the proposed directional antenna system at the site specified in its application.

The issue was added by the Board on a showing by Tedesco, Inc., that the proposed antenna site was located in an area zoned as a single family residential district by the city of Bloomington, and that Bloomington's City Planning Commission had unanimously recommended denial (to Bloomington's city council) [7] of the request by Edina Corp. for a conditional use permit authorizing utilization of the site for the proposed purpose. In adding the issue, the Board rejected arguments by Edina Corp. to the effect that the Commission's general policy of leaving the resolution of zoning matters to local authorities precluded evidentiary inquiry on the point.[8] Regarded by the Board as dispositive of the matter were the Commission's pronouncements in *Massillon Broadcasting Co., Inc.*,[9] where the Commission, although not overruling the earlier cases relied upon by Edina Corp., nevertheless held that, in a situation where existing zoning regulations prohibited the erection of antenna towers, and the applicant had done no more than indicate that it would seek a waiver of the regulations, such applicant must submit evidence establishing "reasonable assurance of the approval of the local zoning authorities" (22 R.R. 96–97). Notwithstanding that Edina Corp.'s request was to be heard de novo by the city council, its total showing—in light of the planning commission's adverse recommendation—was less than that before the Commission in *Massillon;* accordingly, an addition of the issue was clearly indicated. Because the city council had not yet finally acted on the plea for waiver of the existing regulations, the Board refused a request by Tedesco, Inc., for outright dismissal of Edina Corp.'s application.[10]

5. The examiner's findings of fact with respect to the site-availability issue are set forth at paragraphs 21–30 of the initial decision and his conclusions at paragraphs 146–149. In its review of such find-

[5] The application was designated for hearing on July 25, 1962; see *Edina Corp.*, FCC 62–845, released July 31, 1962.

[6] See *Edina Corp.*, FCC 62R–82, 24 R.R. 455, released Oct. 22, 1962.

[7] As to the planning commission's advisory role and the city council's final authority in zoning matters, see initial decision, note 4 (par. 22).

[8] Among other cases, Edina Corp. cited *W. Gordon Allen*, 13 R.R. 1120 (1956); at 13 R.R. 1122, the Commission stated: "Zoning considerations are believed to belong more properly to local zoning boards, park planning authorities, etc. In passing on an application involving approval of a transmitter location, the Commission assumes that the applicant's representations are in good faith and that he has a reasonable expectation of the proposed site being available, but the Commission does not require proof * * * of compliance with the local ordinances and zoning regulations."

[9] FCC 61–1102, 22 R.R. 95.

[10] The theory of the plea was that, at best, Edina Corp.'s antenna proposal was on a site-to-be-determined basis and patently defective under secs. 3.33(a) (now, 73.33(a)), 1.306(b) (now, 1.564(b)), and 1.307(a) (now, 1.566(a)) of the Commission's rules. For the proposition that an applicant who has failed to sustain its burden of proof under a site-availability issue has failed to establish its basic qualifications, see *Milam & Lansman*, 3 F.C.C. 2d 256, —— R.R. 2d —— (1966).

ings of fact and conclusions, the Board has detected no substantial error therein; accordingly, with the modifications effected below and in the appendix hereto, they are adopted. In substance, the examiner found that (on May 8, 1962) the planning commission determined, inter alia, "that a radio station did not constitute a 'public utility' within the zoning concept of 'conditional use' in a residential zone"; that, thereafter, Edina Corp. sought to postpone proceedings on the conditional-use request until after F.C.C. action on Edina Corp.'s instant application; that, notwithstanding Edina Corp.'s efforts in the foregoing respect, Tedesco, Inc., was successful with respect to requests that the city council set the matter for hearing; that, following an unproductive meeting on the matter by the city council on December 3, 1962, and before the date (December 17, 1962) set by the council for further consideration of the matter, Edina Corp. withdrew its request for a conditional use permit and filed a petition in the nature of a request for resolution to the city council, the request seeking a permitted use under the public utilities buildings section of the conditional use provision of the zoning code;[11] that, on December 17, 1962, the city council rejected the petition by a vote of 6 to 1; [12] that optimism by Edina Corp. that it will be successful in obtaining a conditional use permit for its proposed use of radio towers on its specified site was not shared by Bloomington's city attorney, who testified herein that it is "completely uncertain as to whether or not it would be granted";[13] that, although Edina Corp. has been free to refile a petition for conditional use, it had not done so through the closing date of the record;[14] and that Edina Corp.'s own witness had admitted that neither a request for rezoning nor one for a variance from the prescribed zoning would be successful.

[11] Under sec. 7.04(A)(5) of the Bloomington code, "Public utilities installations consisting of gas, electric, telephone, telegraph, water, and sewer, but not including buildings unless publicly owned" are "permitted uses" with respect to "single family residential districts."

[12] The planning commission's adverse recommendation with respect to the conditional use permit had been by a vote of 7 to 0.

[13] Edina Corp.'s optimism stemmed from its zoning attorney's opinion "that by the action it had taken at its December 17 meeting the council had specifically ruled pursuant to sec. 7.03 of the zoning code, that 'the proposed construction by Edina Corp. may be allowed as a conditional use in the applicable R-4 district.'" (See Edina Corp.'s exception 29.) However, on Mar. 4, 1963, the city attorney discussed with the city council the fact of an affidavit by the zoning attorney, in which was stated that the council had "by resolution approved the proposed construction as a conditional use pursuant to sec. 7.03." (Subsequently, the affidavit was changed twice, ultimately stating (in the foregoing respect) that the council had, "in the opinion of affiant, by resolution stated the proposed construction would fall under 'conditional use' pursuant to sec. 7.03.") At the meeting, two of the councilmen denied that favorable action had been taken with respect to the conditional use permit, and there is no evidence that any other councilman disputed their interpretation. (See Edina Corp.'s exception 34.)

[14] Edina Corp. points out that at the council meeting of Mar. 4, 1963 (referred to in the preceding note), the council—even though no zoning request from Edina Corp. was then before it—tabled any further discussion or action with respect to the matter pending the outcome of the FCC action. But, Edina Corp. admits that it was not barred thereafter from resubmitting the request for a conditional use permit, and the argument that the council would have sought good cause for deferring action on the request is conjectural. In any event, by Mar. 4, 1963, more than 2 months had passed since the council's refusal (on Dec. 17, 1962) of the permitted-use request, and the Board is not persuaded that a resubmission of the conditional-use request during that period would not have been feasible. In view of (*a*) the planning commission's determination (of May 8, 1962) "that a radio station did not constitute a 'public utility' within the zoning concept of 'conditional use' in a residential zone," (*b*) Edina Corp.'s attempt to postpone council action with respect to the conditional-use request, and (*c*) that applicant's later withdrawal of such request, the most logical conclusion from Edina Corp.'s failure to resubmit the request is that it had no taste for a showdown in the matter. Irrespective of the validity of the foregoing conclusion, however, the tabling action changed not in the least the significance of the two previous refusals: That on the hearing record herein, there is more assurance of disapproval than approval insofar as Edina Corp.'s site-proposal is concerned—by no stretch of that record can "reasonable assurance of approval" (*Massillon*, par. 4, supra) be concluded.

6. In his conclusions, after indicating his agreement with Bloomington's city attorney as to the uncertainty of Edina Corp.'s ability to successfully prosecute a resubmitted request for a conditional use permit, the examiner stated as follows:

> 149. The best that could be said for Edina's prospect of securing appropriate zoning for its transmitter site is that it has not been proven to be impossible. This falls considerably short of the reasonable expectancy of rezoning required by the Commission, *Massillon Broadcasting Co., Inc.*, 22 R.R. 95. Although the Commission traditionally has been reluctant to intrude itself into zoning matters, believing them to be the province of local authorities, and has not imposed strict standards on land availability from a zoning standpoint, it does require that the applicant have some reasonable ground for believing that his transmitter site will be available for the use specified. This record shows only that present zoning would not permit use of the land, and Edina's efforts to secure rezoning have encountered uniform rejection. In the face of these facts, the unexplained optimism of the applicant's lawyer will not suffice. Therefore, it is concluded that Edina has failed to carry its burden of proving that it has a reasonable expectancy of obtaining permission from the appropriate authorities for the construction of its proposed directional antenna system.

In the Board's view, the above conclusions are eminently sound, and the only ones possible under the facts of record. Because of Edina Corp.'s failure to sustain its burden of proof under the site-availability issue, its proposal must be viewed as on a site-to-be-determined basis, and its application must be denied for want of basic qualifications. Compare *Milam & Lansman*, supra (note 10).

7. In arguments largely repetitive of those advanced by Edina Corp. at the time the site-availability issue was requested by Tedesco, Inc., Edina Corp. asserts that

> * * * it is abundantly clear that the applicant is the beneficiary of a presumption that a specified transmitter site will be available and this is true even where it is shown that the site is in an area zoned residential. As a matter of first impression, the Commission presumes that necessary permission of zoning authorities can be obtained. Moreover, the presumption prevails in the absence of a showing that zoning cannot be changed or that the site is and will be in fact unavailable to the applicant.

Four of the cases now relied upon by Edina Corp. were decided subsequent to the *Massillon* case, supra, and each is a Review Board case.[15] Each of the four stands for the proposition that the "addition of a site-availability issue requires a showing by the petitioner that the applicant lacks reasonable assurance of the availability of the site in question."[16] But, whereas the petitioners' showings in the cited cases were adjudged insufficient to warrant addition of the issues requested,[17] the Board could not do other than regard as sufficient Tedesco, Inc.'s

[15] Cited in Edina Corp.'s brief was *Eastside Broadcasting Co.*, FCC 63R-528, 1 R.R. 2d 763. Cited by Edina Corp. at oral argument were *Charles Vanda*, FCC 65R-65, 4 R.R. 2d 543; *KFOX, Inc.*, FCC 65R-139, 5 R.R. 2d 28; and *Lebanon Valley Radio*, FCC 65R-164, 5 R.R. 2d 65.

[16] See the *Vanda* case, supra, 4 R.R. 2d 545.

[17] In *Eastside*, the showing consisted of a letter from a zoning attorney that "there may be some difficulty" in securing proper zoning. In *Vanda* (which was not a zoning case), a showing by the petitioner that the land in question was Federal property was countered by an affidavit to the effect that the United States Bureau of Land Management had given assurance that the land would be available for the proposed usage. In *KFOX*, the showing (as in *Eastside*) was an attorney's letter to the effect that the applicant would have "difficulties in securing a zoning clearance." In *Lebanon*, the showing was that a neighborhood improvement association would oppose rezoning, and that a tract adjacent to that in question "had been refused rezoning for garden-type apartments."

showing that Edina Corp. had already sought zoning authority and had been met with an adverse recommendation from the planning commission. The latter circumstance clearly distinguishes Edina Corp.'s situation from both the pre- and post-*Massillon* cases relied upon by Edina Corp., and clearly required the addition of the issue. The question of whether Edina Corp. would have been in a better position had it delayed presenting its zoning problem to the local authorities until after a decision herein is not a matter for consideration here;[18] however, whatever Edina Corp.'s reasons for setting the local zoning machinery in motion, the Board could not (at the time of the addition of the issue) and cannot (now) ignore the facts casting substantial doubt on Edina Corp.'s prospects with respect to zoning authority.

8. Edina Corp.'s further point here appears to be that even if the *Massillon* case required the addition of a site-availability issue in this proceeding, the zoning presumptions running to applicants generally are sufficient to dictate a conclusion of reasonable expectancy insofar as Edina Corp.'s site is concerned. However, such a conclusion would require that the evidence adduced pursuant to the issue be disregarded. Further, the argument appears to be that the Commission can have one standard for adding an issue and another for resolving it; and that, in view of the zoning presumptions, a site-availability issue must be determined favorably to the affected applicant as long as there is some chance that the necessary authorizations can be secured. Restated, the argument would be that Edina Corp. had no duty at the hearing to establish reasonable expectancy of obtaining site approval, but that it was Tedesco, Inc.'s burden to show that the securing of such approval would be impossible. The Board agrees with none of the foregoing theories, and none of the cases cited by Edina Corp. lends support to them. The simple question here is whether it can be concluded that Edina Corp. has a reasonable expectancy of obtaining permission from the appropriate authorities for the construction of the proposed directional antenna system at the site specified in its application. As we have already stated, conclusions adverse to Edina Corp. are the only ones that can be drawn from the evidence of record.

9. On November 4, 1964—3 months after the initial decision holding that Edina Corp. had failed to carry its burden of establishing reasonable expectancy of obtaining zoning approval—Edina Corp. filed a petition to reopen the record (without further hearing) to receive the following evidence:

(*a*) That on September 21, 1964, Edina Corp. submitted to the Bloomington City Council a request for reinstatement of the application for a conditional use permit, originally filed with the planning commission in March 1962;

(*b*) That on September 28, 1964, the city council held a hearing on the application for a conditional-use permit, and denied the application;

(*c*) That on October 7, 1964, Edina Corp. instituted—in the

[18] However, in light of the intense interest displayed by Tedesco, Inc., with respect to its opponent's proposed site, it is likely that a showing at least equal to that made in the *Massillon* case would have been submitted by Tedesco, Inc.

District Court of the State of Minnesota, for Hennepin County, Fourth Judicial District—a suit against the city of Bloomington, the suit "seeking a judgment and decree of the court that the applicable zoning laws of the city of Bloomington are unconstitutional as applied in the attendant circumstances to [Edina Corp.'s] property"; and

(*d*) That a letter-opinion of Edina Corp.'s zoning attorney advises Edina Corp. of the attorney's belief "that after a hearing on the merits, the district court will grant the requested relief."

On the same day, Tedesco, Inc., filed a petition requesting that official notice be taken of facts (*b*) and (*c*), above. By memorandum opinion and order of April 14, 1965, the Board denied each of the foregoing petitions.[19] Tedesco, Inc.'s petition was denied on the ground that the petitioner had made no showing "that any of these events materially alter the situation as it existed as of the date the record was closed or that they are likely to be of controlling decisional significance."

10. Edina Corp.'s petition was denied by the Board because of Edina Corp.'s inordinate delay in seeking further action by the city council, and because Edina Corp.'s purpose appeared to be to supplement its showing made under the availability-of-site issue in light of the examiner's adverse conclusions. When Edina Corp.'s flurry of activity following the initial decision is viewed in the light of the record evidence, the Board is reinforced in its view (note 14, supra) that the tabling action of March 4, 1964, was not regarded by Edina Corp. as a legal or practical bar to a resubmission of the request for a conditional-use permit. In the foregoing connection, it may be noted that whereas the council's motion for tabling was in terms of awaiting the outcome of the FCC action, (*a*) Edina Corp. did not await the outcome, but sought reinstatement of its request soon after the adverse initial decision; and (*b*) notwithstanding the wording of its tabling action—which, as has been indicated, was taken at a time when no request by Edina Corp. was pending before the council—the council disposed of the reinstated request within a week after reinstatement was requested.

11. Irrespective of the above, the facts sought to be introduced by Edina Corp. in its petition would hurt rather than help that applicant's cause. Thus, the hearing record would show yet another refusal by local authorities with respect to Edina Corp.'s zoning pleas—such refusal dealing a final blow to Edina Corp.'s interpretation (note 13, supra) of the council action of December 17, 1962. Thus, in view of this final action against Edina Corp. and the proven shortcomings of the prior opinion of counsel, the assignment of appreciable weight to the continued optimism by Edina Corp.'s zoning attorneys would be unwarranted.

12. On April 20, 1965, Edina Corp. filed a petition for leave to amend its application to specify a new antenna site, located 1 mile from Bloomington and 5 miles from its original site. Edina Corp. claimed that it was entitled to amend its application as of right—under section 1.570(c) of the rules—by reason of a change of frequency by station CKSA (Lloydminster, Alberta, Canada) to 1080

[19] See *Edina Corp.*, FCC 65R–133, 5 R.R. 2d 21.

kc/s—the same frequency specified herein by both Edina Corp. and Tedesco, Inc.[20] Alternatively, Edina Corp. pleaded entitlement to amend under section 1.522(b) of the rules, pleading as good cause (*a*) the new CKSA assignment, and (*b*) the fact that on February 8, 1965, Bloomington's city council had acquired—through formal condemnation proceedings—Edina Corp.'s original site for public park purposes. In connection with the CKSA matter, Edina Corp. contended that a new site was needed inasmuch as the required protection to CKSA "could not be achieved without deterioration of the 'premium' primary coverage to Edina that is required for the station community by section 73.188(b) of the rules." [21] By memorandum opinion and order of July 12, 1965, the Board held action on the petition in abeyance pending consideration of the initial decision and the parties' exceptions thereto.[22] In so holding, the Board referred to the protracted nature of the proceeding, and pointed out that a grant of the petition "would entail remanding the proceeding to the examiner for further hearing on Edina's amended proposal and a redetermination of some of the existing issues." [23] Additionally, the Board held that "unless we can conclude that Edina has established its technical qualifications on the basis of the present record, the amendment should not be allowed." In connection with the foregoing, the Board pointed out, inter alia, that "section 1.570 is restricted in its application to those situations where an applicant is seeking to correct deficiencies in its proposal which resulted from the inception of the NARBA problem." [24]

13. Upon further consideration of the matter, the Board adheres to the view expressed above; namely, that amendment could be permitted at this time only upon a conclusion that Edina Corp. was technically qualified at the time the record was closed. Since it is clear that Edina Corp. was not so qualified, its petition must be construed as an attempt to amend from a site which this record shows has never been available to it for the use proposed. To permit the amendment would allow Edina Corp. not only to cure a deficiency which existed well before the occurrence of the events now relied upon, but also to keep a frequency tied up indefinitely while it seeks to remedy whatever defects in its proposals the hearing process reveals. The situation

[20] Canadian List No. 190, released Oct. 2, 1964 (mimeo. No. 58418), disclosed the change of facilities. The official registration of change (under NARBA) was recorded on Oct. 26, 1964. On Dec. 21, 1964, the Commission's Broadcast Bureau requested the Board to take official notice of the change, the Bureau contending that (*a*) a grant to either of the applicants would raise existing levels of interference to CKSA, but that (*b*) a reopening of the record and the specification of additional issues would not be required were the examiner's proposed denial of both applications sustained.

[21] The Broadcast Bureau contended that this was so only because Edina Corp. persisted in proposing a high-powered operation (10 kw), with directionalization northward over Minneapolis. See pars. 1, supra, and 14, infra.

[22] See *Edina Corp.*, FCC 65R–259, 5 R.R. 2d 909.

[23] Edina Corp. disputes the latter proposition and suggests, in effect, that the Board can base new technical findings on the engineering materials submitted by Edina Corp. in its proffered amendment, and resolve all affected issues in Edina Corp.'s favor. Aside from the fact that there has been no accord among the interested parties in the latter respect (indeed, both the Broadcast Bureau and Tedesco have contended that the materials pose new technical problems), Edina Corp. has not explained how the interdictions of *Deep South Broadcasting Co.* v. *F.C.C.*, 120 U.S. App. D.C. 365, 347 F. 2d 459, 4 R.R. 2d 2018 (1965), could be avoided.

[24] The theory of the order was that (*a*) were the CKSA and condemnation matters not in the case, Edina Corp clearly could not be granted leave to amend to circumvent a determination that it had, at the close of the hearing record, no available site; and (*b*) it could not be permitted to ride the coattails of two purely fortuitous events which transpired well after whatever deficiencies had been developed on the record.

here is not unlike that before the Commission in *Paul A. Brandt*, 28 F.C.C. 799, 19 R.R. 42c (1960). In *Brandt*, an applicant who had been denied after hearing because of proposed overlap with an existing station owned by the applicant, sought (in a petition for reconsideration) a grant conditioned on his disposal of one of the stations prior to program tests by the new station. The Commission viewed the offer as an auctioning device and as an attempt to avoid the 1-year proscription set forth in section 1.309(a) (now, 1.519) of the rules, and denied the petition. (And it may be noted that a grant of the amended proposal in *Brandt* could have been effected without further hearing; whereas, as previously indicated, a number of the issues upon which Edina Corp's application were originally heard would have to be retried.[25] It may be that the matters relied upon by Edina Corp. would be found persuasive in a subsequent request by Edina Corp. for waiver of the 1-year proscription above referred to, so as to permit an early refiling of its application. They do not, however, justify the amendment here requested. In sum, Edina Corp.'s failure to sustain its burden of proof under the site-availability issue dictates a denial of its application, and a denial as well of its petition for leave to amend.[26]

14. With respect to the whole of the Edina Corp. proposal, and that of Tedesco, Inc., the following should be noted: On December 27, 1965, the Commission released its *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, FCC 65–1153, 6 R.R. 2d 1901. In pertinent part, the statement provides that where "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," a grant of the application may not be made without a determination of

[25] As to the "longstanding policy of the Commission not to permit an amendment subsequent to the release of an initial decision where, as here, the application cannot be granted without a further hearing," see *Simon Geller*, FCC 63R–147, 25 R.R. 171 (1963).

[26] Of the cases cited by Edina Corp., only one presents a situation where a site change was allowed by the Commission after the issuance of an initial decision. In that case—*S & W Enterprises, Inc.*, FCC 64–643, 3 R.R. 2d 29—the Commission permitted an applicant to specify a new site where the Federal Aviation Agency withdrew an air space clearance extended with respect to the original site. But there no further hearing was required, and the Commission found that the deficiency had arisen after the initial decision, and that the applicant had been diligent in seeking a new site. In the instant case, further hearing would be required, and because Edina Corp. has had a site deficiency ever since the site-availability issue was added—a deficiency which has progressively worsened with the passage of time and the adduction of evidence—a claim of diligence by Edina Corp. would be difficult (if not impossible) to support. Reliance is also placed by Edina Corp. on *Newton Broadcasting Co.*, 28 F.C.C. 865, 5 R.R. 2d 317 (1965). There, however, the applicant preferred by the examiner developed a deficiency subsequent to the initial decision. In that case, the Commission found that the particular facts and circumstances present warranted a departure from the normal policy of summary dismissal. See 38 F.C.C. 869, 5 R.R. 2d 323. In *Fisher Broadcasting Co.*, 30 F.C.C. 177, 19 R.R. 997 (1961), *Northfield Broadcasting Co.*, FCC 63R–11, 24 R.R. 254a (1963), and *Rockland Broadcasting Co.*, FCC 63R–179, 25 R.R. 319 (1963), the amendments involved were sought prior to the initial decision, and the cases are otherwise inapposite. Similarly misplaced is Edina Corp.'s reliance on *Fleming and McNutt* v. *F.C.C.*, 96 U.S. App. D.C. 223, 225 F. 2d 523, 12 R.R. 2043 (1955). There, the appellant-partnership had been denied on the comparative ground that each partner had "acquiesced in certain advertising practices felt by [the Commission] to be contrary to the public interest"; while the case was on appeal, one of the two partners passed away, and the court remanded the case for a determination as to the effect of the death on the Commission's disposition of the case. But the case could be argued as in point only had the remand been predicated on an event (short of death—such as financial or legal disability) as a result of which the surviving partner was seeking to dilute or otherwise overcome the adverse conclusion; even there, however, the pertinence of the case would be doubtful, since the adverse conclusion had not been held by the Commission to be disqualifying in nature.

"whether the application should be treated as a proposal for the applicant's specified community or for some larger community." In the instant case, each of the applicants would fully cover Minneapolis with its 5-mv/m contour, and Minneapolis meets both of the specified population criteria. Since the required determination cannot be made on the basis of the present record, no grant to either of the applicants could be effected without further hearing with respect to the above question. Moreover, were a further hearing to reveal that Minneapolis and not (in the case of Edina Corp.) Edina were the applicant's principal community, issue No. 4 in the proceeding (involving the 10-percent rule) would be significantly affected.[27] Thus, whereas the examiner regarded the issue as moot on the theory that Edina Corp. would be bringing a first local service to the separate community of Edina,[28] the basis for the conclusion of mootness would be destroyed, and the applicant could not thereafter be said to be within one of the exceptions of the 10-percent rule. See section 73.28(d)(3) of the Commission's rules, and *Denver Area Broadcasters* (*KDAB*), 38 F.C.C. 583, 4 R.R. 2d 895.

III. THE KBLO AND 310(B) ISSUES

15. Tedesco, Inc., is a Minnesota corporation organized in the fall of 1960. It has approximately 500 stockholders, only 2 of whom own more than 3 percent of the corporation's capital stock; the latter two are Victor J. Tedesco (age 43), who is president and a director (1 of 7), and Nicholas Tedesco (age 52), who is vice president and a director.[29] Victor and Nicholas are brothers, and each owns 14.3 percent of Tedesco, Inc.'s stock; in each case, the 14.3-percent interest represents an investment of approximately $50,000. As at the close of the record, the corporation's only other officer was Israel E. Krawetz (secretary—0.36 percent), who also served as a director and as the corporation's general counsel.[30] Of Tedesco, Inc.'s other four directors, none owns more than 0.57 percent of the corporation's stock.

16. The broadcasting careers of Victor and Nicholas Tedesco commenced on May 19, 1948, with the filing of an application for a construction permit at Stillwater, Minn., by St. Croix Broadcasting Co., in which Victor and Nicholas (along with Albert Tedesco and one James V. Hobbins) each held a 25-percent interest. In 1948, the Tedesco brothers had a total net worth of approximately $21,000;

[27] See par. 4 of *Charles W. Jobbins*, FCC 65–1154, 6 R.R. 2d 574.

[28] The Board does not reach the question of whether the examiner was correct in his disposition of either issue No. 4 or the related issue No. 3 (the separate-community issue). See note 2, supra.

[29] Hereinafter, the corporation will be referred to as "Tedesco, Inc." or "the corporation." For convenience, Victor J. Tedesco and Nicholas Tedesco will sometimes be referred to by their given names; collectively, they will be referred to as "the Tedescos" or "the Tedesco brothers." Among the persons mentioned in the record are Antonio Tedesco, father of Victor and Nicholas; Albert Tedesco and Patricia Tedesco, brother and sister-in-law of Victor and Nicholas; and Mary (Tedesco) Gentile and Alfred Gentile, sister and brother-in-law of Victor and Nicholas. Of the entire Tedesco family, only Victor and Nicholas have more than incidental involvement in the proceeding. (Mrs. Gentile, however, owns 500 shares in the corporation—0.14 percent—and various other relatives of the Tedescos own similar amounts.)

[30] In note 17 (par. 23) of its brief in support of exceptions, Tedesco, Inc., states as follows: "Israel E. Krawetz was relieved of his officership and directorship in Tedesco, Inc., effective Oct. 6, 1964. Official notice requested FCC form 323 Oct. 23, 1964, on behalf of Tedesco, Inc." See par. 36, infra.

following their sale of WISK,[31] St. Paul, Minn., in 1959 (see pars. 63–64, infra), their total net worth had risen to in excess of $1,000,000.[32] The Tedescos incorporated on the advice of Krawetz, their St. Paul attorney, who did not want them to put all their money back into the radio business (tr. 1711). It was the Tedescos' purpose "to engage in the broadcast business, to obtain the maximum amount of capital, and the broadest possible public support, and to proceed to acquire as many stations as their capital would permit and that the law would permit" (tr. 1528). On October 10, 1960, shortly after the corporation was formed, Victor sent a form letter to approximately 100 radio stations in the Midwest, the letter inquiring into the possibility of acquiring the radio station in that market (tr. 2072–73).[33] One of the stations receiving the letter was KBLO, Hot Springs, Ark. KBLO had been licensed to Hot Springs Broadcasting, Inc. In April 1960, the licensee was adjudged a bankrupt; after April 5, 1960, the station was operated (pursuant to involuntary assignments of the license) by Stanley Morris, first as receiver in bankruptcy, and later (from May 17, 1960) as trustee in bankruptcy. Morris had been sales manager of the station since June 1959 and, at the time of his appointment as receiver, was a creditor of the station. When Morris took over control of the station, he also became the station's general manager and program director; his stated compensation, however, was cut from $150 per week to $125 per week. At all pertinent times herein, Little Rock attorney D. D. Panich served as attorney for the trustee.

17. In a response to its letter of October 10, 1960, Tedesco, Inc., was notified, on or about November 14, 1960, that KBLO was to be sold at a bankruptcy sale on November 17, 1960. Nicholas telephoned Morris for further details, and thereafter Tedesco, Inc., decided to bid at the auction. By order of the bankruptcy court[34] of November 14, 1960, it was provided that:

> * * * any purchaser would be required to deposit with the trustee the full amount of the bid in cash, subject to the approval of the court; that the purchaser would forthwith take such steps as may be necessary to comply with the regulations of the Federal Communications Commission with reference to the permit to broadcast; that pending confirmation of said sale by the Federal Communications Commission the trustee would continue to operate station KBLO keeping separate accounts of all funds received and debts incurred from the time of sale; that when and if confirmation of said sale be made by the Federal Communications Commission the purchaser would take possession as of November 17, 1960, and be chargeable with all

[31] Except where otherwise indicated, all stations herein referred to are standard broadcast stations.

[32] See tr. 1955–56. In November 1960, a prospectus issued with respect to the corporation was accompanied by a reprint of a columnist's article which had appeared in the St. Paul Dispatch following the sale of WISK. In part, the article stated that "within 10 years [the Tedescos] had parlayed $8,500 into three-quarters of a million plus some neat profits on other station sales. The total is well over a million." The column was based on an interview of the Tedescos by the columnist, and the essential accuracy of the article was admitted by Victor, who had ordered the reprints. See tr. 1815–20 and 1955–60. At note 20 (par. 108) of the initial decision, the examiner stated that "The hearsay nature of the newspaper column deprives it, of course, of evidentiary value for the purpose of proving the facts stated therein." However, the examiner's position completely ignores Victor's corroborative testimony.

[33] The letter was sent "to at least every radio station in about a 10-State area" (tr. 2072). The locations of the contacted stations were: "Basically, the Midwest, I'd say, anywhere from Salt Lake City to about—well, Chicago, except I didn't write to Chicago, pretty high, expensive stations there" (tr. 2073).

[34] The United States District Court, Western District of Arkansas, Hot Springs Division.

> expenses of operation during the interim period and would be entitled to the receipts of the radio station during such interim period; * * *.[35]

Nicholas and Krawetz were aware of the terms of the sale prior to bidding on the station. The sale was held as scheduled on November 17, 1960, and Tedesco, Inc., was high bidder at $17,000. Checks in that total amount were duly deposited with the trustee by the purchaser.

18. The contemplated assignment application was not filed with the Commission until March 22, 1961—more than 4 months after the sale. Meanwhile, Tedesco, Inc., had contracted for the purchase of two other stations: (*a*) on November 23, 1960, Tedesco, Inc., agreed to purchase KWKY, Des Moines, Iowa; the KWKY assignment application was filed with the Commission on January 18, 1961; the Commission granted the application on March 1, 1961, and the assignment was executed on March 10, 1961; (*b*) on February 1, 1961, Tedesco, Inc., agreed to purchase WMIN, St. Paul, Minn.; the WMIN assignment application was filed with the Commission on March 8, 1961.

19. Whereas the KWKY application was routinely processed and granted by the Commission, the WMIN application was not.[36] On June 2, 1961, the Commission addressed a letter to each of the parties to the WMIN application, the letter raising trafficking issues as to each of them.[37] On July 26, 1961, following receipt of the parties' responses to the foregoing letter, the Commission designated the WMIN application for hearing.[38] Meanwhile, on July 19, 1961—as a Climax to a number of letters and other inquiries by Panich (Morris' attorney) and Morris—Panich advised Nicholas by mail that unless the Commission approved the KBLO assignment by August 1, 1961, the trustee would be forced to petition the referee in bankruptcy for an order canceling the sale and surcharging the funds deposited by Tedesco, Inc. Such a suit was instituted by Morris on August 7, 1961, the petition alleging that Tedesco, Inc., had been negligent in filing the assignment application and contending that Tedesco, Inc., should be held liable for KBLO's interim losses. A hearing before the referee was conducted on August 18, 19, 24, and 25, 1961, Morris and Krawetz (but neither of the Tedescos) appearing as witnesses. In part, Tedesco, Inc.'s position was that, as a matter of law, a surcharge could not be directed against it since, under the terms of the auction sale, the purchaser was chargeable for interim losses only if the Commission approved the assignment.[39] However, the referee determined that the station's losses had been occasioned by Tedesco, Inc.'s negligence and that Tedesco, Inc., had rendered itself incapable of receiving a grant of the application. Among other things, it was held by the referee that:

[35] See Edina Corp. exhibit 12, pp. 7–8. The November 14 order amended one of November 2, the earlier order having provided only that the sale "was to be for cash in hand subject to the approval of the court and that the transfer * * * was subject to the approval of the Federal Communications Commission and the purchaser would have to make his own arrangements with said Commission for the transfer of said license." (Ibid., p. 7.)

[36] It may be noted here that less than 2 years earlier, the Tedescos had disposed of a station in St. Paul. See pars. 63–66, infra.

[37] See pars. 41–42, infra.

[38] See *Franklin Broadcasting Co.*, FCC 61–955, released Aug. 3, 1961.

[39] See the "when and if" clause in the quoted matter at par. 17, supra.

> The respondent negligently failed to advise the trustee in bankruptcy that it had not filed the application for permission to transfer the broadcasting permit although numerous inquiries were made of the respondent and the action on the part of the said respondent was calculated to lead the trustee to believe that the respondent had filed the application for permission to transfer when in fact it had not done so * * *.

As a result of his findings, the referee entered an order canceling the sale on August 29, 1961.[40] Following an audit ordered by the referee, the referee, on December 22, 1961, entered an order surcharging Tedesco, Inc., in a total amount of $12,900.33, the sum representing $11,552.37 in operating losses by KBLO, $960.56 in costs of the sale, and $387.40 in costs of the audit.

20. Meanwhile, on September 22, 1961, the Commission's Acting Chief Hearing Examiner dismissed (pursuant to the assignor's request) the WMIN assignment application and terminated the proceeding.[41] Three months later, on December 19, 1961, Tedesco, Inc., filed its instant application for Bloomington. Thereafter, by memorandum opinion and order of July 25, 1962, the Commission designated the Tedesco, Inc., and Edina Corp. applications for hearing.[42] On August 20, 1962, Edina Corp. petitioned for a number of additional issues, including a character issue grounded (in part) on Tedesco, Inc.'s conduct in the KBLO matter. In the foregoing respect, Edina Corp. referred to findings by the referee to the general effect that Tedesco, Inc., "did not act in good faith with the trustee in bankruptcy." Tedesco, Inc.'s opposition to the petition was filed on September 4, 1962. Attached to the opposition was a letter of August 24, 1962, from Krawetz to Tedesco, Inc.'s Washington counsel. Among other things, the letter described the KBLO matter as "a run-of-the-mill civil dispute for which proper legal remedies exist." Additionally, the letter pointed out that whereas the referee's action had been "upheld by the district court," Tedesco, Inc., had served a notice of appeal, and anticipated that the appeal would result in a reversal of the earlier decrees. By memorandum opinion and order of October 15, 1962,[43] the Board denied Edina Corp.'s request, observing that Tedesco, Inc., had appealed the referee's order, and holding that Edina Corp. had "failed to allege sufficient facts to warrant addition of a character qualifications issue."

21. The district court opinion (dated July 26, 1962) affirming the referee's determinations did not appear in the advance sheets for the Federal Supplement (Vol. 207, No. 2) until October 1, 1962, nor in the Pike & Fischer reporting service until October 24, 1962. Thereafter, on November 14, 1962, Edina Corp. again sought enlargement of the hearing issues to inquire as to whether Tedesco, Inc., had violated section 310(b) of the Communications Act or had otherwise acted improperly in operating KBLO without Commission consent. In

[40] KBLO was then privately sold to George T. Hernreich, who presently operates the station under call letters KZNG. The application requesting assignment of Tedesco, Inc., was formally dismissed on Oct. 12, 1961; the application requesting assignment to Hernreich was approved by the Commission effective Oct. 25, 1961.

[41] See par. 42, infra.

[42] See *Edina Corp.*, FCC 62–845, released July 31, 1962.

[43] See *Edina Corp.*, FCC 62R–77, 24 R.R. 479.

support of the request, Edina Corp. called attention to so much of the district court's opinion as reads as follows: [44]

> The uncontradicted evidence discloses respondent exercised rights of ownership over station KBLO from November 17, 1960; that Nicholas Tedesco, respondent's president, directed the trustee to work out an exchange agreement with Central Air Lines to trade radio time for a credit card; that said trade was consummated and the respondent secured said credit card and used the same without reimbursing the bankrupt estate for the amount of credit so used; that the president of respondent, Nicholas Tedesco, and his brother, an officer of the respondent, conferred with the trustee in Hot Springs over long distance telephone and directed changes to be made in management policies, and directed the said trustee by letter on January 20, 1961, to discharge an employee and to employ one of respondent's key personnel, Donald Johnson; that respondent would pay the difference between what the discharged employee was being paid and the amount of the salary the said Johnson actually received; that on January 30, 1961, respondent was advised by the trustee that in accordance with the last telephone conversation had with Nicholas Tedesco, president of respondent, trustee had discharged three employees, thereby reducing overhead expenses approximately $900.00 per month.[45]

Additionally, Edina Corp. pointed out that the notice of appeal—which had been filed on the same day (August 24, 1962) that Krawetz wrote his letter—was dismissed by the court at Tedesco, Inc.'s request on September 6, 1962—2 days after the Tedesco opposition and over a month prior to Board action on the previous petition to enlarge.

22. In an opposition of November 28, 1962, Tedesco, Inc., denied that it had assumed control of the station within the meaning of section 310(b). To the opposition were attached four affidavits (prepared by Krawetz),[46] which are summarized, in part, below:

> (*a*) Donald W. Johnson's affidavit of November 24, 1962. The affidavit stated that Johnson had been hired by Morris and paid by KBLO, and that Johnson had never received orders from Tedesco, Inc., or any of its representatives relative to his work at KBLO.
>
> (*b*) Victor J. Tedesco's affidavit of November 23, 1962. The affidavit stated "that at no time did he, or anyone else to his knowledge, assume any control over the operation or policies of radio station KBLO or give directives to any of its personnel as to the manner in which the station should be operated."
>
> (*c*) Israel E. Krawetz's affidavit of November 23, 1962. The affidavit stated that after the district court opinion had been appealed to the court of appeals, "negotiations took place between the parties and settlement resulted in the dismissal of the appeal on September 6, 1962." [47]
>
> (*d*) Nicholas Tedesco's affidavit of November 23, 1962. The affidavit stated "that on one occasion the trustee in bankruptcy requested affiant to assist him in obtaining the services of an announcer; that affiant rendered the assistance and understands that the individual in question was hired by the trustee in bankruptcy as an announcer; however, affiant at no time contracted with the individual involved and at no time gave any orders to

[44] See *In re Hot Springs Broadcasting, Inc.*, 207 F. Supp. 303, 308, 24 R.R. 2011, 2014 (1962).

[45] Obviously, these findings of premature assumption of control by Tedesco, Inc., removed the matter from the run-of-the-mill category contended for by Krawetz in his letter of Aug. 24, 1962.

[46] Actually, five affidavits were attached, the fifth being a verification by Victor "that he has read the foregoing petition and knows the contents thereof; and that the same is true of his own knowledge."

[47] To a reply to opposition filed on Dec. 10, 1962, Edina Corp. attached a copy of an order of modification, adopted by the referee on Aug. 28, 1962. The order reduced the surcharge against Tedesco, Inc., by $1,000, thereby granting a petition for authority to compromise, filed by Trustee Morris. The thrust of the petition was that in view of anticipated costs by the trustee in connection with Tedesco, Inc.'s appeal, the best interests of the estate would be served by permitting the compromise.

106-500—66——4

such individual; that affiant in fact is not aware of the specific duties which were assigned to the said individual."

23. Upon consideration of the above matters, the Board, by memorandum opinion and order of January 2, 1963, added the following issues to the proceeding, the issues becoming issues 14, 15, and 16, respectively:

(*a*) To determine all the facts and circumstances surrounding the application by Tedesco, Inc., for assignment of license of station KBLO, Hot Springs, Ark. (BAL–4186), and appeals and pleadings related thereto;

(*b*) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether Tedesco, Inc., has violated section 310(b) of the Communications Act of 1934, as amended.

(*c*) To determine, with particular reference to the evidence adduced pursuant to the foregoing issues, whether Tedesco, Inc., possesses the requisite character qualifications to be a licensee of the Commission.

(See *Edina Corp.*, FCC 63R–3, released January 7, 1963, 24 R.R. 483.)

24. The KBLO episode was fully explored at the hearing, and over one-quarter of the examiner's findings of fact (I.D., pars. 31–73) are devoted to the matter. Upon review of such findings in his conclusions (I.D., pars. 150–159), he determined that (*a*) "in material aspects the right of station management inherent in the license of KBLO was assumed by Tedesco, Inc., without Commission consent, contrary to the provisions of 47 USC 310(b)"; and (*b*) as a result of "misrepresentations dealing with specific facts within the knowledge of officers of the applicant corporation, and presented in sworn pleadings and testimony of corporate officials", "Tedesco, Inc., has failed to establish the requisite character qualifications which would warrant a grant of the construction permit it seeks." There are no substantial errors in either the findings or conclusions, and with the modifications and amplifications effected herein and in the appendix, they are adopted.

25. Eminently correct is the examiner's view that Tedesco, Inc., principals very early in their relationship with KBLO established "a potential for control" of the station (I.D., par. 151). In a discussion with Morris on the night before the auction, Nicholas and Krawetz became aware that Morris had taken a cut in salary, and the possibility of his being retained by Tedesco, Inc., as KBLO's manager was also discussed. The matter of Morris' potential employment by Tedesco, Inc., was discussed again immediately following the auction, Morris believing that there was a verbal agreement in this respect (tr. 2879), and Krawetz agreeing that the parties were very close to an understanding (tr. 1500). Moreover, during a visit in Hot Springs by the Tedescos on December 6–7, 1960, Nicholas informed Morris that Tedesco, Inc., would employ Morris as KBLO's manager, that he would be restored to his previous salary level $150 per week), and that he would be given a percentage of the station's profits. Thus, whether or not it was so intended Morris was conditioned for the reception and carrying out of orders;[48] and the fact is that, from the beginning, Tedesco, Inc., engaged in acts of ownership with respect to the station.

[48] As the examiner put it at I.D., par. 151, the Tedescos "must have known when they discussed with Morris the possibility of his remaining on as manager, and offered him the job in December of 1960, that he would thereafter recognize that his tenure was dependent on their continued good will."

26. The Board agrees with the examiner that Tedesco, Inc.'s control of KBLO is best illustrated by the Donald Johnson episode. At the December meeting between Morris and the Tedescos, the capabilities of the existing KBLO employees were discussed (tr. 2975–76). Morris indicated that he had one announcer who "didn't quite fit into the pattern." The announcer in question was being paid $80 per week, and he had "some 5, 6 years" announcing experience (tr. 2905). Because of difficulties in hiring employees for the station during the bankruptcy period (tr. 2976), Morris had no intention of replacing the announcer until after approval of the assignment (tr. 2905, 2982–83). During the conversation, Morris expressed a need for a combination man—one who could perform both engineering and announcing duties (tr. 2976–77, 2982); had a combination man been hired, he would not necessarily have been in replacement of the above announcer, and the announcing-specialty of the combination man would have dictated which of the existing announcers was to be discharged (tr. 2982–84).

27. At the time, there was employed at WIXK, New Richmond, Wis., one Donald W. Johnson. The Tedesco brothers had a 42-percent interest in WIXK, and Johnson was an announcer at the station as well as the station's program director. As the examiner found (I.D., par. 45), Johnson was a key man in the Tedesco, Inc., organization, and he had been repeatedly used by the Tedescos to get newly acquired stations "off on the right foot"; thus, he had served as program director at three of the Tedescos' stations. Johnson was slated to report to KWKY, Des Moines, upon Commission approval of the assignment application involving that station. (See par. 18, supra.) In January 1961, he was told by Nicholas that he was being sent to KBLO for 6 weeks or so to "improve the sound of the station" and to look the market over. (I.D., pars. 44–46.) It was agreed that Tedesco, Inc., would pay his traveling expenses to Hot Springs, and that Johnson would work at the station as an announcer, drawing a portion of his agreed salary of $130 per week from the station and the remainder from Tedesco, Inc. By letter of January 20, 1961, Nicholas informed Morris as follows:

> On February 1, a gentleman by the name of Donald Johnson, which is one of our key personnel, will be down to set up your new programing for our takeover date. I would like to have you give notice to one of your employees, that you are planning to do away with, and replace the same salary for Mr. Johnson.
>
> You realize Mr. Johnson will not be working for what you are paying this man that you will be giving notice. We do not expect you to pay him any more than what you would be hiring anyone under the present situation. Tedesco, Inc., will make up the difference in his salary so please notify me in regards to what this employee is making that you will be giving notice to. Keep up the good work.

Upon receipt of the letter, Morris called Nicholas, who confirmed the salary arrangement, and directed that room be made for Johnson on the KBLO staff; thereafter, the announcer above referred to was released by Morris. Pursuant to Nicholas' arrangement, Johnson was to receive $80 per week from KBLO and $50 per week from Tedesco, Inc. Johnson reported for duty at KBLO on or about February 1, 1961, and was instructed in station procedure. Because of an overbear-

ing attitude on Johnson's part, Morris called Nicholas; Nicholas spoke to Johnson and, thereafter, Johnson was a cooperative employee. Morris was told, however, that Johnson should not be tied down completely, and that he should be given time to study programing. Morris still had a need for a combination man, and so advised the Tedescos. In a letter of February 14, 1961, from Victor, Morris was told that the Tedescos had no one to suggest, and that Morris should look in his own area. Pursuant to orders from Nicholas, Johnson left KBLO for the Des Moines station (KWKY) on March 8, 1960; this created a problem for Morris, who was already shorthanded. With a letter of March 2, 1961, advising Morris of Johnson's impending departure, Nicholas enclosed a check for $50, Nicholas suggesting that Morris take Mrs. Morris out to dinner at Tedesco, Inc.'s expense—the expense to be charged to Morris as a travel expense at the right time.

28. As found by the examiner, Morris considered that in the Johnson matter he was interfered with by Tedesco, Inc., in the performance of his duties. Nicholas testified (tr. 2425, 2457) that Morris had authorized him to contact Johnson with respect to employment at KBLO. Morris denied this, and stated that he knew Johnson only as one of the Tedesco, Inc., personnel having travel privileges under an arrangement negotiated by Morris with Central Airlines. The examiner resolved the conflict in testimony in Morris' favor, and that determination is supported by the whole of the relevant evidence. In the foregoing connection, the Nicholas letter of January 20, 1961, makes no mention of any previous discussion of Johnson as a potential KBLO employee, and it reveals that Nicholas had no knowledge as to the salary paid the existing employee. Moreover, as the examiner concluded (I.D., par. 152), the tone of the letter was clearly one of command.

29. In all phases of the Johnson matter, Tedesco, Inc., engaged in acts of control. Thus, Nicholas directed that an existing employee be fired and that Johnson be hired. Additionally, Tedesco, Inc., paid a substantial portion (nearly 40 percent) of Johnson's salary, and not only issued instructions to Morris as to how Johnson was to be utilized, but issued instructions to Johnson directly as well. Finally, when the Tedescos had need of Johnson's services elsewhere, the matter was not even discussed with Morris, who received only a notice that Johnson would be leaving KBLO. In short, the authority exercised by Tedesco, Inc., in connection with the hiring, utilization, and removal of Johnson, and the role played by Morris with respect to these incidents, are completely inconsistent with any conclusion that Morris retained complete control over KBLO and its staff during the period in question.

30. The examiner's findings at paragraphs 39–43 and 51 of the initial decision provide further support for the proposition that, to a substantial degree, Morris was at the Tedescos' beck and call during the period following the auction sale. Thus, Nicholas encouraged the renegotiation of the station's trade-out agreement with Central Air-

lines, and Tedesco, Inc.—without reimbursement to the station [49]—took advantage of the travel privileges even before the assignment application was filed. Moreover, Morris was kept busy by the Tedescos with respect to the promotion of the station, the negotiation of a lease for studio space at the Avonel Motel, and other matters. Among Morris' principal activities on behalf of Tedesco, Inc., appear to have been those related to negotiations for a station frequency trade with station KVRC, Arkadelphia, Ark.,[50] or a merger with station KAAB, Hot Springs.[51] As the examiner concluded (I.D., par. 153), "* * * the record demonstrates that effective control over the station had passed into Tedesco hands."

31. Strengthening the Board's conviction that there was an unlawful assumption of control by Tedesco, Inc., are the applicant's attempts to mislead and deceive the Commission concerning the matter. These attempts are well covered in the initial decision, and will not be treated in detail here. Among the more shocking of Tedesco, Inc.'s efforts at deceit are the four affidavits summarized at paragraph 22, above. Each of the affidavits is false in material respects, and they were obviously submitted as a last-ditch effort to forestall inquiry at the hearing into the KBLO episode. Comparison of Johnson's [52] and the Tedescos' affidavits with the facts discussed in paragraphs 26–28, above, reveals the falsity of the affidavits insofar as they relate to the Johnson matter; the falsity of the Krawetz affidavit is apparent from the following: Whereas the affiant swears that the negotiations leading to the settlement of the KBLO-Tedesco, Inc., dispute took place after Tedesco, Inc.'s appeal of the district court opinion, the examiner's findings at paragraph 64 of the I.D. show that the agreement to compromise the surcharge was effected on August 23, 1962—the day before the appeal was filed. Equally deceitful was the Krawetz affidavit of August 24, 1962, which was attached to Tedesco, Inc.'s opposition of September 4, 1962. (See par. 20, supra.) Thus, at a time when a settlement of the case had been effected by the parties thereto, Krawetz was proclaiming that the appeal of August 24 would result in a reversal of the earlier decrees.

---

[49] Tedesco, Inc.'s point "that so long as they were responsible for the losses of the station anyway, it didn't matter whether they utilized the station's credit" (I.D., par. 39) is inconsistent with its interpretation of the terms of the auction sale; namely, that Tedesco, Inc., was chargeable for interim losses only in the event of Commission approval of the application. (See pars. 17 and 19, supra.)

[50] KBLO was a daytime-only station, and KVRC was unlimited as to broadcast hours.

[51] Like KVRC, KAAB was authorized for unlimited-time operation. A second aspect of the KAAB proposal was an intention to donate KBLO's facilities to the Garland County Board of Education, thereby to reduce the commercial competition in Hot Springs.

[52] The Johnson affidavit was prepared by Krawetz even though Krawetz had not spoken to Johnson about the subject matter. At the time, Johnson was working at a station in Austin, Minn. Nicholas and Victor each called Johnson, Victor indicating that Nicholas would bring the affidavit to Austin for Johnson's signature. Johnson was coming to Minneapolis anyway, and he arranged to meet Victor in a bar. Johnson read and signed the affidavit, and returned it to Victor, who forwarded it to Tedesco, Inc.'s Washington counsel. The affidavit already bore a notarial jurat at the time Johnson signed it. See the I.D., par. 71. Tedesco, Inc., principals also sought Morris' signature on another affidavit prepared by Krawetz, the affidavit including a statement to be made by Morris "that at no time during the period mentioned, or for that matter at any other time, did Tedesco, Inc., or any of its officers or representatives assume any responsibility for the operation of the radio station." Nicholas made two long distance calls to Morris (both in the same evening) urging Morris to sign the affidavit. During the second of the calls, Nicholas offered to buy a present for Morris' wife or children, and made other remarks from which Morris could conclude that there were employment opportunities for him in the Tedesco organization. (See tr. 2840–43 and 2945–46, and I.D., par. 73.) Upon Panich's advice, Morris refused to sign the affidavit.

32. The Tedesco, Inc., pattern of falsification was continued at the hearing. For example, Krawetz testified that the delay in filing the KBLO application was occasioned, in part, by a necessity for gathering and preparing programing material and for compiling data with respect to the corporation's many stockholders. As found by the examiner, however (I.D., pars. 59–60), only minimal programing information was submitted in the KBLO application; and the total material required for the KBLO application was substantially similar to that required with respect to the KWKY application, filed by Tedesco, Inc., more than 2 months earlier. Among the misstatements by Victor was one disclaiming any knowledge of negotiations with the Mutual Network regarding KBLO, notwithstanding that he had discussed the matter with an official of the network. (See I.D., par. 53.) And Nicholas twice testified (tr. 2425 and 2457) that Morris had authorized him to contact Johnson (see par. 28, supra), thereby adhering to the false position taken in his affidavit of November 23, 1962. Finally, here, it may be noted that the Tedesco brothers' misstatements were not confined to the KBLO matter, a fact which will be more fully developed in connection with the Board's consideration of the trafficking issues.

33. At oral argument (tr. 3272–76) the Board was told by counsel for Tedesco, Inc., as follows (obvious errors in the transcript corrected):

> I will admit, gentlemen of the Board, that I reviewed the evidence of this case on this issue. I reviewed the pleadings. And the one thing that I could not figure out is why, why these things occurred as they did. Some of these affidavits made no sense to me, why they would be written this way, why Mr. Krawetz would have the Tedesco brothers sign affidavits which he prepared without having them read them.
>
> This is not consistent with the normal doings of a lawyer. I think the findings on the record reflect why Mr. Krawetz would do these things. A finding had been made by the referee in bankruptcy that he had been negligent. The evidence of the record supports the fact that the Tedesco brothers were pushing him toward filing of the application.
>
> I think from that point on that Mr. Krawetz, because of the charge of negligent representation, was no longer serving the interest of Tedesco, Inc. He had a greater job, and that is of clearing his own name.
>
> No attorney wants to be charged with negligent representation. This was Krawetz' job. This is the only way I could answer that an attorney would prepare affidavits and would have people sign them without having read them, affidavits that are geared to clear the attorney, that really do not relate to some of the issues involved.
>
> Mr. Krawetz wrote a letter to our firm on August 24, saying an appeal had been filed. Yet the determination not to appeal was made some hours after he wrote the letter and the appeal was dismissed and negotiations had occurred prior to that time to terminate the appeal on settlement. Mr. Krawetz never notified us of the termination of the appeal.
>
> * * * * * * *
>
> So we filed then a pleading on September 4 that was technically correct. An appeal was pending and not dismissed until the next day. This, however, is not candid and honest because the appeal had been determined for all practical purposes.
>
> The Review Board, acting upon it, supported our pleading. Then in November when we found out the appeal had been determined because of other pleadings, Mr. Krawetz again filed an affidavit and had other people sign the affidavits which were geared to clearing his name.
>
> * * * * * * *

But I am afraid the record clearly demonstrates the only reasonable conclusion, other than that Mr. Krawetz intentionally lied. I cannot come to that conclusion because the record shows that he is a lawyer of more than 25 years' standing. He is a member of an outstanding law firm in St. Paul and a leader in civic activities.

I must believe it was negligence. That he happens to be an officer and member of the Board, as all general counsel are, should not cause the penalties for his negligence to be put upon Tedesco, Inc.

[Mr. BERKEMEYER. Thank you, Mr. Pepper. Do you have any questions, Mr. Slone?]

[Mr. SLONE. The fact that Mr. Krawetz did act negligently as you say, does that excuse the Tedesco brothers for not reading the affidavits?]

[Mr. PEPPER.] No, Mr. Slone, I certainly would not suggest it excuses them. But I should also point out in that regard here we have two men—it is a question of how much punishment you give them. We have two men, one who went to the seventh grade and one who is an immigrant. There is an attorney whom they relied on or they would not have had him as a corporate attorney. He said here is an affidavit, sign it. They were wrong. They should have read it and studied it. But they did not. I do not think Tedesco, Inc., had any intent to deceive the Commission.

I do not think the punishment of denial in a comparative hearing is warranted. They should be criticized, yes. What the examiner does, he should fine the licensees instead of revoke them. He should try to make a punishment to fit the crime.

I do not think they are that guilty.

34. The above analysis of the record by counsel for Tedesco, Inc., is totally unpersuasive. First, there is a more reasonable explanation for the delay in filing than negligence on the part of Krawetz: As pointed out in paragraph 19, supra, Tedesco, Inc., regarded itself as liable for interim losses only in the event of Commission approval of the assignment. In connection with the foregoing, it must be remembered that Victor had sent letters to some 100 radio stations; responses were coming in (tr. 2331), and there was always a possibility that some other station might be a more promising investment. Indeed, Victor suggested as much when, in July 1961, he sought from Morris a cancellation of the KBLO sale—and a return of the $17,000 deposit—on the ground that Tedesco, Inc., had become involved with a station (WMIN)—see paragraph 40, infra—in St. Paul. (See I.D., par. 55.) Additionally, the Tedescos' enthusiam for KBLO undoubtedly cooled when they were unable to improve the station's studios as they had planned and when their attempts to secure a full-time frequency and to reduce competition failed.

35. Irrespective of the above, so much of the Johnson-Victor-Nicholas affidavits (submitted to the Commission on November 28, 1962) as were concerned with Johnson's employment at the station and the overall question of whether Tedesco, Inc., prematurely took control of the station, have nothing whatever to do with clearing Krawetz' name; rather, they were geared to avoiding a 310(b) issue in the proceeding. Moreover, the contention that the Tedescos did not read their affidavits takes no account of their participation in securing Johnson's signature or Nicholas' efforts to secure a helpful affidavit from Morris. Similarly ignored are (*a*) Victor's testimony at tr. 1784–85, that although he did not ordinarily scrutinize legal documents and had no recollection as to whether he had scrutinized or read the opposition of November 28, 1962, he probably read it, since "he has

read every one that comes into [his] office"; and (*b*) the essential simplicity of the Tedescos' affidavits and the unlikelihood that they would have taxed the mental capacities of, or have been ignored by, two highly successful broadcasting executives,[53] notwithstanding that one had but a seventh-grade education and the other was an immigrant.[54] Finally, in the foregoing respect, even were the Board willing to accept Krawetz as the scapegoat as to the affidavits, the Tedescos did their own testifying, in the process, adhering to and compounding pertinent misrepresentations in their affidavits.

36. As indicated in note 30, supra, Tedesco, Inc.'s brief tells us that Krawetz is no longer an officer of or a director in the corporation. But an assumption that Krawetz was the sole party to the attempted deceptions would be of no help to Tedesco, Inc., since each licensee must be held legally responsible for the misconduct of its employees and officers,[55] and since a corporation cannot redeem itself from a qualifications standpoint merely by dismissal, after hearing, of its offending principals.[56] Counsel suggests that Tedesco, Inc., should be criticized rather than denied, and fined rather than revoked. The proceeding is, of course, not one of revocation; in any event, the forfeiture provisions of the Communications Act are not available to us here. Compare *KWK, Inc.*, supra, note 55. As to the proposition that criticism rather than a denial would be the more appropriate disposition, the language of examiner at paragraph 159 is apt:

> **The Commission, in the discharge of its statutory responsibilities, must rely upon the factual submissions of those who appear before it. It cannot countenance deliberate misrepresentation, nor is the gravity of such conduct mitigated by the fact that it is the product of the fear of discovery of another offense, *Charles W. Stone*, FCC 64–690, mimeo. No. 54390, released July 27, 1964. Here the Commission is confronted with misrepresentations dealing with specific facts within the knowledge of officers of the applicant corporation, and presented in sworn pleadings and testimony of corporate officers offered for the purpose of influencing Commission action with respect to previous activities of the applicant. It is concluded, on the basis of the misrepresentations relating to the KBLO matter, that Tedesco, Inc., has failed to establish the requisite character qualifications which would warrant a grant of the construction permit it seeks.**

To the foregoing there may be added that a premature assumption of control by experienced broadcasters of another station—a direct violation of the Communications Act—even without the aggravation presented by the misleading pleadings and testimony submitted in the proceeding is sufficient to warrant a denial of the Tedesco, Inc., application.

---

[53] Compare *Television Company of America, Inc.*, 1 F.C.C. 2d 99, 149, 5 R.R. 2d 821, 869–70 (initial decision), conclusion adopted, 1 F.C.C. 2d 91, 92, 5 R.R. 2d 811, 815 (1965): "* * * The only thing wrong with this contention is that the attorney, after drafting the various reports, agreements, and contracts in accordance with his understanding of the facts, submitted them to the principals for their perusal and signature. In many cases, the facts were incorrect or misstated, yet the principals signed the documents and are bound by them. *Furthermore, some of the principals are longtime broadcasters and operators of broadcast facilities,* and know, or should know, the requirements of this Commission." (Emphasis added.).

[54] Tedesco, Inc.'s application reveals that Nicholas Tedesco was born in Calabria, Italy, in 1913, and that he became a citizen of the United States in 1924 through the naturalization of his father.

[55] *Pape Television Co., Inc.*, FCC 63–823, 25 R.R. 64a, 64c, citing *KWK Radio, Inc.*, 34 F.C.C. 1039, 25 R.R. 577 and other cases.

[56] See *WOKO, Inc.*, 3 R.R. 1061 (1947). For the related proposition that the fact of innocent stockholders cannot immunize the corporation from the consequences of deception practiced by other of the stockholders, see *F.C.C.* v. *WOKO, Inc.*, 329 U.S. 223, 227 (1946).

IV. THE TRAFFICKING ISSUE

A. Background of the Issue

37. As indicated in paragraph 16, supra, the broadcasting careers of Nicholas and Victor Tedesco began in 1948 when the Commission on November 19 of that year issued a construction permit for a station at Stillwater, Minn.[57] From that date through June 2, 1961, one or the other or both of the two brothers acquired and disposed of ownership interests in the following stations: [58]

WSHB—Stillwater, Minn.
WKLK—Cloquet, Minn.
KOBK—Owatonna, Minn.
KLUZ—Hutchinson, Minn.
KWEB—Rochester, Minn.
WCOW—Sparta, Wis.[59]
WISK—St. Paul, Minn.[60]

Interests in each of the first five were disposed of less than 3 years after authorization of program tests by the Commission.[61] Although the Sparta station was held more than 6 years, the Tedescos attempted to dispose of their interests therein in less than 3.[62]

38. WISK, St. Paul (now KDWB), first went on the air on August 12, 1951, as WCOW, South St. Paul (1590 kc/s, 5 kw, D). Originally, Nicholas and Victor each had a 25-percent interest in the station; they ultimately acquired full ownership through relinquishments from their father, Antonio Tedesco, and their brother, Albert Tedesco. In the 1956–58 period, the Commission approved authorizations whereunder the station was permitted to move to St. Paul, change frequency (to 630 kc/s), and engage in nighttime operation (at reduced power of 500 w). Program tests for the full-time operation were authorized on January 13, 1959, and a license for the St. Paul facility (630 kc/s, 500 w, 5 kw-LS, DA-2, U) was issued on May 5, 1959. On May 22, 1959—17 days after the issuance of the license—the Tedescos contracted to sell the station to Crowell-Collier Broadcasting Corp. The assignment application was filed on June 22, 1959, and approved by the Commission on July 15, 1959, the assignment to be effective on August 25, 1959. As reasons for the sale, Nicholas and Victor stated in the assignment application that

> Assignor has operated at a loss. Operation by a larger organization will overcome this problem and will result in better service to the public at this time.

39. On June 2, 1961, the broadcast interests of Nicholas and Victor Tedesco and Tedesco, Inc., were as follows:

---

[57] Unless otherwise indicated, each of the stations hereinafter mentioned is a standard broadcast station.

[58] On Nov. 17, 1950, an application filed by Nicholas for Monroe, Wis., was dismissed by the Commission, Nicholas receiving out-of-pocket expenses ($500) in connection with the dismissal. Additionally, Nicholas and Victor each had a one-sixth interest in a UHF permittee in St. Paul, the construction permit being surrendered on Jan. 21, 1954.

[59] The call letters of this station were originally WKLJ; they were changed to WCOW on June 1, 1956. (See next footnote.)

[60] As indicated in the next paragraph, this station was originally licensed for South St. Paul, Minn., under call letters WCOW; these were changed to WISK on May 14, 1956. Under its present ownership, the station's call letters are KDWB.

[61] KOBK was disposed of before program tests in a trade with one Johns, whereby Johns acquired a 40-percent interest in KOBK held by the Tedesco family, and the Tedesco family acquired a 15-percent interest in WKLK held by Johns. KDUZ was granted program test authority on Sept. 15, 1953; on June 30, 1954, the Commission approved proposed transactions whereby Nicholas and Victor would exchange a 67-percent interest in KLUZ for a 25-percent interest held by their brother (Albert) in WISK (then, WCOW, South St. Paul).

[62] See BTC-1608, filed Oct. 22, 1953.

(*a*) ***KCUE, Red Wing, Minn.*** (formerly KAAA). Nicholas and Victor owned a total of 40 percent of the stock of the licensee corporation. At the time they purchased the station in October 1955, each obtained a 50-percent interest; however, on June 27, 1957, the Commission approved a transfer of 60 percent of the stock to five persons, one of whom was Alfred Gentile (15 percent), the Tedescos' brother-in-law. On the above date (June 2, 1961), there was pending in Commission files an application to assign the license to Northland Radio Corp., the application having been filed on March 8, 1961. The application was designated for hearing on issues affecting the buyer, and the application was dismissed with prejudice on March 4, 1962, at the request of the seller (docket No. 14523). Eight days later, an application was filed looking toward the assignment of the license to Hiawatha Valley Public Service Broadcasters, Inc.; this application was granted by the Commission on July 13, 1962.

(*b*) ***WIXK, New Richmond, Wis.*** Nicholas and Victor owned a total of 45 percent of the stock of the licensee corporation.[63] They sold their stock on August 10, 1962, because of a potential duopoly question involving the instant application for Bloomington.

(*c*) ***KFNF, Shenandoah, Iowa.*** Nicholas and Victor owned 100 percent of the stock of the licensee corporation. They filed an application for approval of their purchase of KFNF on July 23, 1959; the purchase agreement had been signed on June 30, 1959, 8 days after their application to transfer WISK, St. Paul. The application for assignment to the Tedescos was approved by the Commission on September 2, 1959. The Tedescos commenced their operation of KFNF on October 17, 1959, and 5 months later—on March 24, 1960—applied to move the station to Council Bluffs, Iowa, which is just across the Missouri River from Omaha, Nebr.[64]

(*d*) ***KWKY, Des Moines, Iowa.*** An application requesting assignment of the KWKY license from the existing licensee to Tedesco, Inc., was approved on March 1, 1961, effective March 10, 1961. Tedesco, Inc., had agreed to buy the station on November 23, 1960, less than a week after the purchase of KBLO (see par. 18, supra), and the application for assignment had been filed on January 18, 1961.

40. As of June 2, 1961, the following pertinent applications (in addition to those involving KCUE and KFNF) were on file and undisposed of:

(*a*) ***Chisholm, Minn.*** On October 10, 1960, 2 weeks after Tedesco, Inc., was organized, Nicholas and Victor, d/b as Gabriel Broadcasting Co., applied for new station at Chisholm.[65]

(*b*) ***St. Paul, Minn.*** On February 1, 1961, Tedesco, Inc., signed a contract to purchase WMIN, St. Paul, from Franklin Broadcasting Co., and an appropriate assignment application was filed on March 8, 1961.

(*c*) ***Hot Springs, Ark.*** As set forth earlier herein, Tedesco, Inc., purchased the KBLO assets on November 17, 1960. The assignment application was filed on March 22, 1961.

41. By letter of June 2, 1961, in connection with the proposal to assign WMIN from Franklin Broadcasting Co. to Tedesco, Inc. (BAPL-232), the Commission raised trafficking questions as to each of the parties. In part, the letter read as follows:

> In addition, information has been included with respect to various interests held by Messrs. Nicholas and Victor J. Tedesco, officers, directors, and stockholders of the proposed assignee. This information, when considered in connection with Commission records, indicates that Messrs. Nicholas and Victor J. Tedesco have held ownership interests or corporate offices in numerous broadcast facilities since they first entered the broadcasting industry.

[63] As to the relationship of the original WIXK application to the WISK matter, see pars. 70–75, infra.

[64] An initial decision released Nov. 15, 1962, recommends a grant of the application; final action in the KFNF matter is being withheld pending dispositive action in the instant proceeding. See *KFNF Broadcasting Corp.*, FCC 63R-99, 24 R.R. 1170.

[65] A Tedesco, Inc., prospectus of Nov. 3, 1960, stated that any permit received would be assigned to the corporation at cost.

> The pattern of conduct in buying and selling broadcast properties, and the reasons given to the Commission for requesting its consent to such assignments of license and transfers of control of broadcast licensees, by Messrs. Nicholas and Victor J. Tedesco raise a question as to whether such purchases and sales constitute trafficking in broadcast licenses, rather than a desire to render a broadcast service to the respective communities involved.

The letter requested that Tedesco, Inc., submit the following information:

> 1. A complete listing of all broadcast properties in which Messrs. Nicholas and Victor Tedesco have held, or now hold, ownership interests or corporate offices;
> 2. The length of time each broadcast interest or corporate office has been held;
> 3. A narrative statement reconciling a proposed grant of BAPL–232 with the fact that on July 15, 1959, the Commission granted BAL–3524 (station WISK, now KDWB), wherein Messrs. Nicholas and Victor Tedesco were given consent to divest themselves of an AM broadcast facility which serves the same area as station WMIN. How will the public interest be served by such transactions?
> 4. A narrative statement outlining the plan whereby Messrs. Nicholas and Victor Tedesco, or Tedesco, Inc., intend to concentrate their future broadcast activities.

42. Following its receipt of the applicants' response (dated June 10, 1961, and received by the Commission on June 13, 1961) to the above letter,[66] the Commission, by order of July 26, 1961,[67] stated that it was "unable to find that a grant of the [WMIN assignment] application would serve the public interest, convenience, and necessity," and set the application for hearing on the following issues:

> 1. To determine, in light of (*a*), the facts in the above-captioned application and (*b*) the acquisitions and dispositions of interests in broadcast stations by the applicants, and/or their principals and subsidiaries, whether a grant of the above-captioned application would be consistent with the Commission's policy against trafficking in broadcast licenses and construction permits.
> 2. To determine on the basis of the evidence adduced with respect to the foregoing issue, whether a grant of the above-entitled application would serve the public interest, convenience, and necessity.

On September 22, 1961, pursuant to Franklin's request, the Acting Chief Hearing Examiner dismissed the assignment application and terminated the hearing.[68] Prior to the dismissal (on August 31, 1961), Tedesco, Inc., petitioned for reconsideration of the designation order and sought a declaratory ruling that neither Tedesco, Inc., nor its principals, Nicholas and Victor Tedesco, have "engaged in trafficking of broadcast licenses and construction permits." The petition was supported by a 45-page pleading with a total of 330 exhibits. The Commission refused the request for a declaratory ruling, stating:[69]

> * * * The question of trafficking can in many instances be determined only circumstantially, i.e., by reference not only to the immediate circumstances surrounding the proposed transaction, but also by reference to past events.

---

[66] Two days after filing its response, on June 15, 1961, Tedesco, Inc., filed an application requesting assignment to Tedesco, Inc., of the construction permit for station WRNE in Wisconsin Rapids, Wis. Thereafter the Commission raised questions concerning the assignor, and the application was dismissed on Dec. 7, 1961, at Tedesco, Inc.'s request.
[67] *Franklin Broadcasting Company*, FCC 61–955, released Aug. 3, 1961.
[68] *Franklin Broadcasting Company*, FCC 61M–1557, released Sept. 25, 1961.
[69] *Franklin Broadcasting Company*, FCC 62–52, 22 R.R. 880, 881, released Jan. 23, 1962.

> **Although the past transactions, standing alone, for a proposed transaction, when considered by itself, might not provide any basis for concluding that a party is or has been engaged in trafficking in licenses, an entirely different picture could emerge when the past transactions are considered in conjunction with a proposed transaction. Hence, even though we should rule, as Tedesco requests, that the past transactions did not involve trafficking, such ruling would not necessarily serve to eliminate these past transactions as a basis for designating a proposed transaction for hearing on a trafficking issue * * *.**

43. Meanwhile, on December 19, 1961, Tedesco, Inc., filed its instant application for Bloomington. Under the Commission's processing procedures, the Tedesco brothers' Chisholm application was reached first; and on February 14, 1962, that application was designated for hearing along with that of People's Broadcasting Co. for Minneapolis, Minn. Included among the issues was one "To determine whether Nicholas and Victor J. Tedesco have 'trafficked' or attempted to 'traffic' in broadcast authorizations."[70] However, on July 17, 1962, People's and the Tedesco brothers filed pleadings looking toward a dismissal of the Tedescos' application and reimbursement by People's to the brothers of expenses totaling $16,000.

44. The Edina and Bloomington applications were designated for hearing by memorandum opinion and order of July 25, 1962.[71] On August 20, 1962, Edina Corp. petitioned for a trafficking issue in that (the instant) proceeding. The petition was granted by the Review Board by memorandum opinion and order of February 21, 1963.[72] People's (the Tedescos' competitor in the Chisholm proceeding) and Swanco Broadcasting, Inc., of Iowa, were made parties to the proceeding.[73] Swanco is an interference respondent in the Shenandoah proceeding involving the Tedescos (docket No. 14651), and it had filed with the Board a number of alternative requests, including one to add a trafficking issue in that proceeding.[74] By memorandum opinion and order of March 7, 1963, in the *People's* case,[75] the Board, acting on the joint request of July 17, 1962, dismissed the Tedescos' Chisholm application, but withheld action on so much of the request as contemplated reimbursement by People's of the Tedescos' Chisholm expenses, pending resolution of the trafficking and character issues in the instant proceeding.[76] The trafficking issue in the instant proceeding reads as follows:

> **17. To determine whether Tedesco, Inc., or its principals, Nicholas and Victor J. Tedesco, have trafficked or attempted to traffic in broadcast authorizations.**

B. The Commission's Concern With Trafficking

45. The Commission's concern with trafficking or, as it has been called, "speculation in the public domain,"[77] is of long standing and

---

[70] *People's Broadcasting Co.*, FCC 62–187, released Feb. 19, 1962.
[71] *Edina Corp.*, FCC 62–845, released July 31, 1962.
[72] *Edina Corp.*, FCC 63R–101, 24 R.R. 1167.
[73] See note 3, supra.
[74] See *KFNF Broadcasting Corp.*, FCC 63R–99, 24 R.R. 1170.
[75] *People's Broadcasting Co.*, FCC 63R–122, 25 R.R. 118.
[76] In addition to those mentioned, one other Tedesco application remains undisposed of in the Commission's files: an application filed by Tedesco, Inc., on Oct. 19, 1961, requesting a construction permit at De Pere, Wis.
[77] *Powell Crosley, Jr.*, 3 R.R. 6, 26 (1945).

requires no extensive elaboration here. In brief, it is the Commission's stated policy to discourage the activities of promoters or brokers, who "speculate, barter, or trade in licenses * * * to the detriment of the public interest." [78] Of course, an intention to profit from the operation of a facility, rather than from its sale, is as essential to the full development of broadcasting as it is to the development of any other industry.[79] Support for the foregoing view is found in the following:

> (*a*) Where the licensee seeks his profits from the operation of his station, he has an incentive to increase his audience (and, therefore, his profits) through a searching-out and fulfillment of programing needs.
>
> (*b*) Stations are often sold for a sum substantially in excess of the seller's depreciated investment; this inflation of owner investment can create a situation where the buyer may find it expedient or economically necessary from a private interest standpoint to decrease programing costs or to increase the commercialization of the station—at the possible sacrifice of public service—rather than to continue or improve upon the previous service to the public.[80]
>
> (*c*) A sale of a station can result in "uncertainty on the part of station personnel and disruption in operational continuity caus[ing] programing deterioriation incompatible with broadcasting in the public interest." [81]

46. In the notice of proposed rulemaking in docket No. 13864 (note 81, below), the Commission affirmed that

> * * * each application for acquisition of a construction permit or a license for a broadcast facility whether by initial grant or through purchase includes an implied (if not expressed) representation to the Commission that the applicant intends to operate the station involved for the full period authorized by the license.

Consequently, an attempt to dispose of a license prior to its expiration date may imply on the part of the seller an improper, speculative intent at the time of his original application.[82] The Special Subcommittee on Legislative Oversight of the Committee on Interstate and Foreign Commerce (86th Congress) voiced a similar view: In House Report No. 2238, pp. 14–15, it stated that an early sale of a facility at a price greatly in excess of the seller's actual investment "give[s] rise to the

---

[78] *Applications for Voluntary Assignments or Transfers of Control* (report and order in docket No. 13864), 32 F.C.C. 689, 23 R.R. 1053, 1504 (1962).

[79] See *WMIE–TV, Inc.*, 11 R.R. 1091, 1098 (1955).

[80] Cf. *Powell Crosley, Jr.*, supra, note 77, 3 R.R. 26–27, and *R. R. Jackman, et al.*, 5 F.C.C. 496 (1938).

[81] *Applications for Voluntary Assignments or Transfers of Control* (notice of proposed rulemaking in docket No. 13864), released Dec. 7, 1960, FCC 60–1466, 25 F.R. 12898. See also, the report and order in the foregoing proceeding (supra, note 78), at 32 F.C.C. 689, 23 R.R. 1504 (1962): "* * * the appreciable number of [transfer and assignment] applications involving short-term ownership of stations * * * presents an important public-interest question of whether numerous communities throughout this country are being deprived of the benefits which we believe, based upon our experience, come from sustained station ownership."

[82] So, also, the acquisition of a station with the undisclosed purpose of (*a*) shifting its frequency to another city, or (*b*) trading the frequency for the ultimate benefit of a station in another city, in the process, removing the acquired station from the air, is trafficking. See *KFNF, Inc.*, 3 R.R. 53 (1945), where one plan was to shift the frequency of KFNF, Shenandoah, Iowa, to Omaha, Nebr., and another was to work a frequency trade with Shenandoah's only other station (KMA), and utilize KMA's frequency at Des Moines, Iowa. Had KMA not refused the latter proposal, at least two public interest questions would have been present: One against the Des Moines licensee for seeking a station with no intent to operate it, and one against KMA for seeking a frequency with a view to eliminating local competition. For the proposition that an applicant has a duty "to disclose to the Commission any facet of a proposal as to which there may be a mental reservation, no matter how far advanced the proposal or rudimentary the reservation," see *Hall, et al.* v. *F.C.C.*, 99 U.S. App. D.C. 86, 237 F. 2d 567, 14 R.R. 2009, 2017–18 (1956). (In *Hall*, the court regarded it as a misrepresentation for an applicant to assure the Commission that its intention was to locate its antenna at a particular place "if, in fact, there was no fixed intention, but rather complete indecision whether or not it would do so.")

inference that the licensee's application for the license was not made in good faith." If this be so, the Commission has been confronted with the inference on numerous occasions. Thus, during the 1960 and 1961 fiscal years, 380 of 782 (48 percent) applications "seeking substantial changes in ownership" related to stations held less than 3 years.[83] Few if any, of the 380 applications were designated for hearing on trafficking issues; but the large number of them was an important basis for the Commission's public expressions of concern as to trafficking (notice of proposed rulemaking issued Dec. 7, 1960; report and order released Mar. 19, 1962; see note 81, supra). By themselves, the foregoing figures would seem to provide ample justification for the Commission's overall trafficking concern as well as for its new "3-year rule." [84]

47. The instant case presents a situation differing from the type discussed in the preceding paragraph in that Tedesco, Inc., is attempting not to sell a station, but to acquire a construction permit for a new station. The determinations required under the issues are not whether Tedesco, Inc., is seeking an authorization with a view to a profitable resale; but, first, whether Tedesco, Inc., or its principals have been involved in trafficking in the past, and, second, in view of the evidence presented, whether a grant should be made. Although a safeguard against the possibility of instances of trafficking has been effected by the Commission's 3-year rule (note 84, supra), which not only tends to require ownership by a licensee for a 3-year period, but also provides [85] for a careful staff examination for characteristics of trafficking even where a transfer or assignment application is tendered after the specified period, the rule does not make unnecessary the basic determination required herein. The necessity for that determination is firmly established by the wording of the trafficking issue itself, as it appeared in the St. Paul proceeding involving *Franklin Broadcasting Co.;* by the Commission's rationale in denying Tedescos' request for a declaratory ruling; and by the wording of the trafficking issue as it was carried forward into the Chisholm proceeding and the instant proceeding.[86] Thus, any contention that Tedesco, Inc., can be denied on trafficking grounds only upon a conclusion of trafficking intent with respect to the instant proposal cannot be sustained. This conclusion is reinforced by the fact that the basis for the Commission's inclusion of the trafficking issue in the Chisholm proceeding (which led to inclusion of the issue here) was the Tedescos' history of broadcast applications, acquisitions, and sales—nowhere did the Commission charge specifically that the Tedescos intended to dispose for profit of the Chisholm authorization itself.

48. Two other points should be noted: First, if Tedesco, Inc., or the Tedesco brothers have trafficked with respect to any of their past assignments or transfers, it cannot be persuasively argued that such

[83] See the report and order in docket No. 13864 (note 78, supra), 32 F.C.C. 702, 23 R.R. 1516.

[84] See section 1.597 of the Commission's rules, which emerged from the proceeding in docket No. 13864. In brief, it provides that, except upon certain findings by the Commission, assignment and transfer applications involving stations held by the sellers "for less than 3 successive years" will be designated for hearing on appropriate issues.

[85] In par. (d) thereof.

[86] See pars. 42–44, supra.

assignments or transfers have already been approved by the Commission with statutory public interest findings; such approvals as have been issued were not based on evidentiary hearings, and signify no more than that the Commission—as it has with respect to countless other applications—relied upon and accepted the representations advanced by the seller and buyer at the time of the proposed sale; and, second, the trafficking issue herein is one under which disqualification can be concluded; this is clear from the Commission's order of July 26, 1961, in the *Franklin* case (par. 42, supra), it being inherent in the order and the issues specified that the assignment application could be denied upon the adduction of trafficking evidence at the hearing.[87] This point is stressed, since it is not certain that the examiner regarded the trafficking issue in this proceeding as disqualifying in nature. Thus, at paragraph 176 of the initial decision, wherein the examiner sums up with respect to the Tedesco, Inc., application, his conclusion that the Tedescos have engaged in trafficking follows his conclusion that the KBLO aspect of the proceeding disqualifies Tedesco, Inc., from a character standpoint; and there has been no application of the trafficking conclusion to the ultimate issue in the proceeding or to the statutory public interest standard.

C. Resolution of the Issue

KFNF

49. As hereinabove indicated, the examiner held that the Tedesco brothers had, in their transactions with respect to KFNF, Shenandoah, Iowa, engaged in trafficking operations. Ironically, the trafficking concluded by the examiner related to the same station and was of the same general type involved in *KFNF, Inc.* (supra, note 82); namely, the acquisition of a station with an undisclosed intention of utilizing its frequency elsewhere. Examination of the pertinent facts surrounding the KFNF matter supports the examiner's conclusion of trafficking, and reveals on the part of the Tedesco brothers associated acts of nondisclosure and misrepresentation clearly inconsistent with their obligations to this Commission.

50. Shenandoah is located in southwestern Iowa, in an area devoted largely to agriculture. With a 1960 population of 6,567, it is the largest city in Page County, and is larger than any city of the five Iowa counties adjacent to Page County. It is the home of two of Iowa's oldest radio stations: KFNF, first licensed in 1924, and KMA, first licensed in 1925. The stations were established by competing seed companies in Shenandoah, and each has a history of operating losses. In July 1959, the KFNF losses were at the rate of $700–$800 per month, and it had lost a total of $40,000 over the previous 5-year period.[88] In their application to assign WISK, St. Paul, Minn., the Tedescos gave as a reason for the sale that WISK had been operating

[87] Cf. dissenting opinion of Chairman Minow in *Franklin Broadcasting Company*, FCC 62–52, 22 R.R. 880, 882.

[88] In the 1952–59 period, KMA had financial losses totaling $333,000. See *May Broadcasting Co.*, 30 F.C.C. 133, 167, 19 R.R. 795, 821 (1961). The population data set forth in this paragraph is from the 1960 census; the historical information is from the *May* and *KFNF* cases, supra, and from the public station files for KMA and KFNF. Official notice is taken of the above materials.

at a loss. On July 23, 1959—8 days after Commission approval of the WISK assignment—an application was filed to assign KFNF to KFNF Broadcasting Corp., owned in equal shares by the Tedesco brothers (Nicholas and Victor). The contract for the sale of the station had been signed on June 30, 1959. The brothers knew at the time that KFNF had been losing money, but they regarded the station as "another depressed property which [they] could buy right" (tr. 2347).

51. As the reason for the purchase of KFNF, the Tedescos stated in the KFNF assignment application (BAL–3579):

> The assignee is keenly interested in utilizing the broadcast experience of its stockholders and providing the best possible service to the public in the area served by the station.

The assignment application gave no indication of any interest by the brothers in operating the station at a location other than Shenandoah. The Tedesco brothers use as a "rule of thumb" in purchasing a station a figure of 1½ times the station's annual gross receipts. At the time of the sale, KFNF was grossing $75,000 per year. In agreeing to purchase KFNF for $125,000 ($75,000 in cash and $50,000 on terms), they exceeded their "rule of thumb" figure by 11 percent. The transfer was approved by the Commission on September 2, 1959, and the Tedescos commenced their operation of KFNF on October 17, 1959. Before purchasing KFNF, the Tedescos knew that from an allocation standpoint, the station could be moved to another location (tr. 1895–1902). Thus, from a story in *Broadcasting*, it was common knowledge that the station could be moved to Lincoln, Nebr. Additionally, the broker handling the sale "was building up the station"; the Tedescos, however, "[n]ot believing what was told [them]," had the situation examined by engineering counsel. The engineers confirmed that the station could be moved to Lincoln, and also that the frequency (920 kc/s) could be utilized in the Omaha-Council Bluffs area and the Kansas City area simultaneously. In testifying as to the foregoing, Victor Tedesco stated, at tr. 1897–98:

> We considered it as an insurance policy. After all, I wouldn't go into a town of 6,000 people if I didn't know I could make a go of it in the area. I would want to know if the station would work somewhere else if it had to be. The intention wasn't there.

Contrary to the last assertion, however, the facts below make it unmistakably clear that the intention was there, notwithstanding the record assertions to the contrary. The examiner held incredible (I.D., par. 106) the Tedescos' reasons for their early attempt to move the station to Council Bluffs. But, had he probed the matter in greater detail, it is doubtful that he would have accepted so readily their testimony concerning the large number of other Tedesco transactions or concluded that KFNF represented their only instance of trafficking.

52. At the time of their takeover of KFNF, the brothers regarded it as "nothing more than an inferior KMA" (tr. 1705), and they "did not feel that Shenandoah, Iowa, would support two radio stations" (tr. 1701). According to Victor Tedesco (tr. 1704), it was decided to make KFNF "a format station, a bright music sound in southwest

Iowa." However, the station's existing programing was continued for another 3 weeks before a new programing format was instituted (tr. 1294–95). Victor Tedesco testified that the brothers "more than doubled the staff" (tr. 1705), and this testimony apparently forms the basis for the examiner's finding (I.D., par. 105) that the brothers "substantially increased the staff"—an action regarded by the examiner (along with others) as "consistent with a sincere desire to transform the station into a profitable operation in Shenandoah, and contributing to "ambigu[ity] as to what the Tedescos' true intentions were when they purchased the station." However, Victor supplied no figures pertaining to the station's staff, and his testimony is otherwise uncorroborated in either the record or KFNF's public station files. KFNF's 1958 renewal application (BR–530—filed October 21, 1958) indicated 10 employees at that time; and the KFNF assignment application of July 23, 1959 (BAL–3579), represented that with "[n]o substantial changes contemplated" in either programing or hours of operation, the station would have a total of 17 employees. However, KFNF's annual financial report (FCC form 324) for the period of October 16, 1959, to December 31, 1959 (KIOA exhibit 4), shows that on December 31, 1959—11 weeks after the takeover of the station, and 8 weeks after the new programing format was instituted—there were employed at the station 10 full-time and 1 part-time employees. Thus, the representation made by the Tedescos in their assignment application was not being fulfilled at that time (December 31, 1959), and whether it was fulfilled prior to that date appears highly improbable because of the short period of Tedesco operation prior to the latter date. Thus, the most reasonable finding is that the same number of persons were employed at the takeover date as were employed on December 31, 1959. Since there were but 11 employees on the latter date, Victor's testimony that the brothers "more than doubled the staff" amounts to testimony that when the Tedescos assumed control of the station, it had but 5 or 6 employees. However, such a figure cannot be reconciled with the figure set out in the 1958 renewal application (see above); nor does the figure (5 or 6) appear adequate to staff a full-time station operating 124 hours per week, as KFNF was operating at the time of the Tedesco takeover. Accordingly, Victor's testimony as to a doubling of the staff is unsubstantiated, and cannot be regarded as credible.

53. Of even greater persuasion in terms of removing the ambiguity found by the examiner is the brothers' testimony concerning their establishment of an auxiliary studio. In this area Victor Tedesco testified (tr. 1705) that they established an auxiliary studio "at great expense in Red Oak, Iowa, a town 19 miles away," keeping it there "for about a year, maybe a year and a half." Nicholas Tedesco testified, however (tr. 2596A–97, 2609), that although the studio was established in 1959 "shortly after" the takeover of the station, it was operated for only 1 month; that it was rented on "strictly a trade-out deal"; [89] that equipment purchases were of turntables, "mikes" and a

[89] Compare par. 80, supra (KBLO trade-out deal).

remote box;[90] that an announcer was assigned to the auxiliary studio, the announcer doubling as a salesman in the area; and that the programing from Red Oak was for "1 or 2 hours a day," consisting of "a record show" sponsored by Red Oak merchants. Thus, Nicholas Tedesco's testimony is at variance with that of his brother unless great expense was involved in the purchase of equipment for remote operation. But the Tedescos' own documents establish not only that there was no great expense, but also that no remote equipment whatever was purchased for the Red Oak studio. KFNF's form 324 for 1959 shows that as at December 31, 1959, the station's assets (before depreciation) totaled $125,263. If $125,000 of the total represents the purchase price of the station, only $263 was expended by the Tedescos for assets in the balance of 1959. Was this for remote equipment? The answer is provided by page 2 of exhibit B of the Tedescos' application to move KFNF to Council Bluffs (BP–14206—official notice taken). The page indicates that assets totaling $125,000 were acquired on October 16, 1959 (the day before the Tedesco takeover), and that a "Music Library" was acquired on December 1, 1959, at a cost of $263.15. The same page lists "Studio and Remote Equipment" at $40,000 (as part of the total assets of $125,000), thereby making clear that the station had remote equipment on hand at the time the Tedescos acquired the station. In view of all of the above, the matters relied upon by the Tedescos as demonstrating "a sincere desire to transform the station into a profitable operation in Shenandoah" are totally unpersuasive. Thus, there was no substantial increase in the station's staff by the Tedescos; the establishment of auxiliary studios in Red Oak clearly involved no "great expense"; and the conversion to a "format" operation featuring "a bright music sound" was apparently effected through the investment of $263 in a "Music Library." In short, the Board does not share the view that there is ambiguity in the record as to what the Tedescos' true intentions were when they purchased the station.

54. Nicholas Tedesco testified that the station lost money from the beginning of Tedesco operation, and that the brothers "put money in to cover losses," putting $12,500 into operating capital "right at the start" (tr. 2602–03). On the other hand, Victor Tedesco testified (tr. 1703) that the brothers—even though neither was employed at the station—received salaries therefrom in the total amount of $1,400 during the first 2.5 months of operation in 1959, and the Board finds that they did.[91] It can also be found, however, that the Tedescos did supply the station a gross of $12,500, as contended for by Nicholas Tedesco. The Tedescos' original application to acquire KFNF (and the instant

[90] A portion of the testimony at tr. 2597 reads as follows: "We traded out some time with one of the merchants there and we set up turntables, we set up some mikes at Council and remote box at Council." In its proposed findings (p. 115) Swanco contended that "it is unclear whether this equipment was part of KFNF's assets purchased initially." Alternatively, it stated: "In any event, remote equipment—by its very nature—can be utilized anywhere and the Tedescos' March 1960 application to move KFNF to Council Bluffs, Omaha, made a point of stressing that KFNF would carry remote broadcasts in its new location."

[91] This finding construes the testimony at tr. 1703 in the light most favorable to the Tedescos. The testimony reads as follows:

Q. Do you have any recollection as to how much money you may have taken out of there in the first month or two?

A. I would say $700 or $800, each, for the 2 months, it could have been 3 months.

record) shows that the brothers were to deliver to their corporation $80,000, $75,000 to be paid to the assignor as a downpayment for the station, and $5,000 to be retained by the corporation as working capital. In exchange for the $80,000, the brothers received $50,000 in stock certificates and a note in the amount of $30,000 from the corporation; additionally, the corporation assumed liability for the $50,000 balance due the assignor. (See par. 51, supra.) In KFNF's balance sheet as at February 29, 1960, in BP-14026, the $30,000 (and the $50,000 balance) are shown as long-term liabilities, and among the current liabilities as an item, "Notes Payable to Nicholas and Victor Tedesco" in the amount of $5,699.77. In view of the above, it can be found that the brothers provided the original $5,000 in working capital as agreed (on the basis of Nicholas' testimony); that they subsequently delivered another $7,500 to the corporation; but that, apparently, $1,800.23 ($7,500 less $5,699.77) of the $7,500 was repaid. Accordingly, it can further be found that during the first 4.5 months of operation, the brothers provided a net of $10,700 in working capital. The foregoing still is not the complete story, however, since the same balance sheet shows under current assets, "Accounts Receivable—Officers," a sum of $2,530.[92] The ultimate finding, therefore, is that between October 17, 1959, and February 29, 1960, the brothers had a net of $8,170 in the corporation as working capital for the station.

55. In BP-14026, the Tedescos contended that the station lost $9,935.90 during the first 4.5 months of Tedesco operation (an average of just over $2,200 per month). From the foregoing figures, one could get an impression that KFNF's financial picture dimmed significantly after the Tedesco takeover, inasmuch as the previous owners had losses of only $700–$800 per month. But the picture can stand further developing. First, nearly half the loss is accounted for by "Depreciation" of $4,741.40 (which is not a cash expenditure), and the inclusion of this figure in the station's loss totals severely distorts the before-and-after comparison.[93] Thus, the previous owners carried KFNF's fixed assets at $5,263.64,[94] whereas the Tedescos immediately reevaluated them at $125,000—the purchase price of the station.[95] Second, the loss-total of $9,935.90 includes the $1,400 paid the Tedescos as salaries. Third, the record is unclear as to whether the corporation was charged for legal and engineering expenses incurred in connection with the application to move the station to Council Bluffs.[96] And, fourth, included as expenses are interest accruals of $1,000 to the

[92] The Tedesco brothers are the only officers of the corporation—see assignee's portion of BAL-3579.
[93] Compare KFNF's 1959 form 324 (KIOA exhibit 4).
[94] See exhibit 4 of BAL-3579.
[95] See schedule D of BAL-3579. Obviously, no value was placed on the station's goodwill.
[96] The income-expense statement of Feb. 29, 1960, shows engineering expenses of $421 and legal expenses of $467.25. At tr. 2594, Nicholas Tedesco seems to have said that there had been some engineering expenses in connection with the KFNF assignment application. The application, however, contains no engineering material, and it may be that the witness' reference was to the expenses incurred in checking prior to the application to see if the frequency would work at locations other than Shenandoah. See par. 52, supra. See also tr. 2595–96, 2599, 2601, 2604–07, 2656.

Tedescos and $984.38 to the assignors of KFNF.[97] On the basis of the foregoing, it is concluded that (*a*) KFNF's financial circumstances—in terms of normal expenses—did not materially worsen in the early months of Tedesco operation, and (*b*) unforeseen losses—paper or otherwise—cannot be accepted as the basis for the decision to move the station to Council Bluffs. That decision, as shown below, was made near the end of 1959; and, as stated by the examiner: "It is not credible that broadcasters so experienced as the Tedescos would have genuinely anticipated that the loss picture which obtained when they purchased the station would have been reversed in less than 3 months."[98]

56. As previously indicated, the brothers' proposal to move KFNF to Council Bluffs was filed with the Commission on March 24, 1960, 5 months after they assumed control of the station. The Tedesco position appears to be that speed was necessary in getting the application filed, since (*a*) KIOA, Des Moines, had earlier filed for a power increase on an adjacent channel (940 kc/s—KFNF's frequency is 920 kc/s), and (*b*) according to the Tedescos, March 24, 1960, had been established as the cutoff date for conflicting applications. The examiner gave some acceptance to this contention. (See initial decision, par. 105, note 18.) The haste with which the Tedescos proceeded is demonstrated by the following: Nicholas Tedesco set the proposal in motion near the close of 1959, when he phoned his consulting engineer and arranged for the latter to begin on the engineering phases of the proposal (tr. 2656–57). Immediately after the phone call to the consulting engineer, Nicholas mailed the engineer a retainer check, and the engineer mailed the Tedescos a map depicting the areas in Council Bluffs suitable for the directional operation proposed (tr. 2656–58). Upon receipt of the map in early January 1960 (tr. 2653), the Tedescos "went down to Council Bluffs looking for land" (tr. 2653), and purchased the required acreage on January 8, 1960 (tr. 2597–98). The directional operation contemplated required 30 acres of land, but the Tedescos "had to buy 74, in order to get the land" (tr. 2598–2600).

[97] See the balance sheet and the income-expense statement, both of Feb. 29, 1960, in BP–14026. Thus, the corporation incurs interest charges of approximately $440 per month—$222 on loans from the brothers totaling no more than $37,500, and $218 on the balance of $50,000 due the assignor. The sale agreement under which the brothers bought KFNF provided for interest on the $50,000 at the rate of 5.25 percent and the $984.38 represents the total accruals in 4.5 months at that rate of interest. The purchase agreement provides, however (see pp. 4–5 of the agreement in BAL–3579), that in lieu of all other interest during the first year of Tedesco operation, "Buyer shall pay Company the sum of One Thousand Dollars ($1,000.00) on the last date of the 12th month following the month in which the closing takes place as a flat payment for said year." The 4.5-month accrual on $1,000 would be $375.00.

[98] Actually, there was a basis for a favorable outlook at the end of 1959: Under Tedesco operation, the station had grossed $15,006 in broadcast revenues, and the total expenditures of $20,503 included $2,634 for depreciation (see KIOA exhibit 4), $1,400 in the brothers' salaries, and (undoubtedly) a number of other expenses that the previous owners had not been experiencing. Even allowing for the fact that December is usually a good month for broadcast revenues, the record is impressive, since, as found by the examiner (I.D., par. 105), the brothers conducted no promotion campaign in Shenandoah. (KFNF's income-expense statement of Feb. 29, 1960, discloses that the station spent but $380.73 for "Promotion and Advertising" in the first 4.5 months of Tedesco operation.) If the brothers overlooked the foregoing, it may be that each thought the other was "looking at the books." Thus, at tr. 2030—re which brother had prime knowledge as to the various Tedesco affairs—Victor Tedesco stated: "* * * but, bookkeepingwise, and purchasing equipment, and things like that, that's his department, and also purchasing the station." However, Nicholas Tedesco stated (re the purchase of KFNF), at tr. 2612: "* * * I am not familiar with figures and I let [Victor] handle that. He is better in financial statements than I am. So I let it entirely up to his decision, as far as looking at the books."

57. The Board can agree that there was need for haste in filing the application on or before the alleged cutoff date in order for the Tedescos' application to receive consideration along with the KIOA application. As above indicated, the proposal for Council Bluffs required a design of directional antenna system, and a site had to be acquired; obviously, these matters are time consuming. However, the record contains no convincing showing that anything occurred subsequent to the Tedescos' purchase or commencement of operation of KFNF which precipitated the action taken. As our findings above show, the Tedescos signed a contract on May 22, 1959, to sell WISK to Crowell-Collier Broadcasting Corp. (the assignment application was approved on July 15, 1959); a contract was signed by the Tedescos on June 30, 1959, to purchase KFNF; and they commenced their operation of KFNF on October 17, 1959. During this entire period, the KIOA application was pending, it having been filed, according to Commission records, on May 13, 1959; the Tedescos' engineer subsequently advised them of the necessity for early action because of an impending cutoff date for the KIOA application. (Under the Commission's rules, an application is subject to a notice of a cutoff date during the entire pendency of the application, the imminency of such notice depending upon the application's position on the processing line and also upon its involvement, if any, with other conflicting applications having a higher position on the processing line.) Based on the above, it cannot be contended that a sudden filing of the KIOA application with a consequent cutoff date precipitated any such action. In connection with the foregoing, the Tedescos presented no evidence that a notice of a cutoff date was published for the KIOA application during the period involved, necessitating a change of their plans or the action taken.[99] Moreover, as demonstrated above, it cannot be accepted that an increase in KFNF's financial expenses or unforeseen losses were the cause for such action. Accordingly, the Board cannot accept as valid any of the reasons advanced by the Tedescos for their haste in undertaking to move KFNF. This undertaking—undoubtedly speeded up by the pendency of the KIOA application, which could block their desire to move KFNF to Council Bluffs—can only be construed, insofar as this record shows, as one serving the private interests of the Tedescos. All of the foregoing, therefore, leads to but one conclusion: That the Tedescos' intent at the time of their purchase was to move KFNF to Council Bluffs.

58. This conclusion is further supported by consideration of the following. Less than 5 months after the Council Bluffs application was filed—in late July or early August 1960—Nicholas Tedesco visited the Kansas City area with a view to purchasing another 30-acre tract of land for a directional operation on the same frequency (920 kc/s) in that area (tr. 2525–27). No Tedesco application for the Kansas City area has as yet been filed. But the Tedescos made the whole of their intentions clear in a release to Tedesco, Inc., stockholders in January 1962. The release is in evidence as Edina exhibit 9; it is entitled

[99] The records of the Commission show that a public notice (FCC 60–417) was released Apr. 21, 1960, designating May 27, 1960, as the cutoff date for the KIOA and certain other applications.

"Projected Plans for Expansion and Estimated Worth of Individual Radio Stations for Tedesco, Inc." and it reads, in part, as follows:

> In October 1959, Nicholas and Victor Tedesco purchased radio station KFNF in Shenandoah, Iowa. It was the decision of the purchasers thereafter to move the station to Council Bluffs, serving the Council Bluffs-Omaha metropolitan market. Complete investigation revealed that the 920 location on the dial (which is the KFNF location) would also work in Kansas City, Mo. Tedesco, Inc., has purchased and paid in full for 31 acres of land in Independence, Mo., for the proposed station in Kansas City. Nicholas and Victor Tedesco have agreed to sell KFNF to Tedesco, Inc., after the granting of the application to move the station to Council Bluffs, at their cost and at no profit to them. Of course, a 6-percent interest charge for the use of their money will be paid by Tedesco, Inc. After completion of these two radio stations, Tedesco, Inc., will have an investment of approximately $150,000, including land in the Kansas City market. In the Council Bluffs-Omaha market, Tedesco, Inc., will have a $275,000 investment, excluding land which will be leased. The proposed stations in the Kansas City and Council Bluffs-Omaha markets are completely married to each other because of the purchase of radio station KFNF and the cost should be absorbed at 50 percent each. Therefore, for a total investment of approximately $425,000, Tedesco, Inc., will own two radio stations which, it is believed, will be valued at a minimum of $1,250,000. An interesting facet in the proposed construction of these two radio stations is that under the present rules of the Federal Communications Commission, no one can stop the construction of either station because of the protected status of the KFNF application on the FCC processing line * * *.

59. In our view, the above paragraphs give a reasonably complete picture of the Tedesco trafficking intent as it relates to the total KFNF transaction. The frequency on which KFNF operates is one which would work simultaneously in two major markets—the Omaha and Kansas City metropolitan areas. (The Tedescos' expressed desire is to acquire as many stations as the rules permit and to expand into major markets.) The Tedescos knew that the station had been operating at a loss for years, and, hence, it was a depressed property which could be bought at a price which did not materially exceed the Tedescos' "rule-of-thumb" figure. Thus, from the foregoing, the only conclusions which may be drawn are the following: The Tedescos, knowing that the station was operating at a loss, must have realized, in light of the history of such operation, that the loss situation would be likely to continue; and that such continuing situation, pending the fulfillment of their plans to move the station to Council Bluffs and to acquire a second station on the KFNF frequency in the Kansas City area, could easily be justified in light of the ultimate value of the two stations. (See par. 58, supra.) In addition, a continuing loss situation could be to their advantage: First, such situation could be grounds for relocating the station; and, second, "paper" and other expenditures which the previous owners had not been encountering would be indicative of a worsening situation. (In light of our findings above—see pars. 54 and 55—claims as to a worsening financial picture must be rejected.) Thus, notwithstanding protestations to the contrary, it must be concluded that the Tedescos were never, as contended in the KFNF assignment application, "keenly interested in * * * providing the best possible service to the public in the area served by the station" (par. 51, supra); and that the KFNF transaction represents "the actions of promoters or brokers, who 'speculate, barter, or trade in

licenses * * * to the detriment of the public interest'" (par. 45, supra), and constitutes trafficking of the precise type condemned by the Commission in the 1945 proceeding involving KFNF. (Note 82, supra.)

KBLO

60. As the material considered in detail below demonstrates, the KFNF transaction was not the only one in which the Tedescos manifested trafficking intent. Had the examiner considered the KBLO episode from a trafficking standpoint, it is doubtful that he would have concluded (I.D., par. 167) that "no pattern of improper station manipulation has emerged." The Board believes that when consideration is given to all of the actions (and inactions) attributable to Tedesco, Inc., during the period between the purchase date of KBLO and the date Tedesco, Inc., withdrew from the KBLO venture, a trafficking intent is apparent. Thus, Tedesco, Inc., did not seek to familiarize itself with the Hot Springs community or otherwise seek to ascertain the community's needs.[100] KBLO was but 1 of approximately 100 stations to which Victor directed his form letter of October 10, 1960 (see par. 16, supra). Thus, it is obivous that Tedesco, Inc.'s primary intent at that time was to acquire a station at any location it could; whether Tedesco, Inc., also had a specific intent to render service in the Hot Springs area meeting the needs of that area must be determined on the basis of its subsequent actions.

61. As indicated above, the Tedescos made no survey of the area prior to the purchase of KBLO. Nicholas Tedesco and Israel Krawetz arrived in Hot Springs, Ark., the evening before the auction sale of KBLO and left the following afternoon. During this visit, no survey of the needs of the area was made. Other visits were made to Hot Springs by Nicholas and Victor Tedesco in early December 1960 and the latter part of February 1961, before the transfer application was filed on March 22, 1961. Again, the record does not reflect that any survey of the needs was made during either of these visits; discussions were had with Morris, manager and trustee of the station, but such discussions insofar as the record reflects concerned other matters. Of course, it can be argued that a transferee purchases the know-how and community familiarity of the transferor, if the transferor has some role in the continuing operation of the station; but, since KBLO had passed into receivership (thereby raising a question as to the acceptability of the station in the community), these intangible assets would appear to be of doubtful value in terms of contributing to a transferee's knowledge of the area. Furthermore, it cannot be contended that Donald W. Johnson, who served as an announcer at KBLO for several weeks and as Tedesco, Inc.'s representative in Hot Springs, surveyed the needs of the area. According to Johnson's testimony, he was sent to Hot Springs "for the mere purpose of looking over the town, seeing what the other stations were doing as far as format

[100] It is clear that had Tedesco, Inc., come to the Commission for an original construction permit for Hot Springs, displaying a total lack of familiarity with the community's needs, a denial of the application would have been warranted under the *Suburban* doctrine. See *Suburban Broadcasters*, 30 F.C.C. 1021, 20 R.R. 951 (1961), affirmed sub nom. *Henry et al. v. F.C.C.*, 112 U.S. App. D.C. 289, 302 F. 2d 191, 23 R.R. 2016 (1962), cert. den. 371 U.S. 821.

is concerned, and just listening to them, getting a good look at the town and seeing the possibilities that could be derived from owning a station in that city" (tr. 1258). Moreover, a review of the balance of the record fails to disclose that Johnson contacted any of the community leaders in Hot Springs. From the above, it must be concluded that Tedesco, Inc.—at the time it purchased the station assets and at all subsequent times—had no specific intent to serve the public in the Hot Springs area, as distinguished from a bare intent to acquire a station there. Additionally, the activities of Tedesco, Inc., discussed below reinforce this conclusion.

62. Like KFNF, KBLO was "another depressed property which [Tedesco, Inc.] could buy right." (See par. 50, supra.) Additionally, Tedesco, Inc.'s attempted frequency manipulations with respect to KBLO—begun even before the assignment application was filed—were not unlike those contemplated for KFNF, and are as condemned by the Commission's 1945 *KFNF, Inc.* decision (note 82, supra) as are the Tedescos' actions in acquiring the KFNF frequency with a view to utilizing it elsewhere. Consistent with the Tedescos' intentions in Shenandoah, Tedesco, Inc., sought to acquire KVRC's Arkadelphia frequency—not to utilize it in Arkadelphia, but to establish a full-time operation in Hot Springs. Of the same tenor was the proposal to acquire KAAB's full-time frequency in Hot Springs, the plan being to bring about a noncommercial operation in KBLO's daytime-only frequency, thereby to increase the value of the station retained. That the frequency trade proposals did not bear fruit is beside the point, since the trafficking intent was there, and since the failure of an improper plan does not redeem the qualifications of the planner.[101] Of further persuasion to the Board in this matter of determining Tedesco, Inc.'s intent with respect to KBLO is the 4-month delay in the filing of the KBLO assignment application. To attribute this delay to negligence on Krawetz' part is to ignore (*a*) that the essentially similar KWKY (Des Moines) assignment application was filed on January 18, 1961—less than 2 months after Tedesco, Inc., agreed to buy the station (see pars. 18, 32, and 33, supra); and (*b*) Tedesco, Inc.'s interpretation of the "when and if" liability provision in the terms of the auction sale (see pars. 17, 19, and 34, supra). Moreover, a conclusion that Tedesco, Inc., was little more than "window-shopping" in Hot Springs is supported by the fact that in July 1961, Victor notified Morris "that the Tedescos were involved with a station in St. Paul [WMIN—see par. 40(*b*), supra] and that they would be happy to forget about KBLO and set aside the sale if they could get back their $17,000." (See I.D., par. 55.) Whether the failure to effect a frequency trade in Hot Springs contributed to Tedesco, Inc.'s obvious view that the St. Paul venture represented a better investment is not clear on the record and is not important. What is important is that Tedesco, Inc., was concerned with private interest to the complete exclusion of public interest. Accordingly, it must be concluded that

[101] At tr. 2428–29, Nicholas attributed each of the proposals to Morris. However, the examiner—obviously preferring Morris' contrary testimony at tr. 2882–87—credited each of them to the Tedescos at par. 42 of the initial decision. Tedesco, Inc., has not excepted to the finding.

the whole of the KBLO transaction was one of "speculation in the public domain." (See par. 45, supra.)

WISK

63. In the Board's view, the Tedescos' WISK transaction also constituted trafficking. Nicholas and Victor Tedesco became the sole partners in WISK in April 1957; on October 18, 1958, they effected an assignment of the license to BVM Broadcasting Co., Inc. (BVM), which was owned in equal amounts by the two brothers. Prior to October 7, 1958, the station had operated in South St. Paul on 1590 kc/s, daytime only, at a power of 5,000 w. On the foregoing date, it commenced operations (pursuant to program test authority) in St. Paul on 630 kc/s, daytime only, at a power of 1,000 w. However, on September 24, 1958, the Commission had granted requests by the Tedescos seeking operation (on 630 kc/s) at a daytime power of 5,000 w and a nighttime power of 500 w. Program test authority for the modified operation was granted by the Commission on January 13, 1959, and the modified operation was licensed by the Commission on May 5, 1959. Seventeen days later, on May 22, 1959, the Tedescos signed a detailed contract for the sale of the station to Crowell-Collier.

64. At the time of the contract, the Tedescos' capital contributions to the corporation totaled $40,000.[102] Additionally, as a result of loans they had made to the corporation, they held notes totaling approximately $108,000.[103] Under the contract, Crowell-Collier was to pay the seller $500,000 in cash and was to pay selected obligations of the corporation in a total amount of $125,000;[104] and the Tedescos were to pay the remaining obligations. An exact figure as to these remaining obligations, as at the closing date (August 24, 1959), does not appear in the record. However, they stood at $33,525.83 on May 31, 1959. And from Victor's testimony at tr. 1675–77, it can be found that these other obligations totaled on the order of $37,000 as at the closing date. Thus, Victor testified that the brothers received $500,000 in cash; that the brothers' capital contributions amounted to $40,000;[105] that they paid their father $35,000 pursuant to a preexisting agreement involving the station;[106] and that their profits amounted to $280,000 before taxes. The last three figures total $355,000, and a subtraction of this total from $500,000 yields a difference of $145,000. If $108,000 of the $145,000 represents the sums due the brothers for loans to the corporation—which obligations the brothers were assum-

[102] This figure is stated in BVM balance sheets of Nov. 30, 1958, Feb. 28, 1959, and May 31, 1959, and is the figure found by the examiner in note 15 to par. 94 of the initial decision.

[103] The loan figure is stated as $108,350.30 in the balance sheet of Feb. 28, 1959, and as $107,800.30 in the balance sheet of May 31, 1959.

[104] The selections were made as at Mar. 31, 1959. The corporation was to continue to make regular and due payments on the obligations up to the date of consummation, the seller to reimburse the buyer for principal payments so made.

[105] Victor testified that the brothers "had $241,000 in the station"; the station's total assets stood at $241,940.68 as at May 31, 1959, and this appears to be the figure to which Victor was referring. Obviously, for the purpose of determining the brothers' profit from the sale, the total assets figure (which takes no account of the station's liabilities) cannot be utilized.

[106] However, the $35,000 due the father had never been listed on the corporation's balance sheets.

ing [107]—one can arrive at the figure of $37,000 for the other obligations; and that figure is not inconsistent with the one shown on the balance sheet of May 31, 1959.[108] In addition to the cash payment of $500,000, the brothers also received (*a*) two parcels of land having a book value of $10,700 and an actual value of $90,000; (*b*) two Cadillacs having a book value of $8,800 and an actual value of $10,000; and (*c*) certain accounts receivable having a book value of $28,000 and an actual value of $25,000 (see tr. 2225–26). To sum up, on an investment of $148,000 (capital contributions of $40,000 and loans of $108,000), the Tedescos realized profits of at least (see note 107) $405,000 ($280,000 plus $90,000 plus $10,000 plus $25,000).[109]

65. As stated by the Legislative Oversight Subcommittee (see par. 46, supra), an early sale of a facility at a price greatly in excess of the seller's actual investment "give[s] rise to the inference that the licensee's application for the license was not made in good faith." Here, WISK was sold by the Tedescos at a profit of approximately 275 percent less than a year after the commencement of operation with substantially improved facilities, and only 17 days after the Commission's licensing of such facilities. But the Tedescos have persistently contended that the station was sold because it had been operating at a loss. This was the reason stated in the assignment application (see par. 38, supra), and each of the Tedescos so testified. Thus, at tr. 1673, Victor stated:

> * * * We switched to 630 on the dial, we had a 5 kw radio station, and a very good signal and we went format radio, and the results were disastrous. We lost $89,000, from the time we went on 630 to the time we sold it. From the time the application was filed to transfer, and even though our position was improving each month, we didn't have any kind of reserve to keep the situation going and again the case the station showed the slight profit at the end but we already had it.[110]

And at tr. 2806, Nicholas stated:

> That was the reason we sold the station, yes, because of the losses.

The Board has no difficulty accepting the proposition that if financial losses by the station were the actual reasons for the sale, a conclusion of

[107] It must be noted, however, that there is evidence that the brothers, in addition to receiving the payment of $500,000, were also reimbursed for their loans. Victor so testified at tr. 1677, the testimony being, in effect, that some $55,000 he had received in repayment of his loan was over and above his share of the $500,000. Findings consistent with the foregoing were proposed by Tedesco, Inc., at par. 130 of its proposed findings, and the examiner appears to have adopted those proposed findings at par. 94 of the initial decision. Notwithstanding the foregoing, based on the consideration of the arrangement as a whole, the Board believes that Victor was mistaken in testifying that the brothers received repayment of their loans over and above the payment of $500,000.

[108] The figure finds some support at tr. 1675, where Victor spoke in terms of paying off a note to the Northwestern State Bank, and in the BVM balance sheet of May 31, 1959, which lists as a current liability a sum of $45,000 due the bank. Although it appears that a portion of this liability was one of the "selected obligations" to be assumed by Crowell-Collier, the Tedescos' share of the liability could well have stood at some $37,000 on the closing date of the sale.

[109] This finding of a profit to the Tedescos in an amount in excess of $400,000 demonstrates the falsity of representations which appeared in Tedesco, Inc.'s petition for reconsideration (of Aug. 31, 1961) in the *Franklin* proceeding. (See par. 42, supra; a copy of the petition appears in the instant record as KIOA exhibit 2.) On pages 13–14 of the petition, it was indicated that the Tedescos could have sold the station (WISK) in 1957 for $185,000; the petition further stated as follows: "Here was another grand opportunity to make a substantial capital gain, for if the Tedescos had sold the station at this time, they would have, in effect, after losses, taxes, and the responsibilities of constructing a highly complicated six-tower directional array, made more money than was realized from the sale of WISK 2 years later."

[110] As the examiner found, however (I.D., par. 93), "they had not exhausted their cash or credit resources"; and among their assets were the parcels of land discussed in the previous paragraph.

trafficking would be inappropriate. On the other hand, if such losses were not the reason, not only is the inference of trafficking materially supported, but also the Tedescos are guilty of still more misrepresentations. While the initial decision appears to touch on the foregoing question, the Board believes that the facts bearing on the question warrant a fuller treatment.

66. At the end of approximately 2 months of operation on 630 kc/s (October 7–November 30, 1958), the WISK's stated deficit stood at $20,274.43, indicating losses of just over $10,000 per month. During the next 3 months (ending February 28, 1959)—during the last half of which the station was operating at higher power daytime and was also operating nighttime—the deficit increased by $19,457.02, to $49,731.45; thus the losses per month for the 3-month period had decreased to just under $6,500. During March, April, and May, the deficit increased by $17,212.98, to $66,944.43, representing losses per month of just over $5,700. At tr. 2807, Nicholas confirmed that "the losses were decreasing each month"; and at tr. 2806, he testified that the station showed a profit in the last month (August 1959) of Tedesco operation. Thus, after only 10 months of operation on the frequency,[111] the station began operating at a profit, and this fact is particularly impressive when the makeup of the station's deficits is considered. For example, included in the 8-month loss total of just under $67,000 are more than $11,000 in depreciation—a "paper" loss only.[112] Also included are more than $23,000 in monthly deferred payments, of a type (on land, buildings, equipment, etc.) which do not normally continue beyond a stated term of months or years.[113] Also included are $2,400 paid to the Tedescos' father, at the rate of $75 per week (tr. 2531–32). And also included are on the order of $10,000 paid the brothers as salaries during the 8 months of operation involved.[114]

67. From the fact that large portions of the losses were either "paper," stockholders' salaries, or of a nonpermanent nature, and from the more significant fact that the monthly losses were on the decrease, it defies credibility that the Tedescos—experienced broadcasters, who had nursed a number of stations through their early months of operation in their 10 years of broadcast activity—would have failed to appreciate that the station would shortly turn the corner with respect to profitability. That they did appreciate it—and that others appreciated it—is evidenced by the terms of the sale to Crowell-Collier, pursuant to which the Tedescos realized profits of more than twice

[111] In its consideration of the WISK matter, the Board has attached little significance to the fact that the Tedescos' interests in the station date back to 1950—with the change of frequency, the change of station location, antenna-directionalization, and nighttime hours, the WISK of 1958–59 was essentially different than the WCOW of 1950–58. See, in the foregoing connection, par. 70, infra, including note 119.

[112] From BVM's "Accumulated Depreciation" of $39,367.18, shown in the balance sheet of May 31, 1959 (Broadcast Bureau exhibit 8, subpart 5, pp. 4–5), the Board has subtracted the accumulated depreciation of $28,327.84, shown in BVM's original balance sheet (Edina exhibit 23, p. 12).

[113] Using the exhibits identified in the previous footnote, the Board has subtracted $82,244.22 from $105,336.59 (installment liabilities). The examiner appears to have had some difficulty with the practice of crediting both equipment payments and equipment depreciation to deficit; see note 14 to par. 92 of the initial decision. For purposes of this decision, the Board has assumed that the practice is a proper one.

[114] See tr. 2342, where Victor, in answer to the question of how long his salary had been $635 per month, stated: "Oh, I'd say my salary was $635 a month, probably, from October of '58, when we went on the new frequency, I was getting less than that." Nicholas' salary was the same as Victor's; see tr. 1672 and 3068.

their investment. That the Tedescos were not concerned about a possibility of running out of operating funds is well evidenced by the fact that in April 1959—1 month before the contract to sell the station—the corporation purchased $10,000 worth of Cadillacs—one for each of the brothers. See tr. 2341–42, 2362, and 2378. It is also evidenced by the fact that the brothers could, in Nicholas' opinion (tr. 2547), have borrowed up to $90,000 from the Northwestern State Bank on a 6-month basis (tr. 2547).[115] It is also evidenced by the fact that the brothers had other assets available. (See note 110, supra.) That the Tedescos had no fear of loss situations generally is illustrated by the purchases of KFNF (a depressed property), KBLO (a bankrupt station), and KWKY, which Victor regarded as "a very good buy" (tr. 1712) at $165,000 (tr. 1713) even though the station had been losing money at the rate of $10,000 per month (tr. 2358). And that they had no fear of risking capital in the St. Paul market is illustrated by their efforts (in February 1961) to purchase WMIN from Franklin, and by the instant proposal.[116] Consideration of the evidence discussed above leads to but one conclusion; namely, that losses by the station were not the reason for the sale to Crowell-Collier. Thus far, then, all signs—the quick sale of the station, the large profit on the sale, and the misstatements as to the reason for the sale—are indicative of trafficking.

68. But Tedesco, Inc., contended, and the examiner found (I.D., par. 94), that "WISK was not on the market, and the brothers had not seriously considered selling the station."[117] If this is so—if the brothers were actually seeking profits through the operation of the improved station rather than a sale thereof, and if they were unexpectedly approached with a fabulous offer, promising relative financial security (I.D., par. 164)—a conclusion of trafficking would be difficult to sustain.[118] As will be demonstrated below, however, the contention cannot be accepted.

69. Notwithstanding Victor's testimony (tr. 1674) that the brothers "didn't have [WISK] listed anywhere," and notwithstanding Nicholas' testimony (tr. 2507) that they "didn't advertise" the station and didn't talk to any brokers about it, and that he didn't recall talking to anyone about it, Victor's total response at tr. 1674 suggests that a

[115] A letter of Apr. 10, 1959, from the bank (KIOA exhibit 9, p. 8) speaks in terms of a line of credit up to $50,000.

[116] It is interesting to note that the Tedescos, in late 1959 or early 1960—shortly after the disposition of WISK—commenced work on an application for Bloomington, the station to operate on the frequency 1080 kc/s at 1,000 w. See Edina Corp. exhibit 9, p. 2, and tr. 638–40 and 2319. (Nicholas knew of the feasibility of 1080 kc/s for the general area as early as 1958—see tr. 632–33.) However, a Commission freeze on the frequency halted further work on the application (tr. 608, 611, 668–69). Thereafter, the Tedescos directed their attention to the acquisition of WMIN in St. Paul, and the assignment application in that respect was filed with the Commission on Mar 8, 1961. In Tedesco, Inc.'s reconsideration request of Aug 31, 1961, the following appears: "It can be clearly stated that Nicholas and Victor Tedesco personally, and as principals of Tedesco, Inc., have no intention of ever disposing of WMIN * * *." However, at tr. 616–17, Nicholas testified that the idea of applying for Bloomington on 1080 kc/s "never left the thought because we were waiting for the freeze to come off, and as soon as the freeze came off we were going to pursue our application in which we already had an investment." It is not difficult to determine which of the two intentions was uppermost in the thoughts of the Tedescos. Thus, WMIN was operating on the class IV frequency 1400 kc/s, at 250 w, unlimited, with a construction permit authorizing 1,000 w daytime, while 1080 kc/s is a class II frequency, with a maximum permissible power of up to 50,000 w.

[117] The contention has, of course, a high degree of inconsistency with the plea that the brothers' concern over the station's losses led to the sale of the station.

[118] However, the early attempts to reenter the St. Paul market might still warrant the conclusion.

decision to sell the station had been made prior to the "initial effort" spoken of by the examiner in paragraph 164 of the initial decision. Thus, in answer to the question: "What steps did you take toward the sale of the station?", Victor replied:

> Well, our CPA had told us that he had borrowed money from a bank, we had a good size loan, and we had tried to get on a bigger gross, and we just couldn't quite make it and actually we were approached for the sale of the station. We didn't have it listed anywhere.

Aside from the fact that the many inaccurate statements made by the brothers during the course of the hearing justify a careful approach to virtually all of their assertions, there are indications—from both the above-quoted testimony and other circumstances—that the station was known—at least on a local basis—to be available for purchase. The Tedescos' further testimony (at tr. 1674 and 2507) is to the effect that Washington communications attorney James A. McKenna, Jr., called the brothers long distance and made them an offer; that the brothers refused the original offer; and that McKenna later visited Minneapolis, raised the original offer, and gave them a check the same day in the amount of $5,000. The alleged fact that McKenna had no inkling either of the station's availability or of its financial condition, and yet made an offer not much lower than the $625,000 ultimately paid, is difficult to accept. In this connection, at the time of the offer, McKenna was a 50-percent owner and chairman of the board of Western Broadcasting Corp., licensee of station KEVE (now KQRS), Golden Valley (a Minneapolis suburb), Minn. The other 50 percent of Western was owned by one Robert M. Purcell. The sale of WISK was to WISK Broadcasting Corp. (assignee), a wholly owned subsidiary of Crowell-Collier Publishing Co. In the assignment proceeding, the assignee was represented by a Washington law firm other than McKenna's. Purcell was proposed as president of the assignee corporation, and the Commission conditioned a grant of the application on Purcell's disposing of his interest in KEVE. In meeting the condition, Purcell sold his 50-percent interest in KEVE to McKenna, who thereby became KEVE's sole owner.

WIXK

70. Aside from any of the above, there is an abundance of evidence that the Tedescos were contemplating a sale of WISK in anticipation of Commission approval of the proposal to change the station's frequency from 1590 kc/s to 630 kc/s.[119] To reach this conclusion, one need draw only the logical inferences from the pertinent facts of record, rejecting in the process the disingenuous explanations and denials of the Tedescos, whose testimony, as has been shown, leaves much to be

[119] This conclusion is particularly fatal to the Tedescos even under the restricted test utilized by the examiner for all Tedesco transactions except KFNF; namely, whether "the acquisition of authorizations [was] for the purpose of profitable resale rather than for operation." See initial decision, par. 160. Our holding here should not be construed as one involving a violation of the Commission's "3-year rule" (section 1.597—see note 84, supra), which was adopted well after the completion of the assignment of WISK. However, were the rule applicable, it would be difficult to escape it through a claim—under paragraph (b)(1) thereof—that the St. Paul facility (frequency, power, location, etc.) of 1959 was the same as the South St. Paul facility of 1950, so as to establish 1950 as the date of Tedesco acquisition of the facility. (See note 111, par. 66, supra.) Moreover, even were 1950 accepted as the date of Tedesco acquisition, par. (d) of sec. 1.597 requires a trafficking determination notwithstanding that the station has been operated by the seller for more than 3 years. (See par. 46, supra.)

desired in terms of general credibility. The Board has reference in this paragraph to the important connection—essentially overlooked in the initial decision—between the Tedescos' maneuvers with respect to WISK in St. Paul and correlative plans for a proposed station (WIXK) in New Richmond, Wis. For a proper perspective, certain facts previously set forth will be repeated.

71. In March 1956, WISK (then, WCOW) was operating in South St. Paul on 1590 kc/s, nondirectionally, and with 5,000 w of power. On March 23, 1956, the Tedescos applied to move the station to St. Paul and to operate directionally on the frequency. The proposed 0.5-mv/m contour extended, in its easterly direction, approximately 5 miles beyond New Richmond, Wis., which lies approximately 30 miles east of St. Paul. On May 14, 1956, WCOW changed its call letters to WISK. On June 14, 1956, the Tedescos amended their relocation application to specify operation on 630 kc/s (1,000 w, day), and a system highly directionalized to the west of St. Paul; one effect of the new proposal was to draw the eastern limits of the 0.5-mv/m contour nearer to St. Paul. (See KIOA exhibit 15.)

72. On July 6, 1956—3 weeks after the filing of the Tedesco proposal to change the frequency of WISK from 1590 kc/s to 630 kc/s—the engineering firm which had handled WISK's proposal with respect to the latter frequency completed a contour map contemplating a nondirectional operation in New Richmond on 1590 kc/s, at 1,000 w, the 0.5-mv/m contour to extend (on the west) into the St. Paul area. (See KIOA exhibit 14, p. 3.) Four days later, Nicholas Tedesco, Victor Tedesco, and one John D. Rice [120] incorporated an organization known as Radio St. Croix, Inc. Although Nicholas testified (tr. 2764 and tr. 2777) that the corporation had in mind applying for 1380 kc/s in New Richmond, he further testified that he "hadn't seen [anything] on that." Nicholas personally reviewed land availability and, using his own funds, secured an option in his own name on a piece of land for a transmitter site (tr. 2772–74). On October 24, 1956, the Commission granted the Tedesco application to change WISK's station location and to change frequency from 1590 kc/s to 630 kc/s, and the Tedescos were advised of this by their attorney the same day. At 8:30 p.m. on the same day, the board of directors of Radio St. Croix held a meeting at WISK's studios. Nicholas Tedesco submitted his resignation as president and director of the corporation, and he and Victor withdrew from the corporation, giving up their stock subscription rights.[121] On November 16, 1956, an application specifying operation in New Richmond on 1590 kc/s was filed by Radio St. Croix; the contour proposal prepared on July 6, 1956, was submitted with the application. Radio St. Croix's stock subscribers and officers were as follows:

[120] In August 1955, John D. Rice was a stockholder in and the manager of WKJL (later, WCOW) in Sparta, Wis., a station controlled by Victor Tedesco. (See I.D., par. 85.)

[121] That the contemplated WISK operation and the New Richmond proposal presented an overlap situation is evident from a comparison of the KIOA exhibits identified in this paragraph and the preceding paragraph. Additionally, in an amendment filed by Radio St. Croix on Jan. 29, 1957, it was stated that "to avoid the possibility" of "a question as to [the Tedesco brothers'] multiple holdings," "it was deemed advisable by all parties concerned to withdraw these individuals from the corporation." See, also, Nicholas' testimony at tr. 2783.

Norman N. Abramson	40 percent, treasurer
Vernon Iwanoski	30 percent, president
Walter A. Swanson	5 percent, vice president
Vito Vitale	15 percent, vice president
Zel S. Rice, II	10 percent, secretary

Abramson, Iwanoski, and Swanson were St. Paul businessmen, each of whom had advertised on WISK; they were friends of the Tedescos, Nicholas describing them (tr. 2787) as "very good friends * * * extremely good friends." None of the three had had broadcast experience; according to Nicholas, however, each had expressed an interest in getting into radio, and when Nicholas asked them "if they would want to step in and go into" the New Richmond venture, "they said they'd love to" (tr. 2782–83). Vito Vitale was a friend and former schoolmate of Nicholas and he, too, had expressed to Nicholas a desire to get into radio (tr. 2524–25). Zel S. Rice II is an attorney and is John D. Rice's brother. By amendment of January 29, 1957, the proposed power of the station was raised from 1,000 w to 5,000 w, the new 0.5-mv/m contour extending well into the St. Paul area.

73. After the filing of the application, Nicholas continued to render assistance to the corporation, on one occasion driving to New Richmond to take "pictures from the site in different directions that was requested by the engineer" (tr. 2785). Additionally, the WISK studios were used for meetings by the stockholders, Nicholas telling them that "the facilities [were] available for them anytime they wanted to use it" (tr. 2786–87). The Radio St. Croix application was designated for hearing by the Commission; subsequently, on December 18, 1959, it was severed from the hearing and granted. (Docket No. 12179, FCC 59–1262.) As indicated above, the application had been amended to specify 5,000 w of power—the same power which had been utilized by the Tedescos in operating on the frequency in South St. Paul. At all times, the call letters of the New Richmond station have been WIXK.

74. By December 18, 1959, the Tedescos had completed their transfer of WISK to the Crowell-Collier subsidiary. According to Nicholas, he received a call from Zel Rice II immediately after notice was received of the grant to Radio St. Croix, Rice requesting Nicholas to ask the other stockholders "to go ahead and get their money together so we can start construction of the station" (tr. 2797). Other than that he had been asked to do so as a favor, no explanation was offered as to why a nonparty to the permittee should be the one to contact the other stockholders. Notwithstanding their alleged original enthusiasm for the New Richmond venture (see par. 72, supra), and notwithstanding that they had just completed 3 years of prosecution of the application, Abramson, Iwanoski, and Swanson (representing 75 percent of the permitte's stock) indicated a desire to withdraw from the venture, and each was willing to part with his subscription rights "for exactly what he put into it" (tr. 2800). According to Nicholas, each of the three wished to withdraw because he needed the money for other purposes (tr. 2797–2800). In any event, on March 12, 1960, Abramson, Iwanoski, and Swanson contracted to sell their subscription rights. As a result of the contract (KIOA exhibit 14, p. 14), Victor and

Nicholas each emerged with a 21.1-percent interest (later increased to 22.5 percent each), and their brother-in-law, Alfred Gentile, gained a 15.8-percent interest. In accordance with the foregoing, an application requesting a transfer of control of Radio St. Croix was filed with the Commission in April 1960, and was granted by the Commission on June 23, 1960. (See BTC–3434.)

75. From the above, it is seen that where the Tedescos had formerly operated a station (WISK, 1590 kc/s, 5,000 w, daytime only) in South St. Paul, they emerged several years later in control (with their brother-in-law) of a station (WIXK, 1590 kc/s, 5,000 w, daytime only) in New Richmond.[122] Because of the high powers utilized, and because of the short distance between the two communities, a substantial land area was common to the respective service areas of the two stations; obviously, the simultaneous ownership of the two stations would have been precluded by the Commission's multiple ownership rule (sec. 73.35). It is clear to the Board that from the time the Tedescos amended their relocation application to specify 630 kc/s, it was their intention to ultimately own and operate a station on 1590 kc/s in New Richmond.[123] It is similarly obvious that Abramson, Iwanoski, and Swanson were persuaded to serve as substitutes for the Tedescos during the period when the latter could not reveal themselves as the real parties in interest in the New Richmond proposal.[124] From the foregoing conclusions, there follows the further conclusion that it was the Tedescos' intention—at the time they organized Radio St. Croix—to ultimately dispose of WISK, thereby eliminating the overlap problem which precluded the simultaneous ownership of WISK, and the proposed New Richmond station. Since this intention arose at the time when the Tedescos were seeking from the Commission a frequency change and other substantial improvements for WISK, a clear situation of trafficking is presented. Standing with the other instances of trafficking set forth above, or standing alone, a disqualification of Tedesco, Inc., in the instant proceeding is clearly called for.

Other stations

76. The Board does not propose to probe in detail the remaining Tedesco transactions, since (*a*) additional conclusions of trafficking would be cumulative, and (*b*) conclusions of no trafficking would not affect the decisional significance of the Tedescos' actions with respect to KFNF, KBLO, and WISK–WIXK, which, by themselves, establish a clear pattern of trafficking in the 1956–61 period. In part, contentions by Edina, Swanco, and the Broadcast Bureau that the

[122] In their reconsideration request of Aug. 31, 1961 (see par. 42, supra), the Tedescos represented that WIXK "lost in excess of $14,000 since it went on the air in October of 1960." (KIOA exhibit 2, p. 19.) This is in contrast to Victor's testimony at tr. 1973 that: "New Richmond was a very profitable little station." Moreover, when the Tedescos sold their WIXK holdings in August 1962 (to avoid an overlap situation with respect to their instant application), they sold them at a substantial profit. See I.D., pars. 101–102.

[123] The similarities between the brothers' frequency manipulations in the St. Paul area and those they contemplated with respect to KFNF and KBLO cannot be overlooked.

[124] During the course of the hearing, Victor called Swanson and Iwanoski, advising them that they had no obligation to talk to counsel for any of the parties in the proceeding with respect to their participation in the New Richmond venture or with respect to their relationship with the brothers (tr. 1884). (From Victor's testimony at tr. 1881, it is apparent that Mr. Abramson is deceased.)

Tedescos have engaged in trafficking throughout their broadcasting careers are based on "the multiplicity of the transactions." For example, among other conclusions proposed by the Broadcast Bureau were the following:

> 28. During 14 years in broadcasting, and trading under 19 different legal names, Nicholas and Victor Tedesco have consummated 16 transactions involving broadcast authorizations—an average of more than 1 completed transaction per year. They have unsuccessfully attempted to sell broadcast authorizations twice and they have tried unsuccessfully to purchase such authorizations on four other occasions. Stated simply, they have attempted to buy, sell, trade, or barter in broadcast authorizations 22 times in 14 years—an average of more than 1.5 transactions per year.
>
> * * * * * * *
>
> 30. The Tedescos have applied for nine CP's during the 14-year span—an average of about one every 18 months. Seven of these CP's were granted. The Tedescos have disposed of every interest in the stations represented by those seven construction permits. In other words, today they hold no interest in any station represented by those seven original construction permits.
>
> * * * * * * *
>
> 32. Nicholas and Victor Tedesco have profited substantially from their buying, selling, and trading in broadcast authorizations * * *. On September 1, 1948, and May 10, 1949, Nicholas and Victor showed a net worth of $14,577 and $8,870, respectively. In the fall of 1960 (after they had sold their interest in station WISK, St. Paul; their interest in WCOW, Sparta, Wis.; their interest in KWEB, Rochester, Minn.; and their remaining 40 percent in KCUE, Red Wing, Minn., their joint net worth exceeded $1 million. Even after Tedesco, Inc., was formed (with its attendant construction and operating costs), and after the Hot Springs sale fell through, supra, the Tedescos showed a combined net worth of over $600,000 as of April 1, 1962.

It was the examiner's view that to conclude trafficking "on the basis of the multiplicity of the transactions, each of which was approved by the Commission at the time, would be to engage in a mere numbers game." (I.D., par. 167.) However, that there is something more to the Tedesco statistics than "a mere numbers game" is illustrated by the transactions considered in detail above, and by the misrepresentations rampant in virtually all phases of the Tedescos' testimony and documentary submissions—and not just with respect to the KBLO transaction, where the examiner himself found Tedesco misrepresentations and other misconduct to a degree warranting a denial of the Tedesco, Inc., application on character grounds. Had a more extensive treatment been accorded the whole of the WISK transaction and the testimony concerning it, a closer scrutiny of the other Tedesco transactions undoubtedly would have followed. Such a scrutiny would have revealed, for example, the inconsistencies in the representations as to WIXK's financial situation (see note 122, supra), and the changing representations as to the reasons for the sale of WKLK (Cloquet, Minn.).[125] Irrespective of the foregoing, however, and for the reasons

[125] At p. 9 of its petition for reconsideration of Aug. 31, 1961 (KIOA exhibit 2), it was stated, in part, as follows: " * * * WKLK was operating under a deficit * * *. This, coupled with the fact that Mr. Albert Tedesco was then a naval reservist and was faced with the possibility of being called into service during the Korean war, caused additional uncertainties in this venture * * *." Victor clung to this representation at tr. 1646: "Also, the Korean war came about, and my brother Albert, the general manager of the station, was a naval reservist and subject to call. If I remember correctly, I think he

stated in the first sentence of this paragraph, the Board will not resolve the question of whether any of the other Tedesco transactions present a trafficking situation, but will assume, arguendo, that they do not.

The Tedescos' admission

77. In a large respect, the trafficking conclusions reached above are themselves cumulative, in that the Tedescos have admitted that their participation in the broadcast business has been to "speculate, barter, or trade in licenses." (See par. 45, supra.) Thus, the newspaper article referred to at note 32, supra—which article was reprinted by Victor, distributed along with a prospectus concerning Tedesco, Inc., and verified as to its essential accuracy by Victor—after reporting that the brothers "had just sold their St. Paul radio station, WISK, for $750,000 cash to the Crowell-Collier Publishing Co.," and had "within 10 years * * * parlayed $8,500 into three-quarters of a million plus some neat profits on other radio station sales," further reported (in part) as follows:

> The Tedesco "magic" formula is simple: Buy, plow profits into the station, sell, buy another. Their enterprises have included, at one time, WKLJ in Sparta, Wis.; KDUZ in Hutchinson (now run by their brother, Al, who no longer is associated with the corporation); KCUE, in Red Wing, which they still own, and KWEB in Rochester.

The article is in the record as Tedesco exhibit 10–GG; Victor was quizzed concerning the article at tr. 1816–17, the transcript reading, in pertinent part, as follows:

> Q. * * * Now, did Mr. Hieberth obtain the information for this statement from you?
>
> * * * * * * *
>
> The WITNESS. He did obtain the information from me. However, it was his words, the "magic formula." I did not say that. Of course, I can not deny that I have bought radio stations and I have built radio stations, have sold radio stations, but the most significant thing here is that I plowed the profit back into the radio.
>
> Q. Your quarrel, if you have any, with that statement, is with the use of the expression "magic formula"?
>
> A. I didn't—I didn't like that phrase, but the story was written, I didn't have a chance to see it.
>
> Q. But the remainder of that sentence, of which that is a part, is acceptable or correct?
>
> A. I bought radio stations, I sold them, and I plowed money into stations. It must be correct. That is what we did.[128]

In light of the above and other corroborative testimony by Victor (tr. 1955–60), the examiner's holding (I.D., par. 108, note 20) that "The hearsay nature of the newspaper column deprives it, of course, of evidentiary value for the purpose of proving the facts stated therein" cannot be sustained.

---

was called and, subsequently, he got the deferment." Similarly, Nicholas, at tr. 2703, in answer to a question concerning Albert's military status, stated: "Yes, that's true. In fact, he was—I believe he was notified, and then we wrote, we wrote to see if we could get an extension." However, at tr. 3082, Nicholas withdrew as a reason for the sale of WKLK "Al's status at the time of the Korean war," declaring that the petition for reconsideration was incorrect in that respect, and asserting that the Tedescos were concerned over such status at the time Albert was manager of WCOW, South St. Paul. (See, in the foregoing connection, tr. 2703–05.) It is interesting to note, however, that concern over Al's status did not cause WCOW to be put up for sale.

[128] As is evident above, the Tedescos did not "plow" all their profits back into radio.

In sum

78. Under the trafficking issue herein, the Board's conclusions are (*a*) that Nicholas and Victor J. Tedesco trafficked in a broadcast authorization in connection with KFNF, Shenandoah, Iowa; (*b*) that Tedesco, Inc., and Nicholas and Victor J. Tedesco similarly trafficked in connection with KBLO, Hot Springs, Ark.; and (*c*) that Nicholas and Victor J. Tedesco committed still another act of trafficking in connection with WISK, St. Paul, Minn., the transgression also infecting their transactions with respect to WIXK, New Richmond, Wis. Any one of the trafficking acts is sufficient, in the Board's view, to warrant disqualification of Tedesco, Inc., in the instant proceeding. When they are viewed together, a holding short of disqualification could be justified only upon an unreasonable holding that the Commission's original specification of trafficking issues against the above persons was entirely without purpose. And when they are viewed alongside the web of Tedesco and Tedesco, Inc., misrepresentations woven through the whole of the evidence under the trafficking issue, the case for disqualification of Tedesco, Inc., becomes compelling beyond question.[127]

V. Summation and Order

79. It has been concluded that Edina Corp.'s failure to sustain its burden of proof under issue 13 (the site availability issue) dictates a denial of its application, and a denial as well of its petition for leave to amend of April 20, 1965. With respect to Tedesco, Inc., it has been concluded (*a*) (under issues 14, 15, and 16) that Tedesco, Inc., violated section 310(b) of the Communications Act in prematurely assuming control of KBLO, Hot Springs, Ark.; that the violation warrants a denial of Tedesco, Inc.'s application; and that associated misrepresentations presented in sworn pleadings and testimony of corporate officials of Tedesco, Inc., further preclude a conclusion of requisite qualifications on the part of that applicant; and (*b*) (under issue 17) that Tedesco, Inc., and Nicholas and Victor J. Tedesco have committed trafficking acts to a degree requiring Tedesco, Inc.'s disqualification herein; and that associated misrepresentations by the named persons further preclude a conclusion of requisite qualifications on the part of that applicant.

Accordingly, *it is ordered*, This 17th day of June 1966, (*a*) that the petition for leave to amend, filed by Edina Corp. on April 20, 1965, *Is denied:* (*b*) that the application of Edina Corp., for a construction permit for a new standard broadcast station, to operate on the frequency 1080 kc/s at Edina, Minn. (BP–14018), *Is denied;* and (*c*) that the application of Tedesco, Inc., for a construction permit for a new standard broadcast station, to operate on the frequency 1080 kc/s at Bloomington, Minn. (BP–15272), *Is denied.*

HORACE E. SLONE, *Member.*

[127] Such of the examiner's findings of fact at pars. 74–110 of the initial decision as are not inconsistent with the findings set forth herein and in the appendix may be regarded as adopted. However, his conclusions under the trafficking issue, set forth at pars. 160–173 of the initial decision, are deleted.

APPENDIX

Rulings on Exceptions to Initial Decision

Exceptions of Edina Corp.

Exception No.	*Ruling*
1–20, 107–133	Denied as moot in view of the denial of the two applications on other grounds. See decision, note 2 (par. 2).
21	Denied in substance; whatever the geographical location and physical characteristics of the proposed transmitter site, the significant fact is that the local authorities had zoned it as residential district.
22, 24	Denied in substance; whatever the experience and optimism of Edina Corp.'s zoning attorney and his law firm, the significant fact is that his attempts to secure rulings favorable to Edina Corp. were uniformly rejected.
23	Denied; the requested findings are either already made or are inferable from the balance of the findings in the paragraph complained of.
25, 87, 40, 92, 96	Denied as immaterial, cumulative, or lacking in decisional significance.
26	Denied in substance; that Tedesco, Inc., or others played an active role in getting the zoning matter scheduled by the city council does not alter Edina Corp.'s position before the Commission.
27	Denied in substance; see ruling on previous exception. See, also, decision, note 14 (par. 5).
28	Denied in substance; it is clear from a reading of the minutes of the council meeting (Edina Corp. exhibit 11–A) that a majority of the council regarded the conditional-use request as not before it.
29	Denied; the examiner has fairly summarized the evidence. And see ruling on previous exception, as well as decision, note 13 (par. 5).
30, 31	Denied in substance; inherent in the sentence complained of is a finding that the action "could go either way." However, Edina Corp's burden was to show reasonable assurance of site availability, not merely a possibility.
32, 34	Denied in substance; see decision, notes 13 and 14 (par. 5).
33	Denied: the findings complained of are supported by the record.
35	Denied in substance; see decision, pars. 9–11.
36	Granted in part, as reflected in the decision, par. 25. As to the balance of the exception, see ruling on Edina Corp.'s exceptions 43 et al.
38	Denied in substance, since the Tedescos undoubtedly learned of the Central Airlines matter from Morris. However, it is clear that Nicholas encouraged the renegotiation; and the use of the arrangement by Tedesco, Inc., officials and employees prior to approval of the transfer constituted an act of ownership.
39	Granted in substance, as reflected in the decision, pars. 30 and 62 (including notes 51 and 101).
41	Denied, in that the findings requested are inherent in the findings made by the examiner.
42, 51	Denied; the examiner has adequately summarized the significant facts of record.
43, 45, 46, 48, 89, 90, 93–95, 99, 103, 137, 138.	Denied; findings or conclusions of additional misstatements, misrepresentations, or misconduct by the Tedescos, Krawetz, or Tedesco, Inc., would be cumulative.

RULINGS ON EXCEPTIONS TO INITIAL DECISION—Continued

Exceptions of Edina Corp.—Continued

Exception No.	*Ruling*
44	Granted; in par. 58 of the initial decision, change "Arkadelphia" to "Arkansas."
47	Granted; the examiner's findings at pars. 63–65 of the initial decision are supplemented at pars. 21 and 31 and note 47 (par. 22) of the decision.
49	Granted; in the first sentence of par. 65 of the initial decision, change "Trustee" to "Referee."
50	Granted in substance, as reflected in the decision, par. 20.
52, 53, 140	Granted in part and denied in part, as reflected in the decision, pars. 22 and 35.
54–56	Granted in substance, as reflected in the decision, note 52 (par. 31).
57	Granted in substance, in that the decision sets forth a more complete background with respect to the addition of the trafficking issue to the proceeding.
58–62, 64–68, 72, 76–80	Denied, in that the Board has assumed, arguendo, that the Tedesco transactions other than those related to KFNF, KBLO, and WISK–WIXK do not present trafficking situations. See, also, ruling on Edina Corp. exceptions 43 et al. However, some of the additional background data called for by these exceptions are included in the decision.
63	Granted to the extent indicated in the decision, par. 76, including note 125 (Albert's military status). As to the balance of the exception, see previous ruling.
69	Granted in part and denied in part, as reflected in the decision, pars. 63, 71, and 72.
70, 71	Granted, in that the first two sentences of par. 91 of the initial decision are deleted; see, in this connection, decision, par. 67.
73	Granted in substance, as reflected in the decision, par. 67 (including note 115).
74	Granted in part and denied in part, as reflected in the decision, par. 65.
75	Granted in part and denied in part, as reflected in the decision, note 58 (par. 37).
81–85	Granted in part and denied in part, as reflected in the decision, pars. 70–75.
86–88	Granted in substance, as reflected in the decision, pars. 50–51 and 54.
91	Granted in substance, as reflected in the decision, pars. 15 and 16.
97	Granted, as reflected in the decision, par. 77.
98	Granted, as reflected in the decision, note 32 (par. 16) and par. 77.
100	Granted, and par. 108 is corrected to show that the Tedesco, Inc., response of June 10, 1961, was signed, not by counsel for Tedesco, Inc., but by Victor (for himself) and Nicholas (for himself and as president of the corporation).
101	Granted to the extent indicated in the decision, pars. 15, 50, and 60.
102	Granted to the extent indicated in the decision, par. 67.
104	Granted to the extent indicated in the decision, pars. 41–42.
105	Granted; in this sixth sentence of par. 110 of the initial decision, change "April 18, 1961" to "June 15, 1961."
106	Granted to the extent indicated in the decision, note 116 (par. 67).

RULINGS ON EXCEPTIONS TO INITIAL DECISION—Continued

Exceptions of Edina Corp.—Continued

Exception No.	*Ruling*
134	Denied in substance; the significant fact is that neither a request for "rezoning" nor one for "a variance from prescribed zoning" would be successful. See decision, par. 5.
135, 136	Denied in substance for the reasons stated in the appropriate paragraphs of the decision and in the rulings on this applicant's exceptions to the findings of fact under the site availability issue.
139	Granted in substance, as reflected in the decision, pars. 31–32.
141	Granted in substance; pars. 45–48 set forth a more complete statement as to the Commission's concern with trafficking. See, also, decision, note 127 (par. 78).
142, 143	Granted in substance as to the examiner's conclusions involving WISK and WIXK for reasons stated in the decision, pars. 63–75. Denied in substance as to the remainder; see decision, par. 76. See, also, ruling on Edina Corp. exception 58; and see decision, note 127 (par. 78).
144–147	Granted in substance. Issue No. 17 is directed to the question of whether "Tedesco, Inc., or its principals, Nicholas and Victor J. Tedesco, *have* trafficked or attempted to traffic in broadcast authorizations" (emphasis added), and not whether they *would in the future*. Two other points may be made: (*a*) Although there has been no attempt to conceal the "up-marketing" plan, this record is replete with attempts to conceal trafficking and other improper activities; and (*b*) the Tedescos' sale of a station (WISK) in the major market of St. Paul and their subsequent purchases in smaller markets, such as Hot Springs and Shenandoah, are completely inconsistent with the announced "up-marketing" plan. Pars. 170–172 of the initial decision are among those deleted by the Board. See decision, note 127 (par. 78).
148, 150	Granted in part and denied in part, as reflected in pars. 37–78 of the decision.
149	Denied as to issues Nos. 2 and 8; see ruling on Edina Corp. exceptions 1 et al. Denied as to issue No. 13; see ruling on Edina Corp. exceptions 135 et al.
151, 152	Denied for the reasons set forth in the decision, pars. 4–8.

Rulings on Exceptions of Tedesco, Inc.

1–3, 42, 43, 59	Denied as moot in view of the denial of the two applications on other grounds. See decision, note 2 (par. 2).
4	Denied. Such of the requested findings as are not already contained in the initial decision, pars. 33 and 34, would contribute nothing of substance to the decision.
5	Denied in substance; even if Morris stated that he would like to move out of the existing studios, the fact remains that he made no effort to do so prior to the purchase of the station by Tedesco, Inc.
6	Denied. Actually, the finding as made by the examiner views the whole of the pertinent evidence in the light most favorable to Tedesco, Inc. See decision, par. 25, including note 48. As to Tedesco, Inc.'s knowledge that it would be responsible for losses, see decision, note 49 (par. 30).

RULINGS ON EXCEPTIONS TO INITIAL DECISION—Continued

Rulings on Exceptions of Tedesco, Inc.—Continued

Exception No.	*Ruling*
7	Denied; the finding complained of finds record support in Tedesco, Inc., exhibits 10–E and 10–G (Nicholas' letters of November 23, 1960, and December 27, 1960).
8	Granted, and the fifth sentence of par. 39 of the initial decision is deleted.
9, 18	Denied; the matter of the station's losses after the station's purchase by Tedesco, Inc., underscores Tedesco, Inc.'s lack of good faith in handling the assignment application.
10, 11, 16	Denied in substance; whether or not some or all of the subjects were prospective in nature, the significant fact is that, in major respects, the Tedescos were issuing the orders and Morris was carrying them out. See decision, par. 30.
12	Denied in substance; the significant fact is that Nicholas was issuing orders prior to Commission approval of the transfer.
13	Granted; for want of materiality, note 9 (par. 46) of the initial decision is deleted.
14	Denied in substance; see decision, pars. 26–29.
15	Denied in substance; notwithstanding that Johnson "became cooperative and followed Morris' instructions," the significant fact is that Nicholas was issuing orders in major respects.
17	Denied in substance. As to the first part of the exception, the fact that Morris continued to perform a number of management functions is not inconsistent with the holding that "effective control over the station had passed into Tedesco hands"; see decision, par. 30. As to the second part, the optimistic tone of Morris' letter is not inconsistent with the finding that the Tedesco order moving Johnson to Des Moines "created a problem for Morris."
19	Denied; the substance of the finding requested was made by the examiner in the paragraph complained of.
20	Denied; that Morris became aware upon the receipt of the letter of January 20, 1961, that the application had not been filed, is not inconsistent with the fact that he was under the impression, prior to that time (and again, within a reasonable time thereafter), that it had been filed.
21	Denied in substance; Krawetz' lack of credibility is well established on the record, and the testimony relied upon in the exception is completely unworthy of belief.
22	Denied; the examiner correctly interpreted the Board's order.
23	Denied in substance; in view of Morris' impression that "Nick thought I would sign it as soon as I talked to my lawyer" (tr. 2947), it is clear that he understood the gift offer to relate to his signing of the affidavit. Moreover, he did talk to his lawyer, and that this did not fully satisfy Nicholas' condition precedent is evident from the fact that the record does not show that Nicholas followed through with the promised gift.
24–26, 30	Denied, in that the Board has assumed, arguendo, that the Tedesco transactions other than those related to KFNF, KBLO, and WISK–WIXK do not present trafficking situations.
27, 31, 40	Denied; all of the Tedesco brothers' broadcasting transactions are within the scope of the trafficking issue.

RULINGS ON EXCEPTIONS TO INITIAL DECISION—Continued

Rulings on Exceptions of Tedesco, Inc.—Continued

Exception No.	*Ruling*
28	Granted in substance; in the last sentence of par. 85 of the initial decision, insert "to Nicholas" following "stock interest."
29	Denied; the finding contended for is made in par. 92 of the initial decision.
32	Granted, and note 16 (par. 100) of the initial decision is deleted.
33	Granted; the last sentence of par. 101 of the initial decision is revised to read as follows: "A total of $10,000 was paid by the Tedescos for this stock, and each later acquired an additional 125 shares at $5 per share."
34	Granted in substance; in the third sentence of par. 102 of the initial decision, change "somewhat less than $3,500" to "$2,750."
35	Denied; the finding is relevant. See decision, note 98 (par. 55).
36	Denied in substance; however, the Board disagrees with so much of the last sentence of the paragraph (par. 106 of the initial decision) as suggests that the intention to move the station was a qualified one.
37, 41	Denied as immaterial.
38, 39	Denied; see decision, note 32 (par. 16) and par. 77.
44	Denied, as reflected in the decision, par. 24.
45	Denied, as reflected in the decision, par. 25.
46	Denied, as reflected in the decision, pars, 26–29.
47	Denied, as reflected in the decision, par. 30.
48	Denied, as reflected in the decision, par. 32.
49	Denied, as reflected in the decision, pars. 24 and 30–32.
50	Denied, as reflected in the decision, pars. 31–35; see, particularly, counsel's admissions set forth in par. 33.
51	Denied, as reflected in the decision, note 52 (par. 31).
52	Denied, as reflected in the decision, par. 31.
53	Denied, as reflected in the decision, par. 36.
54	Denied, as reflected in the decision, note 82 (par. 46).
55	Granted to the extent that all of the examiner's conclusions as to the trafficking issue have been deleted; see decision, note 127 (par. 78). As to the conclusions complained of in the exception, however, the Board is in substantial accord.
56, 58	Granted to the extent that all of the examiner's conclusions as to the trafficking issue have been deleted; see decision, note 127 (par. 78). The Board agrees, however, that the KFNF transaction constituted trafficking; see decision, pars. 49–59.
57	Granted to the extent that all of the examiner's conclusions as to the trafficking issue have been deleted; see decision, note 127 (par. 78). See, however, ruling on Edina Corp.'s exceptions 144 et al.
60, 61	Denied for the reasons set forth in the decision, pars. 14–79.

Rulings on Exceptions of Swanco Broadcasting, Inc. of Iowa (KIOA)

1, 7, 8, 10, 11, 14, 52, 58	Denied; findings or conclusions of additional misstatements, misrepresentations, or misconduct by the Tedescos, Krawetz, Johnson, or Tedesco, Inc., would be cumulative.
2, 6, 9	Denied; the examiner has adequately reported the significant facts of record.
3, 44	Denied as immaterial, cumulative, or lacking in decisional significance.

RULINGS ON EXCEPTIONS TO INITIAL DECISION—Continued

Rulings on Exceptions of Swanco Broadcasting, Inc. of Iowa (KIOA)—Continued

Exception No.	*Ruling*
4	Denied; the requested findings appear in par. 38 of the initial decision.
5	Granted in substance, as reflected in the decision, par. 28.
12, 54	Granted in substance, as reflected in the decision, par. 22.
13	Granted in substance, as reflected in the decision, note 52 (par. 31).
15–18, 20–26, 30–36, 56–59, 61, 63.	Denied; see ruling on Edina Corp. exceptions 58 et al.
19	Granted in part and denied in part; see ruling on Edina Corp. exception 63.
27	Granted, in that the first two sentences of par. 91 of the initial decision are deleted; see, in this connection, decision, par. 67.
28, 29, 60	Granted in part and denied in part, as reflected in the decision, pars. 64–69.
37–43, 62	Granted in part and denied in part, as reflected in the decision, pars. 70–75.
45, 46	Granted in substance, as reflected in the decision, par. 51.
47, 49	Granted in substance, as reflected in the decision, pars. 56–58.
48, 64	Granted in substance, as reflected in the decision, pars. 52–53.
50	Granted in substance, as reflected in the decision, pars. 54–56.
51	Granted in substance, as reflected in the decision, note 32 (par. 16) and par. 77.
55	Granted in substance, as reflected in the decision, note 82 (par. 46).
65	Granted in substance, as reflected in the decision, pars. 51–59.
66, 67	Granted in substance; see Edina Corp. exceptions 144 et al.
68	Granted, in that par. 173 of the initial decision has been deleted; see decision, note 127 (par. 78).

Rulings on Exceptions of the Broadcast Bureau

1	Granted to the extent that the respective proposals are summarized in par. 1 of the decision.
2–6, 37, 38	Denied as moot in view of the denial of the two applications on other grounds. See decision, note 2 (par. 2).
7	Granted; in the third sentence of par. 32 of the initial decision, change "sole" to "sold."
8	Granted; in par. 58 of the initial decision, change "Arkadelphia" to "Arkansas."
9	Denied, in that the significant statistics involved can be determined from the findings made. See, however, decision, par. 76, where a number of the statistics urged by the Bureau are set forth.
10–14, 18, 20–22, 24, 27, 29.	Denied; see ruling on Edina Corp. exceptions 58 et al.
15	Granted to the following extent: Par. 83 of the initial decision is supplemented to show that (*a*) whereas the original application was submitted on February 28, 1950, it was returned by the Commission on March 10, 1950, as incomplete, and resubmitted by the applicant on March 20, 1950; and (*b*) the amendment specifying 5 kw was filed on October 20, 1950.

RULINGS ON EXCEPTIONS TO INITIAL DECISION—Continued

Rulings on Exceptions of the Broadcast Bureau—Continued

Exception No.	*Ruling*
16	Granted; in the fifth sentence of par. 84 of the initial decision, change "WKJL" to "WKLJ."
17	Granted; in the sixth sentence of par. 84 of the initial decision, change "sole" to "sold."
19	Granted; in the last sentence of par. 85 of the initial decision, insert "to Nicholas" following "stock interest."
23	Granted to the extent reflected in decision, pars. 63, 71, and 72.
25	Granted to the extent that the first two sentences of par. 91 of the initial decision are deleted; see, in this connection, decision, par. 67.
26	Granted in part and denied in part, as reflected in the decision, pars. 63–67.
28	Granted; in the first sentence of par. 96 of the initial decision, change "May 20, 1957" to "May 29, 1957."
30	Granted in substance, and note 16 (par. 100) of the initial decision is deleted; see decision, par. 75.
31	Granted in part and denied in part, as reflected in the decision, pars. 70–75.
32	Granted in substance, as reflected in the decision, pars. 50–59.
33	Denied as lacking in decisional significance.
34	Granted in part and denied in part, as reflected in the decision, pars. 40–44.
35	Granted in substance, as reflected in the decision, note 32 (par. 16) and par. 77.
36	Denied. The exception is essentially repetitious of pars. 89–111 of the Broadcast Bureau's proposed findings, and is inconsistent with the procedural requirements of section 1.277(a) of the Commission's rules. Compare *Biscayne Telcvision Corp.*, 11 R.R. 1113, 1118–19 (1956), and case cited.
39	Granted in substance; see ruling on Edina Corp. exception 141.
40, 42	Granted to the extent that all of the examiner's conclusions under the trafficking issue have been deleted; see note 127 (par. 78) of the decision. As to the conclusions contended for by the Broadcast Bureau, however, see decision, par. 76.
41	Granted to the extent that all of the examiner's conclusions under the trafficking issue have been deleted. Additionally, see decision, par. 77.
43	Granted in substance, as reflected in the decision, par. 16 (including note 32).
44	Granted in substance, as reflected in the decision, pars. 60 and 77.
45, 46	Granted in substance; see ruling on Edina Corp. exceptions 144 et al. See, also, decision, pars. 45–46 and 67.
47, 48	Denied to the extent that the exceptions call for denials of the applications on issues other than those considered by the Board. See ruling on Broadcast Bureau exceptions 2 et al.

STATEMENT OF BOARD MEMBER JOSEPH N. NELSON

Edina's request for leave to amend its application should be granted since it comes squarely within the provisions of section 1.570(c). There is nothing in the rule to support the majority's holding that

"unless we can conclude that Edina has established its technical qualifications on the basis of the present record, the amendment should not be allowed." Although I am sympathetic to the majority's interpretation, I am unable to read into the rule language which results in an exception to the rule. The "meaning" of a Commission rule "should not be extended beyond its fair reading." *Jefferson Amusement Co., Inc.* v. *FCC*, 96 U.S. App. D.C. 375, 226 F. 2d 277, 12 R.R. 2078 (1955).

The majority has found that the corporate applicant (Tedesco, Inc.) has committed trafficking acts to a degree requiring its disqualification. The acts were those of Nicholas and Victor J. Tedesco, whose holdings in the corporate applicant total 28.6 percent of its stock. The balance of the stock totaling 71.4 percent, is held by approximately 500 stockholders; there are 5 additional directors besides Nicholas and Victor J. Tedesco. It appears, therefore, that control of the corporate applicant can be exercised by stockholders other than the Tedescos.

The corporate applicant was organized in the fall of 1960; it filed its instant application for Bloomington in December 1961. Almost all of the stations with respect to which the Tedescos are charged directly or inferentially with trafficking were acquired by them prior to the above dates, during the period commencing in 1948, and their sales were approved by the Commission. Assuming that the Tedescos' operations constituted a pattern of trafficking, should their noncontrolling, minority stock interest of 28.6 percent be permitted to taint the corporate applicant to the degree of total disqualification? I do not think so.

Assuming that the corporate applicant is so tainted, the question is also presented as to whether the corporate applicant can be disqualified without relating the alleged trafficking pattern to its instant application for Bloomington. The majority states in the decision that "any contention that Tedesco, Inc., can be denied on trafficking grounds only upon a conclusion of trafficking intent with respect to the instant proposal cannot be sustained." I would think that a conclusion that the corporate application for Bloomington, filed in 1961, should be denied on the basis of prior minority stockholder actions with respect to other stations requires a connecting bridge or two. In the circumstances of this case, I would say that insofar as the corporate applicant is concerned, the acts chargeable to it should be considered malum prohibitum and not malum in se.

As to the so-called pattern of trafficking, the majority has chosen WISK (formerly WCOW) as an outstanding example. I shall not attempt to deal with the various ex post facto nuances reflected in the decision; there are positive factors of more pertinent note. Nicholas and Victor (together with their father and brother) applied for a construction permit for WCOW, South St. Paul, in February 1950, received a grant on 1590 kc in December 1950, and were on the air in August 1951. Subsequently, Nicholas and Victor acquired sole ownership and, in 1956, obtained Commission consent to change station location to St. Paul on 630 kc. In September 1958, WISK was authorized to operate with increased facilities; in January 1959, it was granted program test authority; and in May 1959 it received its license for its increased facilities. The application to assign said license was filed on June 22, 1959. Despite this 8-year record of con-

struction, operation, and improvement of facilities, the majority has concluded that trafficking has taken place with respect to WISK. I cannot so conclude. Cf. section 1.597 (b) (1) of the Commission's rules.

Finally, I am of the view that there is substantial evidence to support the majority's conclusion that the Tedescos engaged in misrepresentations to the Commission with respect to station KBLO, Hot Springs, Ark.; that they acted as officers, directors, and stockholders of the corporate applicant herein; and that said corporation is chargeable with their actions and the consequences thereof. Accordingly, I concur in the decision only with respect to said conclusion.

FCC 64D-47

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
EDINA CORP., EDINA, MINN.	Docket No. 14739 File No. BP-14018
TEDESCO, INC., BLOOMINGTON, MINN.	Docket No. 14740
For Construction Permits	File No. BP-15272

APPEARANCES

Fred H. Walton, Jr., *William J. Dempsey*, *William C. Koplovitz*, and *Milton D. Price, Jr.* (Dempsey and Koplovitz), on behalf of Edina Corp.; *Vincent A. Pepper* and *Thomas W. Fletcher* (Smith and Pepper), on behalf of Tedesco, Inc.; *Bernard Koteen* and *Rainer K. Kraus* (Koteen and Burt), on behalf of Swanco Broadcasting, Inc., of Iowa (KIOA); *George O. Sutton*, on behalf of People's Broadcasting Co. (WPBC); and *John B. Letterman*, *Earl C. Walck*, and *Walter C. Miller*, on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER CHESTER F. NAUMOWICZ, JR.

(Adopted August 4, 1964)

PRELIMINARY STATEMENT

1. By order released July 31, 1962, the Commission designated the above-captioned mutually exclusive applications for hearing. The order of designation and subsequent orders specified the following issues: [1]

1. To determine the areas and populations which would receive primary service from the proposed operations of Edina Corp. and Tedesco, Inc., and the availability of other primary service to such areas and populations;
2. To determine whether a portion of the city sought to be served by the proposal of Edina Corp. is in an area of maximum signal suppression, and, if so, whether the proposed directional antenna system represents good engineering practice, especially in light of the normally expected wide variations in signal strength occurring in null areas of directional pattern;
3. To determine whether, for the purposes of section 73.28(d)(3), Bloomington, Minn., and Edina, Minn., are separate communities;
4. To determine, in the event it is concluded pursuant to issue No. 3, that Bloomington, Minn., and Edina, Minn., are not separate communities as contemplated by section 73.28(d)(3) of the Commission's rules, whether the interference received by each instant proposal from any of the proposals herein and any existing stations would affect more than 10 percent of the population within its normally protected primary service area in contravention of section 73.28(d)(3) of the Commission's rules, and, if so, whether circumstances exist which would warrant a waiver of said section;
5. To determine whether a grant of the instant proposal of Edina Corp.

[1] In the text of this initial decision, the issues have been renumbered for reference convenience.

would be in contravention of the provisions of section 73.35(a) of the Commission's rules with respect to multiple ownership of standard broadcast stations;

6. To determine, in light of the joint interests of J. C. Hunter and R. K. Power in station WCMP, Pine City, Minn., and their separate respective interests in Edina Corp. and station WAVN, Stillwater, Minn., and the overlap which would exist between Edina's proposal and station WAVN's operation, whether a grant of the instant proposal of Edina Corp. would tend to diminish open, arm's-length competition between Edina Corp. and station WAVN;

7. To determine whether there is a reasonable possibility that the tower height and location proposed by Edina Corp. would constitute a menace to air navigation;

8. To determine whether the instant proposal of Edina Corp. would provide coverage of the city sought to be served, as required by section 73.188 of the Commission rules, and, if not, whether circumstances exist which would warrant a waiver of said section;

9. To determine whether the transmitter site proposed by Tedesco, 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 pattern;

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

11. To determine, in the event it is concluded that a choice between the instant 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 in the light of the evidence adduced pursuant to the foregoing issues and the record made with respect to the significant differences between the applicants as to:

(*a*) The background and experience of each having a bearing on the applicant's ability to own and operate the proposed station;

(*b*) The proposals of each of the instant applicants with respect to the management and operation of the proposed station;

(*c*) The programing service proposed in each of the instant applications;

12. To determine, in the event that Bloomington, Minn., is preferred under the section 307(b) issue, whether the proposal of Edina Corp. would (1) be in substantial compliance with section 73.188(b) of the Commission's rules with respect to Bloomington, and (2) to comply with section 73.30 of the Commission's rules with respect to Bloomington, and, if not, whether circumstances exist which would warrant waiver of section 73.30 of the Commission's rules;

13. To determine whether Edina Corp. has a reasonable expectancy of obtaining permission from the appropriate authorities for the construction of the proposed directional antenna system at the site specified in its application;

14. To determine all the facts and circumstances surrounding the application by Tedesco, Inc., for assignment of license of station KBLO, Hot Springs, Ark. (BAL-4186), and appeals and pleadings related thereto;

15. To determine, in light of the evidence adduced pursuant to the foregoing issue (issue 14), whether Tedesco, Inc., has violated section 310(b) of the Communications Act of 1934, as amended;

16. To determine, with particular reference to the evidence adduced pursuant to the foregoing issues (14 and 15), whether Tedesco, Inc., possesses the requisite character qualifications to be a licensee of the Commission;

17. To determine whether Tedesco, Inc., or its principals, Nicholas and Victor J. Tedesco, have trafficked or attempted to traffic in broadcast authorizations; and

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

2. The applicants published notice of the hearing and notified the Commission thereof pursuant to 47 USC 311 and 47 CFR 1.594. Prehearing or hearing conferences were held on September 21, October 29, 1962, January 25, March 7, and on October 11, 1963; hearing sessions were conducted on January 3, February 7, 8, 11, 12, and 13, March 19 and 26, May 6, 7, 8, 9, and 10, June 18, 19, 20, 21, 24, 25, 26, 27, and 28, July 12, December 9 and 16, 1963, and April 8, 1964. The record was closed on December 16, 1963; reopened on April 3, 1964; and again closed at the conclusion of hearing on April 8, 1964. Proposed findings of fact and conclusions of law were filed by respondent, Swanco Broadcasting, Inc., of Iowa (KIOA), on May 12, 1964, and by Edina Corp., Tedesco, Inc., and the Broadcast Bureau on May 22, 1964;[2] reply findings were filed by Edina Corp., Tedesco, Inc., and Swanco Broadcasting, Inc., of Iowa on June 12, 1964.

FINDINGS OF FACT

Issue No. 1

3. The predicted coverage of the proposed Edina facility is as follows:

Contour (mv/m)	Population	Area (sq. mi.)
2.0	1,335,705	1,176
0.5 (normally protected daytime)	1,448,203	4,155
2.5 (normally protected nighttime)	1,306,324	951
Interference nighttime	293,683 (22.5%)	621 (65%)
7.9 (interference-free nighttime)	1,012,642	330

During daytime operation, a minimum of 4 and a maximum of 19 existing stations would provide primary service to all rural areas within the proposed Edina primary service contour, while a minimum of 11 and a maximum of 16 existing stations would provide primary service to the urban areas. Nighttime, a minimum of three and a maximum of eight existing stations would provide primary service within Edina's proposed primary service contour. Although no standard broadcast station is now located in Edina, 14 stations provide daytime primary service to that community, and a minimum of 4 and a maximum of 6 existing stations provide primary service to any given part of Edina at night.

4. Tedesco's predicted coverage is as follows:

Contour (mv/m)	Population	Area (sq. mi.)
2.0	1,679,662	5,566
0.5 (normally protected daytime)	2,031,774	19,169
2.5 (normally protected nighttime)	1,404,051	1,091
Interference nighttime	505,723 (35%)	531 (48%)
7.9 (interference-free nighttime)	898,328	560

[2] On June 25 and 26, 1963, the applicants and the Broadcast Bureau filed proposed findings of fact directed to issues Nos. 3, 10, and 12.

A minimum of 4 and a maximum of 21 existing stations would provide primary service to all rural areas within the daytime primary service contour of Tedesco's proposed operation, while a minimum of 4 and a maximum of 16 existing stations would provide primary service to the urban areas. A minimum of two and a maximum of eight existing primary services are available nighttime to the rural areas to be served, and between three and eight such services are available to the urban areas. Bloomington itself now receives between 11 and 14 primary services daytime, and between 4 and 5 such services are available at night, although no standard broadcast station is assigned to the community at present.

Issues Nos. 2 and 8

5. The community of Edina, which is shaped roughly in the form of a square with 4-mile sides, borders on the southwest corner of Minneapolis. Edina Corp.'s transmitter site is some 1.5 miles south of Edina in the town of Bloomington. From this site the directional radiation pattern is oriented so that the maximum radiated field in the major lobe is pointed at an azimuth of 8° true in the direction of Minneapolis. Because the proposed site is immediately to the south of the southeast corner of Edina, and the pattern is oriented slightly to the east of north, a portion of the southwest corner of Edina lies in a sharp minimum of the pattern, and would not receive the signal strength prescribed by the Commission's rules. While virtually all of this underserved area consists of park property, the net result is that 0.3 percent of the city of Edina, wherein reside 11 persons (0.04 percent of Edina's population), would not be included within the 5.0-mv/m contour of the Edina Corp. proposal. At night 0.84 percent of the city's area and 18 persons (0.06 percent of the population) would not be included within the station's 7.9-mv/m (interference-free) contour. Coverage is also restricted to the areas adjacent to Edina on the south, southwest, and west. An alternative site was available approximately 1 mile to the west or northwest, from which full coverage of Edina would have been obtained, but the proposed site was preferred because it would provide a signal to a greater population within the nighttime interference-free contour; that is, better service would be provided to the metropolitan area of Minneapolis-St. Paul.

6. Edina Corp.'s proposed directional array consists of six towers in the form of a parallelogram with three towers located on the east and west sides. As heretofore noted, the major lobe is oriented in the direction of 8° true, while running in a clockwise direction there are four minor lobes and five minima in the pattern between 82° and 300° true, and a small portion of the city of Edina lies within one of these minima. The proposed antenna system is of conventionally stable design. While minor variations of directional antenna parameters may occur under operating conditions, they are not expected to produce any significant variation in the radiated fields in the vicinity of that portion of Edina located within the null of the proposed pattern.

7. All of the business and industrial areas of Edina would lie within the proposed station's 25-mv/m contour, and the proposed 5-mv/m

contour would encompass 99.7 percent of the city's area and 99.6 percent of its population. If the alternative site noted at paragraph 5, supra, had been utilized, 5-mv/m coverage would have extended to 100 percent of the city as specified in rule 73.188.

Issues Nos. 3 and 4

8. Both Edina and Bloomington are incorporated communities in Hennepin County, Minn., and both are part of the Minneapolis-St. Paul urbanized area. Edina lies to the southwest of Minneapolis, the northeast portion of Edina abutting the southwest portion of Minneapolis. Bloomington lies to the south and southeast of Edina, its eastern portion being separated from Minneapolis by Edina. Neither Edina nor Bloominton abuts on St. Paul.

9. Edina, with a 1960 population of 28,501 persons, is the ninth largest city in Minnesota. It lies approximately 8 miles from downtown Minneapolis and some 10 miles from downtown St. Paul. It is governed by the council-manager form of government, and employs its own village manager, attorney, finance director, treasurer, police chief, fire chief, and other regular municipal employees. It has its own municipal court, public works program, planning commission, schools, churches, civic, and social organizations. It also contains a substantial number of business establishments and the offices of professional practitioners. Edina has its own weekly newspaper, although no broadcast stations are assigned to the city. Edina is in a different congressional district than Minneapolis, and is represented in the Minnesota Legislature by individuals other than those who represent Minneapolis.

10. Bloomington, with a 1960 population of 50,498 persons, is the fourth largest city in Minnesota. It is approximately 9 miles from the downtown areas of both Minneapolis and St. Paul. It is governed by a mayor-council form of government with an appointed city manager, who has administrative responsibility for the city's various departments. Bloomington employs a city attorney, police chief, fire chief, planning director, finance director, and similar personnel through which it provides its citizens, as does Edina, all or substantially all of the services customary in a contemporary metropolis. It contains its own schools, churches, and civic and social organizations, as well as business and professional establishments. It has its own weekly newspaper, although no broadcast stations are assigned to Bloomington. It does not lie in the same congressional district as Minneapolis, and its representation in the State legislature is different.

11. By Memorandum opinion and order released on September 25, 1963, the hearing examiner ruled that evidence directed to issue No. 4 need not be adduced. Accordingly, no findings directed to that issue are included in this initial decision.

Issues Nos. 5 and 6

12. John C. Hunter is a 25-percent stockholder in Edina Corp., and issues Nos. 5 and 6 grew out of the fact that he was also an officer, di-

rector, and 58-percent stockholder in Pine County Broadcasting Co., licensee of station WCMP, Pine City, Minn. On June 30, 1964, the Commission granted consent for transfer of the Hunter interest in WCMP, and the transfer was effectuated on July 7, 1964, thereby rendering moot issues Nos. 5 and 6.

Issue No. 7

13. By letter dated July 31, 1962, the Federal Aviation Agency advised Edina that its proposed antenna structure would not constitute a menace to air navigation.

Issue No. 9

14. Tedesco had photographs taken on the ground in eight directions from its proposed transmitter site. These photographs disclose that there are no objects in the vicinity of the site which would tend to distort its proposed directional radiation patterns.

Issue No. 10

15. Much of the information relative to the communities which the applicants propose to serve, and which is ordinarily considered in determining an issue under 47 USC 307(b), has been recited at paragraphs 8–10, supra. The findings at paragraphs 3 and 4, supra, as to the applicants' proposed coverage are also pertinent to this issue. However, additional findings as to the nature of the areas to be served are also significant.

16. As heretofore noted, the Edina Corp. transmitter site is located to the south of Edina and oriented over Edina in the direction of Minneapolis. Only small areas to the south of the transmitter would receive primary service, whereas such service would be provided to very substantial areas lying to the north. Of the 1,377,143 persons residing in the Minneapolis-St. Paul urbanized area in 1960, 1,293,230 (94 percent) would be within Edina's 2-mv/m contour; 1,132,955 (82.3 percent) would be within the station's 5-mv/m contour; and 1,011,734 (74.6 percent) would be within the 7.9-mv/m (nighttime interference-free) contour; 10-mv/m service would be provided day and night to all of the 482,872 inhabitants of Minneapolis. Of the 313,411 residents of St. Paul, 215,400 (68.8 percent) would be within Edina's 5-mv/m contour, and 162,100 (51.8 percent) would be within the 7.9-mv/m contour.

17. The Tedesco transmitter site is located somewhat to the south of that proposed by Edina, and it also is directionalized in a generally northerly direction. Its proposed daytime operation would include 100 percent of both Minneapolis and St. Paul within the 5-mv/m contour. Nighttime, 90.5 percent of the area of Minneapolis and 53 percent of the area of St. Paul would be included within the interference-free contour.

18. Because the two transmitter sites are only some 9 miles apart, and both directional operations are oriented in the same general direction, substantial portions of the proposed service areas are common

to both applicants. Daytime, the proposed 2.0-mv/m and 0.5-mv/m of the Edina proposal would be almost entirely contained within the equivalent contours of the Tedesco proposal, with the bulk of the population to be served in common residing within the Minneapolis-St. Paul urbanized area. At night, Tedesco's interference-free contour overlaps approximately one-half of the area within Edina's interference-free contour. The commonly served area nighttime would include 90–100 percent of Minneapolis; 40 percent of St. Paul; and all or substantially all of the cities of Golden Valley, St. Louis Park, Morningside, Hopkins, Edina, Richfield, Lauderdale, and Falcon Heights, including some 725,000 persons in the aggregate.

Issue No. 12 [3]

19. The Edina proposal would place a 25-mv/m signal over 48.1 percent of the Bloomington industrial area and 81.2 percent of the Bloomington business area. However, in the opinion of Edina Corp.'s consulting engineer, the business and industrial areas, which are scattered throughout the city, are of such nature as to create low noise levels, and would be adequately served by a signal of 10 mv/m. The Edina proposal would provide a 10-mv/m signal to 86.7 percent of Bloomington's industrial area and 91 percent of its business area. The Edina 5-mv/m contour would encompass 78.2 percent of Bloomington's residential area and 90 percent of its population. The nighttime interference-free signal would cover 77.8 percent of the Bloomington population residing in 90.9 percent of the city's area.

20. Edina's main studio will be located at its transmitter, which is situated within the city limits of Bloomington.

Issue No. 13

21. The Edina transmitter site is located in a single family residential district (R–4) of the city of Bloomington. Radio towers (and necessary installations used in connection therewith) cannot be placed in such a residential district unless an applicant for such construction receives either: (1) A conditional use permit; (2) a permitted use permit; or (3) a rezoning authorization.

22. Mr. Price, of the law firm of Oliver, Gearin, Price, and Melzarek, was retained by Edina to represent it for the purpose of obtaining authorization from the city of Bloomington to construct its radio towers (and necessary installations used in connection therewith) on said property. In August of 1961, an associate of the firm made inquiries of the city with regard thereto. On the basis of information so secured, Price informed Edina that there would be no problems connected with obtaining the required authorization. However, on learning in January of 1962 that application in the form required had not been filed with the city, Mr. Price, as a result of a personal investigation, discovered that the present zoning ordinances of the

[3] Issue No. 11 is a contingent standard comparative issue, under which evidence was adduced pursuant to the hearing examiner's order released September 25, 1963. Because the determination of that issue rests, in part, upon evidence directed primarily to other issues, findings thereunder are made in a subsequent portion of this initial decision (pars. 111–134, infra) for the sake of convenience and logical arrangement.

city did not make specific provision for construction of radio towers. After consultation by Price with the city attorney and the city's building department, Edina applied for "a conditional use permit" on March 14, 1962. This procedure was followed although questions obtained as to whether or not it was the most feasible one. However, because, in Mr. Price's opinion, the proposed use was for the purpose of providing Bloomington with a broadcast service it did not have, Mr. Price believed that the city planning commission and ultimately the city council [4] would adopt the viewpoint that such a purpose was within the exception contained in the ordinance for "public utility-conditional uses." Price realized that other courses of action were available under the city's zoning ordinances, such as a petition for rezoning, but this approach was rejected on the ground that it involved securing a permanent change in the authorized use of the land as opposed to conditional use, which is effective only for the period of use and which does not affect basic zoning.

23. Hearings on Edina's "conditional use permit" application were held before the city planning commission on April 10 and May 8, 1962. At the latter hearing the planning commission, following the recommendation of the city planner, recommended unanimously that Edina's request for a "conditional use permit" be denied. This denial was, inter alia, on the ground that the proposed use "does not fit in with the overall plans of the community." In denying Edina's application for a "conditional use permit," the planning commission determined that a radio station did not constitute a "public utility" within the zoning concept of "conditional use" in a residential zone.[5]

24. Subsequent to the May 8 adverse recommendation of the planning commission, Edina requested postponement of the hearing before the city council to allow for sufficient time to prepare its case on the merits, and also because it adjudged it to be more practical to defer submission of the matter for city council determination to such time as Edina's application before the Commission had been considered and acted upon. In view of the adversary nature of the contest involving Edina and Tedesco, Mr. Price considered it inadvisable to inititate action that would require a lengthy hearing and a determination by the city council before Edina could give the council any assurances that its work and efforts might not be wasted.

25. However, as a result of a request made by Tedesco on September 19, 1962, notice was received by Edina on September 26, 1962, that a city council meeting was to be held concerning the "conditional use permit to construct radio towers and necessary buildings and installations used in connection therewith at 3349 West 90th Street" (the Edina property). Edina authorized Mr. Price to employ special coun-

[4] Section 11.07 of the city's zoning code provides that the function of the planning commission is to report to the city council; that after hearing on any specific matter it reports and recommends to the city council, which may or may not follow these recommendations; and that the city council is actually the body that makes a final determination on the specific question presented.

[5] The planning commission also held that it was without jurisdiction to approve radio tower construction as a conditional use in a residential area. In addition, the Commission stated "There are a number of land use problems of the community's plans that involve this particular property." Bloomington's city ordinances do not specifically list radio towers, as well as necessary buildings and installations used in connection therewith, as falling under "conditional use," although, a "public utility installation consisting of gas, electric, telephone, telegraph, water, and sewer" is allowed as "permitted use."

sel in the city of Bloomington to aid in the presentation of this matter. To this end, the assistance of Bailey Soukup, a practicing attorney in the city of Bloomington, was secured. In consultation with Mr. Soukup, reexamination and review of possible alternative approaches under the zoning code were made. As a result thereof, Edina prepared a petition in the nature of a request for resolution to the city council. The request sought a "permitted use" under the appropriate section of the zoning code, or in the alternative, an interpretation by the council that construction of radio towers is a "permitted use," while construction of transmitter buildings would require a "conditional use permit" under the "public utilities buildings" section of the conditional use provision of the zoning code.

26. Before this request was filed, a council meeting was scheduled for December 3, 1962, at the request of nonadjacent property owners. Because only one citizen attended as a nonadjacent property owner, the council rescheduled the hearing for December 17, 1962. At the December 3 meeting, council was informed that Edina's request for resolution would be filed during that week. On December 10, 1962, before the December 17 hearing was held, Edina withdrew its application for a "conditional use permit." Thus, after that date the city council had before it only Edina's request for resolution.

27. At the council meeting held December 17, 1962, a representative of the nonadjacent property owners was present; he called for a denial of Edina's proposed resolution. By a vote of 6 to 1 the council rejected the resolution.

28. Edina is of the opinion that the action taken by the city council must be interpreted as approving the proposed construction of transmitter buildings as a "conditional use" pursuant to the city's zoning ordinance. On this basis, Edina argues that all it has to do henceforth is to apply for a "conditional use permit" and that such a permit will be granted as a matter of course. Accordingly, Edina advances the contention that it will be successful in obtaining a "conditional use permit" for its proposed use of radio towers on its specified site.

29. However, the city attorney of Bloomington, who advises the city council on zoning matters, did not share Edina's evaluation of the council's action. He repudiated Edina's contention that the action taken by the council in its December 17 meeting constituted an acceptance of Edina's request. He testified: "As I see it, it is uncertain whether or not they may even be considered for conditional use. If they are considered for conditional use, it is uncertain as to whether or not—completely uncertain as to whether or not it would be granted."

30. Under the provisions of the city's zoning code, Edina could refile a petition for conditional use. No record evidence exists, however, that Edina has in fact submitted such a petition anew. If Edina elects to refile for a "conditional use permit," such a request would go to the planning commission. As has already been noted, that commission recommended (by unanimous vote) a denial thereof. Edina's own witness had admitted that "permitted use" has been denied; that the planning commission has denied its "conditional use permit"; that a variance from the prescribed zoning was not possible; and that re-

zoning is not feasible since it would require "spot zoning," which is not favored by the city council as a matter of policy.

Issues Nos. 14, 15, and 16

31. In April 1960, Hot Springs Broadcasting, Inc., was adjudged bankrupt, and operation of its broadcast station KBLO, Hot Springs, was undertaken by the trustee in bankruptcy, Stanley Morris, station sales manager who had been employed at the station since June 1959.

32. By letter of October 10, 1960, Victor advised the "President and Owner" of KBLO that Tedesco, Inc., was "exploring the possibility of acquiring a radio station" in the Hot Springs market, and inquired whether KBLO might be for sale.[6] At the time this letter was written, Tedesco, Inc., was unaware that Hot Springs Broadcasting, Inc., was in financial difficulties. On or about November 14, 1960, Tedesco, Inc., received notification that KBLO was to be sold at a November 17 bankruptcy sale, and Nicholas telephoned Morris to obtain more details. At a meeting of the Tedesco, Inc., Board of Directors attended by Nicholas, Victor, Israel Krawetz, the corporation's secretary and general counsel, and his law partner, Mr. Firestone, it was decided to bid at the auction.

33. Nicholas arrived in Hot Springs with Krawetz during the evening of November 16. They met with Morris that night. During the approximately 2-hour conference, Morris revealed that the lease on the KBLO transmitter site had expired. Morris' potential employment by Tedesco, Inc., as KBLO's manager was also discussed.

34. On the morning of the 17th, prior to the auction, a brief agreement was drafted by Krawetz to commit the owner of KBLO's transmitter site to continue the station's lease. The owner so committed himself that morning.

35. At 10 a.m. Nicholas and Krawetz attended the public auction. Upon a high bid of $17,000, Tedesco, Inc., purchased station KBLO by checks made payable to the trustee in bankruptcy.

36. The November 2, 1960, order of the bankruptcy court stated that the sale would be held on November 17, 1960, that the sale would be for cash, and that the purchaser would have to make his own arrangements with the Commission for the transfer of KBLO's license. This order was amended on November 14, 1960, to specify, among other things, that the purchaser would be responsible for all KBLO profits and losses after the sale date while Commission approval of a license assignment was being sought. The Tedescos were not aware of this post-sale liability before they arrived in Hot Springs. They learned of it, however, before bidding on the station.

37. After the auction sale, Nicholas, Morris, Mr. Panich, Morris' attorney, and Krawetz met with members of the station's staff then not on duty. KBLO's regular newscaster, Colonel Haynes, was among them. During this conference, Morris advised Nicholas, among other matters, that KBLO had no full-time engineer. Morris' potential employment by Tedesco, Inc., was again discussed. Morris and

[6] Similar letters were written to the other radio stations in Hot Springs and to every other radio station in a 10-State area.

Nicholas drove thereafter to the Avonel Motel, as Morris had heard that the motel was considering building another floor and renting out space and Nicholas found KBLO's studios depressing.

38. When visiting Hot Springs again in December (see infra), Nicholas informed Morris that Tedesco, Inc., would employ him as KBLO's manager after Commission approval at the salary Morris was getting before he took a voluntary cut (from $150 to $125 per week) while trustee in bankruptcy. Morris was also promised a percentage of the profit, and he indicated willingness to accept a job on those terms. He was also led to believe by the Tedescos that he might look forward in the future to an ownership interest in KBLO or Tedesco, Inc. The Tedescos' reason for making these arrangements with Morris was to give him an incentive to work harder and to keep the losses down. Upon written request from Tedesco, Inc., Morris kept Nicholas informed by telephone and correspondence of KBLO's business, monthly billings, operating losses, and other information.

39. KBLO had an existing trade-out agreement with Central Airlines which was nearing its expiration date in November of 1960. Morris volunteered the idea that he could extend the agreement with the airline and that the Tedescos were welcome to use it, although renegotiation of the trade-out agreement with the airline required a yearly contract, and such a contract affected the day-to-day business affairs of KBLO. Morris was given a list of seven names of Tedesco, Inc., personnel, including Nicholas and Victor Tedesco, Krawetz, Allan Kennedy (a Tedesco chief engineer), and Don Johnson, whom Nicholas wanted to place on this trade-out list. Although Nicholas asked Morris to have the credit cards available for Tedesco, Inc.'s use prior to the December visit of the Tedesco brothers in Hot Springs, they were not available until a later date, and Morris was pressed on several occasions by Nicholas to obtain the credit cards. Nicholas admitted that similar credit card arrangements for the benefit of the Tedescos were not made with stations KFNF or KWKY prior to their being taken over. However, the Tedescos were of the opinion that so long as they were responsible for the losses of the station anyway, it didn't matter whether they utilized the station's credit.

40. On January 2, 1961, a $1,300 trade-out agreement for 1 year was entered into between Central Airlines and KBLO. The credit cards requested were mailed to Nicholas by letter dated January 8, 1961, from Morris; they were used by Nicholas and Victor on visits to KBLO in February of 1961, and by Allan Kennedy in July of that year. This use resulted in charges of $180 against the KBLO account with the airline for which the station received no reimbursement from Tedesco, Inc. In January of 1961, KBLO began operating at a loss.

41. On December 6 and 7, 1960, the Tedesco brothers conferred with Morris at the Avonel Motel, Hot Springs. The purpose of this visit was to let Victor inspect the station, see Hot Springs, and look over Morris. The qualifications of each station employee were discussed and a decision was made about which employees would be fired after the Tedescos took over the station. Nicholas and Victor talked to the station's newscaster, Colonel Haynes, and sized him up. Nicholas suggested that an announcer singled out by Morris because of bad

diction should be replaced but Morris stated that nobody would work at KBLO because of job security fears.

42. At the December visit, Morris also asked if the Tedescos could recommend or supply a combination radio engineer-announcer for which KBLO had a dire need. Some of the other subjects covered during the visit concerned future KBLO programing, negotiations with the Avonel Motel for new KBLO studios (a proposed agreement with the motel owners for leasing space there for use as KBLO's studios was discussed and Morris was asked to negotiate such an agreement), a plant of the Tedescos for exchange of frequencies between KBLO and a full-time station in Arkadelphia, Ark,[7] as well as a merger with full-time station KAAB, Hot Springs.

43. Audition disks for KBLO's station promotion jingles were sent by Morris in connection with working out an agreement for their use subject to approval by Nicholas. The jingle supplier was advised of Tedesco, Inc.'s other stations and was referred to Nicholas for bargaining on a contract which would cover KBLO, along with these other stations, and thereby afford opportunity for a better rate for KBLO. Likewise, Morris' ideas for a KBLO treasure hunt promotion and for a station promotion on buses were referred to Nicholas at the latter's request. Morris also kept Tedesco, Inc., informed of letters received by him from the Commission.

44. In January of 1961, Nicholas told Donald Johnson, who was then employed at station WIXK as announcer and program director (Johnson then had a stock interest in that station), that Johnson was being sent to newly acquired station KWKY as soon as Commission approval for the acquisition of that station came through—with an interim assignment at KBLO. Nicholas wanted Johnson to go down to KBLO to improve "the sound of the station" and to look the market over.

45. Except for a brief period in 1959 when he continued working for the new owners of the Tedescos' former station WISK (St. Paul, Minn.), Johnson had been employed by the Tedescos at four different stations during nearly 4 years preceding the KBLO assignment. He was one of Tedesco, Inc.'s key personnel and their "strongest air personality." They repeatedly used him to get stations they had newly acquired off on the right foot.

46. Johnson's instructions from Nicholas were first received by telephone, followed by a personal meeting of the two in the latter's office in St. Paul, in which the subject was covered in greater detail. Johnson was told that Nicholas wanted him to go down to KBLO for 6 weeks or a little longer (the time Nicholas expected for Commission approval of the KWKY assignment application, see infra) to replace a KBLO announcer, and that he would work under Mr. Morris as a regular announcer. Nicholas also told Johnson that he would be paid $80 a week by KBLO and an additional $50 a week by Tedesco, Inc. He was to look over the town to find out what the formats of other stations were like; to observe the possibilities that could be derived

[7] Although Nicholas Tedesco thought that the possibility of getting a full-time frequency out of a one-station market like Arkadelphia was "very remote," he told Morris to "see what they want."

from owning a station in Hot Springs; and to formulate KBLO's programing after Tedesco, Inc., took over.[8] For his expenses in going to and from Hot Springs, Johnson received payment from Tedesco, Inc.[9]

47. By letter dated January 20, 1961, Nicholas Tedesco wrote Morris:

> On February 1, a gentleman by the name of Donald Johnson, which is one of our key personnel, will be down to set up your new programing for our takeover date. I would like to have you give notice to one of your employees, that you are planning to do away with, and replace the same salary for Mr. Johnson.
>
> You realize Mr. Johnson will not be working for what you are paying this man that you will be giving notice. We do not expect you to pay him any more than what you would be hiring anyone under the present situation. Tedesco, Inc., will make up the difference in his salary so please notify me in regards to what this employee is making that you will be giving notice to. Keep up the good work.

At the time of receipt of that letter, Johnson was unknown to Morris except as one of the names supplied by Tedesco, Inc., for the list of persons eligible to use the Central Airlines credit cards. Morris telephoned Nicholas, who advised that Tedesco, Inc., would pay the difference in salary above what KBLO could afford and that room should be made for Johnson on the KBLO staff. Accordingly, Morris discharged an announcer with 5 or 6 years' experience whom he then desired to replace but had not expected to discharge until after the station ownership had been transferred to Tedesco, Inc., pursuant to Commission approval.

48. When Johnson first reported to work at KBLO on or about February 1, 1961, he was given instructions on station procedure. When Johnson's overbearing attitude and his issuance of a few orders created conflict with other employees, Morris advised Nicholas, who spoke to Johnson. Thereafter, Johnson became cooperative and followed Morris' instructions. However, although Nicholas advised Johnson to follow Morris' instructions, he also told Morris not to tie Johnson completely down so that he would have time to study programing. Accordingly, Morris assigned Johnson to the shorter afternoon shift. When Johnson wasn't working his shifts as staff announcer, he spent the rest of his time studying programing of station KBLO and other stations which he monitored. Johnson discussed with Morris the type of music and program format that would be best for KBLO. On a couple of occasions he mentioned that what KBLO was then programing "would be all right." He left with Morris a basic program format for KBLO which he personally typed up before he left the station. Morris retained the format for use after Commission approval of the transfer. He identified many of the handwritten changes appearing on the written format as having been made by Johnson himself.

49. Johnson was not an engineer and did not meet Morris' previously

[8] Nicholas regarded Johnson as a promotion man with good ideas. He had been program director at three Tedesco stations.

[9] In contrast to his utilization at KBLO prior to Commission approval of the KBLO assignment, Johnson was not to go to KWKY until after Commission approval of that station's assignment application.

expressed need for a combination engineer-announcer. When, after Johnson's arrival, Morris made known to the Tedescos his continuing need for a combination man, he was advised (by letter of February 14 from Victor Tedesco) that he should look in his own area because the Tedescos had no one to suggest for meeting this need.

50. During the approximately 5-week period that Johnson was in Hot Springs, he spent a total of only 3 or 4 hours monitoring stations other than KBLO. All of his monitoring took place prior to the February visit of Nicholas and Victor Tedesco.

51. On February 23 and 24 the Tedesco brothers again visited KBLO to work out a studio trade deal with the motel. On the basis of arrangements made by Morris at their request, the Tedescos personally met with one of the motel owners and offered to write a check for $8,000 to expedite commencement of construction necessary to accommodate KBLO's studios. The motel representatives did not accept the offer. At that time there was further discussion with Morris about the possibility of getting a full-time frequency for KBLO either by frequency exchange with Arkadelphia or by purchase of the other full-time Hot Springs station. Johnson was with the Tedescos half of the time they spent in Hot Springs on this visit and was asked for and gave them a report on Hot Springs and the programing of other stations. Johnson analyzed the possibilities for a musical format for KBLO and counseled them on how KBLO should be operated.

52. Upon approval, on March 1, 1961, of the application for assignment of KWKY to Tedesco, Inc., Johnson received a telephone call from Nicholas, telling him to leave KBLO and report to KWKY on March 10, and by letter of March 2, Morris was notified thereof by Nicholas. Johnson left KBLO on March 8. The letter of March 2 told Morris to arrange for a replacement engineer-announcer. It also included a check for $50, with the suggestion that Morris take Mrs. Morris out to dinner on Tedesco, Inc., * * * an expense which would be charged to Morris as travel expenses at the right time. Morris considered that in the Johnson matter he was interfered with by Tedesco, Inc., in the performance of his duties as trustee in bankruptcy and general manager of KBLO. When Johnson had come to Hot Springs, Morris considered that he had already been hired to work at KBLO by Tedesco, Inc. The peremptory order moving Johnson to Des Moines created a problem for Morris, who was already short-handed.

53. Although most of Morris' contact with Tedesco, Inc., was through Nicholas, he did have personal conversations with Victor during the latter's visits in the spring of 1961, as well as by telephone and other communications, mostly about the need for early approval of the KBLO assignment application. As time passed, this contact became more frequent and Victor answered the telephone when Morris called during the summer of 1961. Victor testified he had "nothing to do with Morris for KBLO whatsoever and considered [himself] an outsider"; that he had never called Morris on the telephone; had only written him one inconsequential social-type letter; that he received no correspondence from Morris; and that he had no discussions with Morris concerning KBLO's operation from November

1960 to August 1961. However, as heretofore noted, Victor made two trips to KBLO, and it was brought out on cross-examination that Victor had signed and sent the first letter to KBLO and the other Hot Springs stations inquiring as to whether any of these would be available for acquisition by Tedesco, Inc.; that he wrote Morris on February 14, 1961, to suggest that he hire an engineer in the Hot Springs area and advised him of their impending visit and desire to see Morris and Johnson; and that on March 6, 1961, he wrote Morris again to tell him that the Tedesco, Inc., negotiations with Mutual for a KBLO affiliation were underway and stating that with Mutual news and Colonel Haynes, KBLO would become the No. 1 station in Hot Springs. When confronted at the hearing with the letter of March 6, 1961, Victor disclaimed any knowledge of negotiations with Mutual regarding KBLO.[10] He testified that Nicholas was doing all the KBLO negotiating and that he wrote the letter at Nicholas' direction because no secretary was available at the time and Nicholas could not type. The letter showed the initials of the Tedescos' secretary who typed it. Moreover, although Victor originally testified that he did not know whether Nicholas had offered Morris a job, on December 12, 1960, he wrote to Morris to tell him that he agreed with Nicholas as to Morris' capabilities, and that with Morris' management and Tedesco, Inc.'s financing, KBLO would shortly become No. 1 in the market. On further cross-examination, Victor admitted knowledge of the condition of the KBLO studios and the motel trade deal negotiations. He also knew that Johnson was sent to KBLO to work as an announcer on the split shift, with Tedesco, Inc., paying about 40 percent of Johnson's KBLO salary.

54. On March 29, 1961, Morris wrote Nicholas expressing alarm over the losses suffered by KBLO during 1961, and he requested every cooperation of Tedesco, Inc., in speeding Commission consideration of the KBLO assignment application. KBLO was experiencing financial difficulties and competitive detriment because of the uncertainty of getting advertisers to take more than 1 month's advertising at a time. Morris was doing everything he could to keep the station in operation—a decision in which Nicholas concurred.

55. In June of 1961, Nicholas requested and received from Morris a physical inventory of KBLO station property. However, by July of 1961, the Tedescos' interest waned to a point where Morris was notified by Victor that the Tedescos were involved with a station in St. Paul and that they would be happy to forget about KBLO and set aside the sale if they could get back their $17,000.

56. As noted, Tedesco, Inc.'s purchase of KBLO took place on November 17, 1960. At that time Morris impressed upon Tedesco, Inc., that it was critical that the transfer be accomplished as soon as possible because of KBLO's uncertain financial condition. Soon after the sale, Morris sent the assignor's part of the application for forwarding to Tedesco, Inc. By letter of December 1, Krawetz advised Panich, inter alia, that he had received the referenced portion of the Commission application for consent to the KBLO assignment and that he ex-

[10] He eventually "refreshed his recollection" and recalled that he had discussed this affiliation for KBLO with Mr. King of the Mutual Network.

pected "to have [assignee's] part of the application for transfer of license ready for filing within the next few days." On January 9, 1961, Panich wrote Krawetz expressing the trustee's interest in closing the bankrupt estate as soon as possible and also asking for recent information on the status of the matter. Though Krawetz sent Panich a letter, dated January 11, no answer was given to Panich's question; it merely contained a request for copies of the order of the bankruptcy court confirming the trustee's sale of KBLO. The requested copies were sent to Krawetz with Panich's letter of January 19, which again asked for information on the status of the KBLO assignment application. Nicholas concluded a letter to Morris on January 20, 1961, by asking him to see that his attorney furnish some material (which had by then already been sent) that Krawetz had requested of Panich to permit filing of the KBLO assignment application. No other word having been received by the trustee in bankruptcy or his attorney from Tedesco, Inc., regarding the status of the application, Panich, on February 17, again wrote Krawetz requesting information regarding the KBLO assignment. The record reflects no reply thereto.

57. The application was not filed until March 22, 1961. Morris learned about it when he received a notice at that time from Tedesco, Inc.'s Washington attorney regarding necessary newspaper advertising of the filing. Morris had been under the impression that the KBLO assignment application had been filed soon after the sale; this impression was based on the fact that during the period between November 17, 1960, and March 22, 1961, Morris had been frequently advised by Tedesco, Inc., whenever he inquired, that approval of the KBLO assignment application would be forthcoming shortly. The filing delay had a serious adverse effect upon KBLO's ability to continue operation. Morris notified Panich, his counsel, of the filing and contact was made with the Commission only to find that immediate action was precluded by a mandatory waiting period after date of filing.

58. Both at the hearing in bankruptcy court in August 1961 and in the instant hearing, Krawetz testified that the delay in filing the KBLO application was due to work entailed including: updating the history of Tedesco, Inc.'s prior radio activities; gathering and preparing program material and other technical data information on citizenship and other broadcast interest of all of the company's 400 to 500 stockholders, and in regard to the qualification of Tedesco, Inc., to do business in Arkadelphia; and in obtaining from the trustee or his attorney certified copies of the order confirming sale and assignor's portion of the Commission's assignment form.

59. Despite Krawetz' statements of extensive program preparation, the program section of the application, as ultimately filed, was accompanied by only two program exhibits—one a five-line, two-sentence general statement of policy with regard to public issues and the other a four-page proposed program schedule listing programs (by title only) with times and symbols for each to permit computation of program percentages.

60. Concurrently, Tedesco, Inc., was involved in the acquisition of other broadcast stations (a contract to purchase KWKY, Des Moines,

was entered into on November 23, 1960). Krawetz acknowledged that while he was working on preparation for the KBLO assignment application he was working on preparation of the KWKY assignment application for Tedesco, Inc. Substantially similar work was involved on both applications on behalf of the Tedescos. The KWKY application for consent was dated January 17, 1961, and was filed January 18, 1961. It was granted by the Commission on March 1, 1961, and the assignment was executed on March 10, 1961. On February 1, 1961, Tedesco, Inc., had entered into an agreement to purchase station WMIN, St. Paul. Application for Commission consent for assignment of that station was dated February 23, 1961, and was filed with the Commission on March 8, 1961.

61. When no Commission action was forthcoming after nearly 5 months, Panich, upon inquiring at the Commission, was advised by Commission letter of August 15, 1961, that there had been no Commission communication with Tedesco, Inc., relative to the KBLO assignment and that action on that application had been withheld because of matters raised in the Commission's order entered July 26, 1961, designating the WMIN application for hearing "in view of the pattern of conduct with respect to buying, selling, and exchanging of broadcast property."

62. On July 19, 1961, by letter to Nicholas Tedesco, Panich had advised that the trustee would be forced to petition the referee in bankruptcy for an order canceling the sale and surcharging the funds deposited by Tedesco, Inc. Upon petition by the trustee in bankruptcy (Morris) for an order canceling the KBLO sale to Tedesco, Inc., and surcharging the latter for losses suffered in the operation of the station, hearings were held in August 1961 before the referee in bankruptcy on orders to show cause. An order canceling the sale was entered on August 29, 1961, and the order surcharging Tedesco, Inc., was entered on December 22, 1961. The surcharge was $11,552.37 for KBLO's net operating loss suffered by the trustee in bankruptcy from the date of sale to the date of cancellation (August 24, 1961), plus fees and expenses for the auctioneer and cost of audit, for a total of $12,900.33. Tedesco, Inc., through its counsel Krawetz, took the position that nothing was owed to the bankrupt estate since under the terms of sale, as construed by them, Tedesco, Inc., was to assume losses only in the event of Commission approval. Appeal to the U.S. district court was taken by Tedesco, Inc., from the referee's orders. The orders were affirmed by that court in an opinion of July 26, 1962 (*Hot Springs Broadcasting, Inc.*, 207 F. Supp. 303; 24 R.R. 2011). The district court's decision was in turn appealed by Tedesco, Inc., to the U.S. Court of Appeals for the Eighth Circuit. This appeal was taken on August 24, 1962, upon the decision of the Tedesco brothers on recommendations to do so by Krawetz and Ben Allen, Little Rock counsel for Tedesco, Inc. The matter of this appeal was not discussed at that time with Tedesco, Inc.'s Washington counsel.

63. Testimony by Krawetz offered on behalf of the Tedescos was to the effect that, after noting the appeal, Krawetz gave the matter further consideration and advised his clients that, even if the appeal

were successful, the reduction in surcharge would not greatly exceed the costs of the appeal; that on this advice the Tedescos decided to try for a compromise with the trustee, but to dismiss the appeal whether or not the compromise negotiations reached fruition; that this decision was communicated to Allen by Krawetz; that Allen immediately entered into negotiations with the attorney for the trustee, and promptly concluded that a $1,000 reduction was the best compromise that he could effect; that this compromise was accepted by the Tedescos; and that on August 27, 1962, 3 days after the appeal was noted, Panich, counsel for the trustee in bankruptcy, filed a petition with the district court for authority to compromise.

64. This version of the events did not survive the introduction of Edina exhibit No. 13, a letter from Allen to Panich dated August 23, 1962, 1 day before the appeal was noted, wherein Allen confirmed the agreement to compromise the surcharge by reducing the amount thereof by $1,000, the precise settlement which formed the basis of Panich's petition for authority to compromise filed 4 days later on August 27, 1962. Thereafter, Krawetz' testimony became increasingly vague. In determining whether Krawetz' patently inaccurate testimony should be attributed to failure of recollection, or to some other cause, and in understanding why Tedesco, Inc., should file an appeal the day after the judgment appealed from had been settled by compromise, it is helpful to refer to pleadings then pending before this Commission.

65. On August 20, 1962, Edina had filed a petition for enlargement of the issues herein premised in part on the August 29, 1961, report of the trustee in bankruptcy, wherein it was stated that Tedesco, Inc., had unduly delayed filing the assignment application and in part on the district court monetary judgment against Tedesco, Inc. On August 24, 1962, the day the appeal from the district court judgment was entered, but the day after counsel agreed to a compromise settlement of the judgment, Krawetz wrote to Tedesco, Inc.'s Washington communications counsel on the subject of Edina's petition to enlarge issues. He stated that "a notice of appeal has been served by Tesdesco, Inc.," and that " we feel that an appeal will result in a reversal thereof." These allegations furnished the basis, in part, for an opposition to the Edina petition filed by Tedesco, Inc.'s Washington counsel on September 4, 1962. Indeed, a copy of Krawetz' August 24 letter was attached to the opposition. Washington counsel was not aware when he filed the opposition that a petition for authority to compromise the judgment had already been filed in the district court.

66. Tedesco, Inc.'s allegations with respect to the appeal were not without effect. On October 16, 1962, the Review Board denied Edina's request for an issue based on the KBLO situation, noting specifically that the request was based on an order from which Tedesco, Inc., had taken an appeal.

67. On November 14, 1962, Edina filed a further pleading entitled "Petition for Enlargement of Issues and for Reconsideration," reciting, inter alia, the fact that both in Krawetz' August 24 letter and the Tedesco, Inc., September 4 opposition of which it was a part the pendency of the appeal and Tedesco, Inc.'s expectation of reversal

were referred to and were allowed to remain before the Review Board even though the appeal was dismissed 2 days after the opposition was filed and 30 days before the Review Board rejected the issue requested by Edina. This pleading was opposed by the Tedesco, Inc., opposition dated November 28, 1962, which was supported by affidavits of Donald W. Johnson (dated November 24, 1962), of Nicholas and Victor Tedesco, and of Israel E. Krawetz (all dated November 23, 1962). The entire pleading was verified by Victor Tedesco as president under date of November 23, 1962. Krawetz had prepared all of these affidavits.

68. The Krawetz affidavit recited, inter alia, that: "after taking the appeal, negotiations took place between the parties and settlement resulted in the dismissal of the appeal on September 6, 1962."

69. In the November 23 affidavit of Nicholas Tedesco, the following statement appears:

> **Affiant further states that on one occasion the trustee in bankruptcy requested affiant to assist him in obtaining the services of an announcer; that affiant rendered the assistance and understands that the individual in question was hired by the trustee in bankruptcy as an announcer; however, affiant at no time contracted with the individual involved and at no time gave any orders to such individual; that affiant in fact is not aware of the specific duties which were assigned to the said individual.**
>
> **Affiant further states that he makes this affidavit for the purpose of establishing that Tedesco, Inc., at no time assumed control of radio station KBLO or of its management or policies.**

70. Donald W. Johnson, in his affidavit, stated, inter alia, that he was "employed by Mr. Morris * * * as an announcer with certain program responsibilities"; that he authorized Nicholas Tedesco to accept the position for him and was informed later that Morris agreed to hire him; that at no time was he directed by Tedesco, Inc., in the manner of carrying out his duties at KBLO; and that he was in fact hired by Morris and paid by KBLO.

71. In addition to the discrepancies between the recitations in these affidavits and the facts disclosed on this record, supra, other irregularities in the affidavits were revealed. Krawetz did not talk to Johnson before he prepared the affidavit for him. About a week prior to November 24, 1962, Johnson received a long-distance telephone call from Nicholas in which he was told that Tedesco, Inc., needed some information about his work at KBLO, and he received another call from Victor saying that Nicholas would bring the affidavit with him for Johnson to sign in Austin (where Johnson was then production director of station KAUS). However, Johnson told Victor he would be in Minneapolis that weekend and would meet him at a bar. Victor gave Johnson the original affidavit with the notarization of Rose Berland, a notary public and secretary in Krawetz' law office, already on it. No question was raised in Johnson's mind by the fact that the jurat already appeared on the affidavit before he signed it. He read it, signed it, and returned it to Victor, who mailed it to Tedesco, Inc.'s Washington counsel.

72. The circumstances attending execution by Nicholas Tedesco of his affidavit were that Krawetz called him to come to Krawetz' office to sign the prepared affidavit, which Nicholas executed without

reading. Afterward, Nicholas noted one inaccuracy in the sentence "affiant at no time contracted with [Johnson] and at no time has given any orders to [Johnson]." Nicholas testified that this statement was wrong in that Johnson was paid part of his salary at KBLO by Tedesco, Inc., but that he had not advised Krawetz of this matter.

73. The Tedescos attempted unsuccessfully to obtain and file with their November 28 opposition an affidavit from Morris. When Nicholas Tedesco telephoned Morris a second time to find out whether he had signed the affidavit, gift and job offers were made to Morris by Nicholas.[11] Morris understood the gift to relate both to his signing the affidavit and to doing it quickly. Acting on Panich's advice, Morris did not sign the affidavit.

Issue No. 17

74. The history of Nicholas and Victor Tedesco with respect to broadcast authorizations commenced on May 19, 1948, when an application was filed for a new standard broadcast station on 1220 kc, 250 w, daytime only, at Stillwater, Minn., by St. Croix Broadcasting Co. The corporation was owned in equal shares by Victor, his brothers Nicholas and Albert, and one James V. Hobbins. At that time, Nicholas and Victor were without significant radio experience, but Albert had graduated from a radio broadcasting school, had been employed by a radio station in Georgia, and was currently employed by station KATE, Albert Lea, Minn., and in charge of KATE's Austin, Minn., studio.

75. The application was granted November 19, 1948. However, prior to going on the air, a change in the original plan of financing resulted in a modification of stockholders. Mr. William Johns, Jr., who then worked for station WTCN, St. Paul, Minn., and lived some 10 miles from Stillwater, offered to buy a stock interest and to loan Albert and Victor the sums necessary to meet their financial commitments to the station. As a result, Johns became general manager of the new station and the stockholdings were divided as follows: Johns, 22½ percent; Victor, 22½ percent; Albert, 20 percent; Nicholas, 25 percent; and Hobbins, 10 percent.

76. Program test authorization was granted on March 13, 1949, and the station was licensed on June 24, 1949. Nicholas and Victor accomplished the major part of the construction of the station themselves, not only the business and administrative aspects but the physical labor as well. Albert and Victor worked at the station full time, with Nicholas undertaking part-time sales duties. The station was profitable from the start, and Victor's initial salary of $65 per week was raised to $80, and a distribution of profits paid $1,000 to Nicholas and $900 to Victor.

77. Sometime in the fall of 1949 personal disagreements between the Tedescos and Mr. Johns resulted in the decision to sell the Tedescos'

[11] Nicholas denied this. He testified that he only told Morris he would "pay him for the amount of hours it took him" to get the affidavit signed in order to show his appreciation for any inconvenience. When pressed as to the meaning of this remark to Morris, Nicholas stated: "My meaning was very vague, for him to determine any way he desired to do so."

interest in the station to Johns. On January 9, 1950, an application dated December 30, 1949, was filed with the Commission wherein the Tedescos' 67½ percent of St. Croix Broadcasting Co. was sold to Johns for $58,000. Nicholas, who had $5,000 invested in the station, received $20,000, and Victor, whose investment was $4,000, received $18,000 or $19,000.[12] This application was granted by the Commission on March 6, 1950, and became effective on March 10, 1950.

78. Prior to the disagreement between the Tedescos and Mr. Johns, these parties had joined together to file additional applications for stations at Cloquet and Owatonna, Minn. On May 16, 1949, Cloquet Broadcasting Co., a corporation owned 15 percent by Nicholas, 15 percent by Victor, 15 percent by Albert, 15 percent by Johns, 15 percent by George Griedes, a resident of Cloquet, and 25 percent by John O. Vick, chief engineer of the Stillwater station, filed an application for a new standard broadcast station on 1450 kc at Cloquet, Minn. The station was built at a cost of approximately $20,000, and went on the air January 31, 1950. Albert Tedesco was employed as general manager, but, although Victor and Nicholas had assisted in the construction of the station, neither was employed in its operation.

79. On September 8, 1949, the Tedesco-Johns interests filed an application for a new standard broadcast station at Owatonna, Minn. This application was filed by Owatonna Broadcasting Co., of which William F. Johns, Sr., owned 30 percent, William F. Johns, Jr., owned 30 percent, Nicholas, Albert, and Victor owned 10 percent each, and Antonio Tedesco, their father, owned 10 percent. This application was granted on May 12, 1950, but did not receive final Commission approval of the transmitter site until September 1950.

80. The ill feeling which had led to the Tedesco sale to Johns of their interest in the Stillwater station now resulted in a severance of relationships at Cloquet and Owatonna. The parties agreed to exchange the Tedescos' 40 percent collective interest in Owatonna, where no construction had yet been undertaken, for Johns' 15 percent interest in Cloquet, which was then on the air. At the same time, the Tedescos purchased John O. Vick's 25 percent in Cloquet, and, as a result, their ownership in Cloquet was thereafter divided 24⅓ percent each to Nicholas, Victor, and Albert, and 12 percent to Antonio. Applications for consent to the transfers were filed on July 19, 1950, and were granted September 6, 1950. The transfers were accomplished on September 24, 1950.

81. The Cloquet station was initially profitable, and in the late summer of 1951, a Mr. Richard Rall who resided in Cloquet offered to purchase it for $40,000. The Tedescos refused this offer, but business thereafter dropped off. Subsequently, on September 29, 1952, an application was filed to transfer the Tedesco interests in Cloquet to Rall for approximately $20,000, representing a profit to the Tedescos in the neighborhood of $1,000. This application was granted on December 4, 1952.

[12] The figures given for the Tedesco brothers' investments do not include any valuation for their labor and services in constructing the station because no such valuation is supplied by the record. However, it is apparent that these factors are entitled to some consideration, and would tend to increase the amount of their investments and decrease the amount of their profits.

106-500—66——8

82. On March 31, 1950, Nicholas, who by that time had decided that radio was a good business to be in, applied as an individual for a new station at Monroe, Wis. He selected Monroe from a list supplied at his request by a consulting engineer of available communities within 350 miles of St. Paul. The application was designated for hearing because of slight interference which would be caused to an existing station. In the meantime, Nicholas became aware of the intention of a group of Monroe residents to file an application in competition with his. In order to avoid the hearing, which he did not view optimistically, Nicholas dismissed his application on payment to him by the Monroe group of $500, in compensation of expenses.

83. In the meantime, on Feberuary 28, 1950, South St. Paul Broadcasting Co., owned in equal shares by Nicholas, Victor, Albert, and Antonio Tedesco, filed an application for a 1 kw, daytime only, station on 1590 kc at South St. Paul. After amendment to specify 5 kw, the application was granted on December 20, 1950, and went on the air on August 12, 1951, as station WCOW.

84. At about this same time, on June 7, 1950, Victor filed an application as an individual for a new daytime station on 990 kc, 250 w, at Sparta, Wis. The application was granted on December 13, 1950, and went on the air on June 20, 1951. Nicholas assisted in the construction, and the operation was conducted by employed general managers. Victor took personal charge of neither the construction nor the subsequent operation of the station. On Februray 5, 1952, Victor applied to transfer the license of the Sparta station (WKJL) to Sparta-Tomah Broadcasting Co., Inc., in which Victor held 99 percent of the stock, and Nicholas, Albert, Antonio, and the station manager divided the other 1 percent. On July 9, 1952, Victor sold some 47 percent of the corporation's stock to nine different individuals for $7,925, representing some 37.9 percent of the construction cost of $20,901. In 1955, the frequency of the Sparta station was changed from 990 kc to 1290 kc, and power was increased from 250 to 1,000 w.

85. By August 1955, all stockholders had sold out except Victor, who then owned 74 percent of the stock, and the manager, John D. Rice, who owned 26 percent.[13] By application filed August 15, 1955, and granted August 26, 1955, Victor transferred one-half of his stock interest in consideration of $1,000 and brotherly affection.

86. On July 31, 1957, Nicholas and Victor filed an application to transfer their 74 percent interest in the corporation to Zell S. and Vena H. Rice, the parents of John D. Rice, for $56,400. When this sum is added to the $7,925 received by Victor in 1952, it is apparent that the Tedescos made a profit on their dealings with the Sparta station, and probably a substantial one relative to the sums involved, but the exact amount is impossible of determination in view of the failure of the record to disclose the precise amount the Tedescos had invested in the station.

87. On March 6, 1952, Nicholas, Victor, and Albert, as equal partners, filed an application for a new daytime station on 1260 kc,

[13] The record does not disclose the price Victor had paid to bring his stock interest back to 74 percent, and it is, therefore, impossible to determine the exact amount he had invested in the station at the time of the ultimate sale, par. 86, infra.

1 kw, at Hutchinson, Minn. The application was granted on December 4, 1952, and the station went on the air on September 15, 1953. Nicholas worked on the construction, although neither he nor Victor was employed at the station, which was managed by Albert. Shortly thereafter, a family disagreement led to the decision that the interests of Victor and Nicholas, on the one hand, and Albert, on the other, would be disassociated. As a result, by applications filed and granted in the spring and summer of 1954, the two-thirds interest of Nicholas and Victor in the Hutchinson station was traded to Albert for Albert's one-fourth interest in the South St. Paul station, paragraph 83, supra. No cash or other consideration was involved in this exchange.

88. After the 1954 Hutchinson-South St. Paul trade, the ownership of the South St. Paul station was vested in a new partnership consisting of Nicholas, Victor, and their father, Antonio. The station was thereafter operated with Victor as the general manager. Subsequently, in 1957, Antonio's health failed, and his partnership interest was acquired by Nicholas and Victor for the consideration of a payment of $75 per week, and, upon his death, $35,000 to his estate. In October of 1958, the license of WCOW was assigned from the partnership to BVM Broadcasting Co., Inc., a corporation in which Nicholas and Victor retained the same equal interest they had shared under the partnership.

89. In the meantime, substantial modifications in the South St. Paul facility had taken place. The station had originally been licensed on 1590 kc, 5 kw, daytime. By a series of applications filed and granted between 1956 and 1958, the station location was changed from South St. Paul to St. Paul; the call letters were changed from WCOW to WISK; the frequency was changed from 1590 kc to 630 kc; and the powers and hours of operation were changed from 5 kw, daytime only, to 5 kw, day, 500 w nighttime. Station WISK commenced operation with its new facilities in October 1958.

90. On July 22, 1955, Nicholas and Victor, trading as Rochester Broadcasting Co., an equal partnership, filed an application for a new station on 1270 kc, 500 w, at Rochester, Minn. The application was granted, after hearing, on May 17, 1957, and commenced operation as station KWEB in September 1957. By assignment effective November 1, 1957, the license was assigned to Rochester Music City, Inc., a corporation owned in equal shares by Nicholas and Victor. Neither of the brothers worked at the station, although Nicholas drew a salary, but both regarded it as a particularly satisfactory operation.

91. In the fall of 1958, Nicholas and Victor were encountering a cash squeeze in connection with the construction of the modified St. Paul facility, WISK. Accordingly, they were receptive when approached by a broker indicating he had a buyer for KWEB. On October 15, 1958, an application was filed for consent to sell the station for $75,000, including $55,000 cash, $10,000 in 1 year, and $10,000 in 2 years. At that time the Tedescos had approximately $41,000 in KWEB, and, therefore, their profit after approximately 1 year of ownership was in the neighborhood of $35,000. The Commission consented to the assignment on December 17, 1958, and the transaction

was completed 2 days later. The proceeds were devoted to the WISK operation.

92. As heretofore noted, the revised WISK operation went on the air in October of 1958. Costs of installing the new six-tower array were high, and, although substantial amounts of cash were available ($40,000, including $35,000 cash from the sale at the end of 1958 of the land and buildings used in the old 1590 kc operation; $55,000 cash from the sale of the Rochester station; and $56,400 from the mid-1957 sale of the Sparta station), the station was substantially in debt when it commenced its new operation. In the initial months of the station's operation it suffered heavy operating losses,[14] although the amount of these losses showed a sharp downward trend, and by the month preceding the sale in August of 1959, the station showed a profit.

93. In any event, by February 28, 1959, Nicholas and Victor had committed approximately $150,000 to the WISK operation,[15] and, although they had not exhausted their cash or credit resources, the WISK investment represented a substantial portion of their collective net worth.

94. Although WISK was not on the market, and the brothers had not seriously considered selling the station, they were contacted in early May 1959 by a representative of Crowell-Collier Broadcasting Corp. with an offer of purchase. The offer was declined, but the prospective buyer raised the bid and the new offer was accepted. On May 22, 1959, a formal contract was executed whereby WISK would be sold to Crowell-Collier for $500,000 cash and assumption by the buyer of $125,000 of selected obligations of the seller. After paying off other obligations of the station which the buyer did not assume, the profit to the Tedescos was approximately $280,000. In addition, they received payment of something over $100,000 they had loaned the station, they were permitted to retain two expensive automobiles which the station had bought for their use shortly before the sale, they retained land belonging to the station worth approximately $50,000, and they retained certain accounts receivable. Application for Commission consent to the sale was filed on June 22, 1959, granted on July 15, 1959, and the transaction was concluded on August 25, 1959.

95. On October 24, 1955, Nicholas and Victor entered into a contract to purchase station KAAA, Red Wing, Minn., the licensee of which had previously filed with the Commission a letter of protest to their proposal to construct a new station at Rochester, Minn. (par. 90, supra). The purchase price was $60,000. In March of 1956, the license was transferred to Hiawatha Broadcasting Co., Inc., a corporation owned by Nicholas and Victor in equal shares. Red Wing lies midway between St. Paul and Rochester, and the brothers became

[14] It is difficult to garner from the record a meaningful separation between operating losses and capital contribution. Thus, while it was entirely proper to include equipment payments as an operating expense contributing to an operating loss, such payments also decreased the station's debt to the same extent as would an equal capital contribution devoted to debt service. Similarly, while depreciation is an appropriate item under operating expense, it does not represent a cash loss or expenditure, and, if it is to be considered as an expense item on the operating balance sheet, it should also be deducted from original asset value in computing the profit ultimately shown in the sale of the station.

[15] Capital contribution, $40,000; loan by Nicholas, $55,705.76; and loan by Victor, $52,644.54.

concerned about overlap between Red Wing and both the then-proposed improved facilities at St. Paul and the then-proposed new station at Rochester. Therefore, in the fall of 1956, they represented to the Commission that they were willing to dispose of the Red Wing station in order to secure authorizations in the other two communities. However, although the Rochester and St. Paul applications were granted, the Red Wing facility was not disposed of at that time.

96. On May 20, 1957, the Tedescos applied for Commission consent to transfer 60 percent of the stock of the Red Wing license for $24,000. The new stockholders were Alfred Gentile, the Tedescos' brother-in-law, 15 percent; Eugene Elston, the station manager, 15 percent; John Rice, with whom the Tedescos were associated in the Sparta station, 15 percent; Clarence Thole, a St. Paul businessman, 10 percent; and Robert Olsen, a St. Paul businessman, 5 percent. Although the Tedescos retained only a 40-percent interest in the station, they continued de facto supervision of the operation. On March 8, 1961, an application was filed to assign the Red Wing license, the call letters of which were by then changed to KCUE, to a corporation unaffiliated with the Tedescos for $87,500. This application was dismissed in March 1962, at the assignor's request, after it was designated for hearing on issues relating to the purchaser.

97. On March 12, 1962, a second application to assign KCUE was filed, and this application was granted on July 13, 1962. The purchase price was $87,500, of which the Tedescos were entitled to 40 percent, $35,000. While, on the surface, the sums received by the Tedescos from the 1957 and 1962 sales would seem to approximate the $60,000 paid for the station in 1955, additional factors indicate that the brothers actually made a substantial profit from their sale of KCUE. The original $60,000 purchase price was financed through $59,000 in loans which became the obligations of the licensee corporation. By the time of the 1962 sale, substantially all of these loans had been repaid from operating revenues. Therefore, virtually the entire amount received by the Tedescos from the 1957 and 1962 sales represented profit.

98. Although the 1962 application for transfer of KCUE did not mention it, the actual reason for selling the station was because of overlap which would have existed between KCUE and the instant Bloomington proposal, because the instant proposal would place a 2-mv/m signal over Red Wing.

99. On July 10, 1956, Nicholas, Victor, and John D. Rice were the incorporators of Radio St. Croix, Inc. The corporation was formed to construct a new station at New Richmond, Wis., on 1380 kc. However, it was at about this same time that the Tedescos were in the process of modifying their station WISK in St. Paul, and the evolving plans for WISK had a substantial impact on the New Richmond proposal. The original application for modification of WISK had contemplated continued operation on 1590 kc, but on June 14, 1956, the application was amended to specify 630 kc, which would have the effect, if the application were granted, of freeing 1590 kc for use in the St. Paul area. With this fact in mind, the New Richmond application was engineered for 1590 kc, and the New Richmond engineering

preparation was substantially completed by July 6, 1956, some 3 weeks after the filing of the WISK 630 kc application, and 4 days before the incorporation of Radio St. Croix, Inc.

100. Nicholas assisted the Radio St. Croix preparations by reviewing land availability, and used his own money to secure a site option. However, on October 24, 1956, the Tedescos were advised that the WISK 630 kc application had been granted, and on that same day a meeting of the directors and stock subscribers of Radio St. Croix was held at which the Tedescos surrendered their stock subscription rights.[16] The subscriptions were taken up by individuals recommended by the Tedescos, and on November 16, 1956, the Radio St. Croix application was filed.

101. The Radio St. Croix application was granted, after hearing, on December 16, 1959, at which time Zel Rice asked Nicholas to contact the stock subscribers he had recommended to call for their subscriptions. Three of the subscribers, who represented 75 percent of the subscriptions, stated a desire to sell out their interests, and the Tedescos came back into Radio St. Croix as owners, each owning 21.1 percent of the corporate stock. A total of $10,000 was paid for this stock, plus $625 for 125 later-acquired shares.

102. On August 10, 1962, the Tedescos sold their Radio St. Croix stock to two other existing stockholders, receiving therefor a total of $18,000. At the time they sold their stock they forgave a total of $4,000 owed them by Radio St. Croix as salary for supervisory duties performed during the previous 20 months. Thus, a net profit of somewhat less than $3,500 was realized from the brothers' sale of the New Richmond station. The stock was sold because of a potential duopoly problem involving the New Richmond station and the instant proposal, and because New Richmond holdings did not appear to be an appropriate investment for Tedesco, Inc.,[17] par. 107, infra.

103. While the application for transfer of WISK was pending, the Tedescos were investigating the availability of other stations for purchase. On July 23, 1959, 8 days after the WISK sale was approved, an application was filed for transfer of station KFNF, Shenandoah, Iowa, to KFNF Broadcasting Corp., which was owned in equal shares by Victor and Nicholas. The purchase price was $75,000 cash, and a balance of $50,000 on terms. At that time, the station was grossing approximately $75,000 per year, but was losing money at the rate of $700–$800 per month. The transfer was approved by the Commission on September 2, 1959, and the Tedescos commenced their operation of KFNF on October 17, 1959.

104. Before purchasing KFNF, the Tedescos had the situation examined by their consulting engineer, who advised them that the station could be moved to Omaha or Lincoln, Nebr., or to the Kansas City area. Each of these communities is of substantially greater size than Shenandoah.

[16] The Tedescos' prompt withdrawal from Radio St. Croix on receiving the 630 kc grant at St. Paul would warrant a finding that it had been their intention all along to devote their energies and capital to the St. Paul station if they received a grant, and that Radio St. Croix was only an alternative, being held in reserve in the event the St. Paul application was denied. However, in that the Radio St. Croix application had not then been filed, and there had been no representations to the Commission with respect to the Tedescos' intentions in New Richmond, such finding would be of dubious relevance.

[17] Nicholas and Victor had an obligation to Tedesco, Inc., to divest themselves of interests in radio properties not owned by the corporation.

105. The evidence is ambiguous as to what the Tedescos' true intentions were when they purchased the station. On the one hand, they modified the programing; installed and, for a time, operated auxiliary studios in a nearby community; and substantially increased the staff, all of which actions are consistent with a sincere desire to transform the station into a profitable operation in Shenandoah. On the other hand, engineering work on moving the station to Council Bluffs was commenced only 2 months after the Tedescos took over the station; a transmitter site in Council Bluffs was purchased within 2½ months of takeover; an application to move to Council Bluffs was filed on March 24, 1960, only 5 months after KFNF was taken over; [18] and in the summer of 1960, less than 1 year from the time KFNF was acquired, a transmitter site meeting the requirements for a directional operation on the KFNF frequency was purchased in the Kansas City area. Moreover, although the Tedescos had had experience in a two-station market such as Shenandoah when they built the second station in Rochester, Minn. (pars. 90 and 91, supra), and had learned the value of an aggressive campaign of promotion, they conducted no such campaign in Shenandoah.

106. While the station continued to experience losses in the interval between the Tedesco takeover and the time preparations for the move to Council Bluffs were commenced, it is not found that this was the reason for seeking to move the station. It is not credible that broadcasters so experienced as the Tedescos would have genuinely anticipated that the loss picture which obtained when they purchased the station would have been reversed in less than 3 months. On the basis of the circumstantial evidence presented, it is found that the Tedescos purchased KFNF with the intention of moving the station from Shenandoah to a larger market unless the Shenandoah operation could be converted to a profit almost immediately—an event they could not reasonably have deemed likely—and that this intention was not communicated to the Commission.

107. By the fall of 1960, the Tedesco brothers had accumulated relatively substantial capital from their activities in the radio business. They wished to remain in radio, but it was not their intention to place all of this capital again at risk. Accordingly, they formed Tedesco, Inc., which was capitalized at 350,000 shares sold at $1.00 each. Each of the brothers initially purchased 50,000 shares,[19] and the balance was sold to the public. Since the formation of the corporation, Nicholas and Victor have held the principal executive offices and have been wholly responsible for the conduct of corporate affairs.

108. The publicity which Tedesco, Inc., has released concerning itself, and the information supplied prospective stockholders, has emphasized the Tedesco brothers' profits from the sale of radio sta-

[18] However, it should be noted that Mar. 24, 1960, was a cutoff date, after which the then-pending application of station KIOA, Des Moines, Iowa, respondent herein to increase power to 50 kw would be protected against mutually exclusive applications. Because KIOA is adjacent channel to KFNF, the KIOA power increase would have precluded moving KFNF to Council Bluffs. This conflict was subsequently mooted when the KIOA application was not prosecuted.

[19] Subsequent purchases had, at the time of the hearing, vested ownership of 52,075 shares in each brother.

tions and has been entirely silent as to their history or prospects of profitable station operation. A prospectus issued on November 3, 1960, reviewed the past ownership of selected Tedesco brothers' stations, and stated that "each of these stations was later sold at a substantial profit." No mention was made as to the operating record of the stations. The mailing of the prospectus to stockholders and potential stockholders was accompanied by reprints of a column published in the St. Paul Dispatch. The column, which was based on an interview of Victor and Nicholas by the columnist, was inspired by the sale of WISK, and purported to give a brief outline of the Tedesco radio operations. It was stated therein that "within 10 years they [the Tedescos] had parlayed $8,500 into three-quarters of a million plus some neat profits on other radio station sales. The total is well over a million," and "the Tedesco magic formula is simple; buy, plow profits into the station, sell, buy another." [20] On June 10, 1961, counsel for Tedesco, Inc., responded to a Commission inquiry by stating that "as Tedesco, Inc., becomes successful, smaller stations will be sold so as to up-market the Tedesco chain." However, it was emphasized that such sales would not be for the purpose of realizing capital gains, but as a consequence of the limitation on station ownership imposed by the Commission's rules.

109. On November 23, 1960, Tedesco, Inc., executed a contract to purchase station KWKY, Des Moines, Iowa, for $165,000 on terms of $40,000 down, with the balance of the purchase price to be paid in monthly installments of $2,083.33. The sale was approved by the Commission on March 1, 1961, and the station is still owned and operated by Tedesco, Inc.

110. The Tedesco brothers have also experienced abortive attempts to acquire other radio interests. On October 10, 1960, doing business as Gabriel Broadcasting Co., they filed an application for a new 5 kw station on 980 kc in Chisholm, Minn. The application was designated into a consolidated hearing on February 14, 1962, but was dismissed on July 16, 1962, on payment to the Tedescos of expenses up to $16,000. The reason for dismissal was the Tedescos' disenchantment as to economic prospects in Chisholm. On February 1, 1961, Tedesco, Inc., contracted to purchase station WMIN, St. Paul, Minn., for $200,000. The application was designated for hearing on July 26, 1961, and in September 1961, the assignor exercised an option to dismiss the application. On April 18, 1961, an application was filed to assign to Tedesco, Inc., the construction permit for station WRNE, Wisconsin Rapids, Wis. The permit was held by Bill S. Lahn, but the station had not then been constructed. The application was dismissed on December 7, 1961, at the request of Tedesco, Inc., because the Commission had raised questions relative to the assignor. On October 19, 1961, Tedesco, Inc., filed an application for a new station on 1520 kc, De Pere, Wis. This application is still pending before the Commission.

[20] The hearsay nature of the newspaper column deprives it, of course, of evidentiary value for the purpose of proving the facts stated therein. However, the inclusion of reprints of the column in mailings by Tedesco, Inc., lends it evidentiary value to the extent that it tends to show what the corporation wished prospective stockholders to know and believe about the business history of its chief executive officers.

Issue No. 11

Edina Corp.

111. Edina Corp. is a Colorado corporation with no present business interest other than the instant application. Its principals are Robert Donner, Jr., president, director, and 25 percent stockholder; John C. Hunter, treasurer, director, and 25 percent stockholder; Kenneth E. Palmer, secretary, director, and 25 percent stockholder; and Croil Hunter, 25 percent stockholder.

112. Mr. Donner, who was born in 1930, resides in Colorado Springs, Colo. He has never resided in Minnesota. In April 1958, he joined with John Hunter and Kenneth Palmer in organizing General Broadcasting Corp., which, from July 1958 to November 1960, was licensee of station KYSN, Colorado Springs, Colo. Donner was secretary, director, and one-third stockholder of the corporation. In October 1960 Donner joined with Hunter and Palmer in forming KIMN Broadcasting Co., which since January 1, 1961, has been the licensee of station KIMN, 950 kc, 5 kw, day and night, Denver, Colo. He is vice president, treasurer, director, and 30 percent stockholder of KIMN. He is a director in a Denver company dealing with IBM radio systems, a director of a philanthropical foundation in Philadelphia, and a director and co-founder of a girls' school in Colorado Springs. Mr. Donner will not participate in the day-to-day management of Edina Corp.'s proposed station, but will participate in corporate management and be available for advice.

113. John C. Hunter was born in 1926, and since July 1963, has been a resident of St. Paul, Minn., where he had been raised and had previously lived. Mr. Hunter would be the resident general manager of Edina Corp.'s proposed station. He has visited Edina for brief periods over a span of 20 years, with two or three visits a year between 1959 and February of 1963. During 1953, he did sales work among merchants in Edina.

114. Between April 1956 and June 1964, Hunter was an officer, director, and 58 percent stockholder of Pine County Broadcasting Co., licensee of station WCMP, Pine City, Minn. (see par. 12, supra). He was officer, director, and majority stockholder of KOW Boy Broadcasting Co., which was licensee of station KOWB, Laramie, Wyo., from October 1957 to November 1960. During that period he resided in Laramie and was active in the day-to-day management and supervision of KOWB in the nontechnical phases of the operation. In the fall of 1960, when KOW Boy Broadcasting Co. built station KYCN, Wheatland, Wyo., Hunter participated in the construction of the station in a supervisory capacity. From July 1958 to November 1960, Mr. Hunter was treasurer, director, and one-third stockholder of General Broadcasting Corp., licensee of station KYSN, Colorado Springs, Colo. From January 1961 to the present, he has been president, director, and substantial minority stockholder of the licensee of station KIMN, Denver, Colo. Between January of 1961 and July of 1963, he was active on a day-to-day basis in the sales and financial aspects of the KIMN operation. Since June of 1961, he has been an officer, director, and one-third stockholder of the corporate applicant for a new station at Brush, Colo.

115. Mr. Hunter is an officer, director, and part owner of two businesses in the Denver area, a firm dealing with IBM radio systems, and a general insurance agency. While resident in Denver and Laramie, he was active in the affairs of local civic organizations.

116. Kenneth E. Palmer, who was born in 1925, is a resident of Denver, Colo. From March 1943 to June 1944, he was employed as an announcer-engineer at station KTTS, Springfield, Mo. From June 1944 to April 1945, he was announcer-assistant farm director at station KVOO, Tulsa, Okla. From April 1945 to April 1946 he was with station WHAS, Louisville, Ky., as an announcer, newsman, and writer-producer. From April 1946 to July 1947, he was employed as an announcer and writer-producer at stations WGBF and WEOA, Evansville, Ind. From July 1947 to October 1950, he served at station KPDN, Pampa, Tex., in the successive capacities of program director, sales manager, and general manager. From October 1950 to December 1951, he was general manager at station KVER, Albuquerque, N. Mex. From December 1951 to February 1952, he was associated with the construction of KVWO, Cheyenne, Wyo. From February 1952 to June 1958, he was vice president and general manager, Intermountain Network, Denver Division, a regional radio network. From July of 1958 to November of 1960, Mr. Palmer was president, director, and one-third stockholder of station KYSN, Colorado Springs, Colo., at which station he was active in programing, selling, and bookkeeping in addition to his administrative duties. Since January 1961 he has been vice president, director, substantial minority stockholder, and general manager of station KIMN, Denver, Colo. During his first 2 years in this position, he was active in all nontechnical phases of the KIMN operation, and since then his activities have been confined to programing and managerial duties. He is also associated with Donner and Hunter in the IBM radio systems business in Denver, and is treasurer, director, and one-third stockholder in the pending application for a new station at Bush, Colo.

117. Mr. Palmer has been active in civic organizations in the Texas and Colorado communities in which he has resided. He does not propose to move from Denver, but, in the event of a grant, he will be present in Edina to assist in the implementation of the station's programing proposals. Thereafter, he will visit the station several times a year to be available for consultation.

118. Croil Hunter, who was born in 1893, has been a resident of St. Paul, Minn., since 1932. He has had no broadcast experience. He has been chairman of the board of Northwest Airlines, Inc., since 1953, and between 1937 and 1953 he was president of that corporation. He is also a director of the Dakota National Bank of Fargo, N. Dak. Mr. Hunter has a distinguished background of activity in national and international, public and private, nonprofit organizations in the air transportation industry, and has been the recipient of many awards for his services to that industry. Mr. Hunter will not participate in the day-to-day affairs of the proposed station, but will be available for consultation and advice.

119. Edina Corp. proposes to direct its program service to the needs of Edina, Bloomington, and other listeners in the coverage area. To

achieve familiarity with the changing needs of the area, this applicant would conduct periodic surveys of local organizations, broadcast on the air solicitations of public comment, and encourage its employees to participate in the community affairs. The station will assist local groups in their utilization of the broadcast facilities.

120. Prior to the submission of Edina's original proposal, only informal programing surveys were conducted. In the spring of 1962, an Edina representative contacted the Bloomington mayor, school superintendent, and a police lieutenant, as well as two Bloomington businessmen, and as a result of these contacts Edina Corp. decided to include Bloomington as well as Edina in the formal survey of community programing needs it then contemplated. Thereafter, Mr. Palmer designed a questionnaire which was utilized in making a telephone survey of Edina and Bloomington groups, officials and individuals. On the basis of these surveys, plus personal contacts by John Hunter, Palmer and Hunter prepared a programing amendment which was submitted in July 1962. In October 1962 and October–November 1963, additional surveys were conducted involving both recontacts of some organizations and wholly new contacts with others.

121. The present Edina programing proposal is broken down as follows: Entertainment, 75.4 percent; religious, 6.9 percent; agricultural, 2.1 percent; educational, 2.8 percent; news, 6.1 perecnt; discussion, 5.9 percent; and talks, 0.8 percent. The programing would be 18.3 percent live, 65.1 percent commercial, and 34.9 percent sustaining.

122. The specific programs proposed include:

Religious: "Morning Worship" and Evening Worship," 5-minute opening and closing devotional programs to be rotated among local ministers; "Church of the Air," 8:30–9 a.m., Monday–Saturday, live sustaining for use by local churches and groups; "Auditorium Organ," Sunday, 7–7:30 a.m., "The Good Life," Sunday 7:30–7:45 a.m., "Family Worship Hour," Sunday, 7:45–8 a.m., and "The Sacred Heart Hour," Sunday, 8–9 a.m., a series of nonlocal recorded religious programs; "Psalm of Life," Sunday, 9–9:30 a.m., a recorded program of religious music and sermons; "Minnesota Protestant Churches," Sunday, 9:30–10 a.m., a recorded program of music, sermons, prayers, and devotional talks on a rotating basis by all major Protestant denomations; "Edina and Bloomington Church Program," Sunday, 10–11 a.m., taped broadcasts of Church services held earlier to be presented on a rotating basis; and "Edina and Bloomington Church Remote," Sunday, 11–12 a.m., consisting of remote broadcasts from local churches on a rotating basis.

Agricultural: "Farm Report," Monday–Saturday, 5:10–5:15 a.m., summaries of livestock and grain market quotations; "Farm Program," Monday–Saturday, 5:30–5:35 a.m., farm news and information supplied by USDA; "Farm Report," Monday–Saturday, 6:05–6:10 a.m., farm news and information from wire services, USDA, and local sources; "Agricultural College Program," Sunday, 9–10 p.m., a series of programs produced by the University of Minnesota Agricultural College and other agricultural colleges in the area, with music to be broadcast on such occasions as a full hour agricultural programing may not be available; and "4–H Club News," Sunday,

4–4:15 p.m., news or projects of local 4–H Clubs, and similar organizations.

Educational: "Modern Medicine," Monday–Saturday, 9–9:05 a.m., a discussion of ailments and treatments prepared in conjunction with the Minnesota State Medical Association; "Today's Children," Monday–Saturday, 10–10:05 a.m., problems of childhood and their solutions by a University of Minnesota professor; "Our Complex Society," Monday–Saturday, 1–1:05 p.m., consideration of sociological and economic problems of contemporary society by a University of Minnesota professor; "The Magic Carpet," Monday–Saturday, 2–2:05 p.m., a variety of taped materials from the Audio-Visual Extension Service of the University of Minnesota; "Local School News," Monday–Saturday, 4–4:05 p.m., news of local schools; "A Way of Living," Sunday, 1–1:05 p.m., opinion program featuring educators; "The World of Tomorrow," Sunday, 3–3:05 p.m., discussion of social, scientific, and economic trends; and "Local High School Programs," Sunday, 5–6:00 p.m., material prepared and presented by local high school pupils.

News: "Local News," Monday–Saturday, 8–8:05 a.m., 12–12:05 p.m., 5–5:05 p.m., and 10–10:05 p.m.; "Twin Cities News," Monday–Saturday, 7–7:15 a.m.; "Wire Service News," Monday–Saturday, 5–5:05 a.m., 6–6:05 a.m., 8–8:05 p.m., and 9–9:05 p.m.; "Wall Street Final," Monday–Saturday, 3–3:05 p.m.; "Weather Reports," Monday–Saturday, 5:05–5:10 a.m., 6:10–6:15 a.m., 12:05–12:10 p.m., and 5:05–5:10 p.m.; and a Sunday only news summary from 10–10:05 p.m. The contents of the news programs are implicit in their titles.

Discussion: "Edina Roundtable," Monday–Saturday, 6:05–7 p.m., a discussion of issues of popular interest with listener participation; "Edina Report," Sunday, 7–7:30 p.m., reports by Edina Village officials with participation by local groups; "Bloomington Report," Sunday, 7:30–8 p.m., Bloomington version of "Edina Report," supra; "Citizen's Forum," Sunday, 8–9 p.m., opportunity for listener comment on "Edina Report" and "Bloomington Report," supra; "Minnesota Federation of Women's Clubs," Sunday, 6–6:15 p.m., forum for local women's clubs on rotating basis; and "Local Jaycees," Sunday, 12–12:05 p.m., reports on Jaycee activities.

Talks: "Entertainment Guide," Monday–Saturday, 11–11:05 a.m., information on the availability of local entertainment; and "Station Editorial," Monday–Saturday, 6–6:05 p.m., editorials on matters of interest.

Entertainment: "Early Morning Show," Monday–Saturday, 5:15–5:30 a.m. and 5:35–6 a.m., diskjockey program with rural orientation; "The Morning Show," Monday–Saturday, 6:15–7 a.m., 7:15–8 a.m., 8:05–8:30 a.m., 9:05–10 a.m., 10:05–11 a.m., and 11:05–12 a.m., diskjockey program directed toward housewives; "The Best of Broadway," Monday–Saturday, 12:10–1 p.m., 1:05–2 p.m., and 2:05–3 p.m., diskjockey show featuring Broadway tunes; "The Afternoon Show," Monday–Saturday, 3:05–4 p.m., 4:05–5 p.m., and 5:10–6 p.m., diskjockey program; "Theatre of the World," Monday–Saturday, 7–8 p.m. and 8:05–9 p.m., recorded music, dramatic presentations, etc.; "The Late Show," Monday–Saturday, 9:05–10 p.m. and 10:05–12 p.m., diskjockey program; "The World's Great Music," Sunday, 12:05–1

p.m., 1:05–2 p.m., 2:15–3 p.m., 3:05–4 p.m., and 4:15–5 p.m., diskjockey show; "Bloomington Municipal Band," Sunday, 2–2:15 p.m., live or taped presentations of local musical aggregations; "The Dinner Hour," Sunday, 6:15–7 p.m., a diskjockey show; and "The Late Show," Sunday, 10:05–12 p.m., a diskjockey program.

123. Special programing will be presented on behalf of local organizations as the need arises. Free political time will be given to candidates for local office.

Tedesco, Inc.

124. Tedesco, Inc., is a Minnesota corporation with over 500 stockholders, over 90 percent of whom are Minnesota residents. Its principals, and their stockholdings, are as follows: Victor J. Tedesco, president, director, and 14.3 percent stockholder; Nicholas Tedesco, vice-president, treasurer, director, and 14.3 percent stockholder; Israel E. Krawetz, secretary, director, and 0.36 percent stockholder; Walter V. Dorle, director and 0.14 percent stockholder; Ralph C. Rinkel, director and 1.14 percent stockholder; Samuel Grais, director and 0.24 percent stockholder; and Gerald S. Palmer, director and 0.57 percent stockholder.

125. Victor Tedesco, who was born in 1922, lives in St. Paul, Minn., where he has resided all of his life. He has been active in religious, civic, and political organizations in his community. As hereinabove indicated, his experience as a radio station owner and administrator extends virtually uninterrupted since 1948. At various times during that period he has also served as an announcer, an entertainer, a program director, and a general manager. Victor Tedesco would be general manager of the proposed Bloomington station, personally responsible for the day-to-day supervision of the operation.

126. Nicholas Tedesco, who was born in 1913, resides in Maplewood, Minn. Prior to 1948, he was employed in a variety of occupations unrelated to broadcasting. Aside from his church, he is a member of one religious, one fraternal, and one businessman's organization. His experience in radio, as hereinbefore indicated, goes back to 1948, and has been largely confined to construction, technical, sales, and business matters. He would supervise construction of the proposed station and the technical aspects of its operation, and would be active in the commercial aspects of its business.

127. Israel E. Krawetz, who was born in 1915, has been a lifelong resident of St. Paul, Minn. Since 1958, he has practiced law in St. Paul, and he has been active in a substantial number of religious, civic, and legal associations. He was not shown to possess any broadcasting experience other than as legal adviser to the Tedescos in connection with some of their stations. He will be available on a daily basis in connection with local legal problems.

128. Walter V. Dorle was born in 1907, and resides in St. Paul, Minn. Since 1926, he has been employed by the Northwestern State Bank, St. Paul, Minn., since 1949 in the capacity of president. He has been a director of a number of business corporations, and active in a substantial number of civic, business, and professional organizations,

although he is without broadcast experience. He will be available to the applicant corporation on financial matters at all times.

129. Ralph C. Rinkel was born in 1908, and since 1949 has been an automobile dealer in St. Paul. He has been active in the Minnesota Automobile Dealers Association. He is without broadcast experience, and his services to the corporation will be limited to those of a director.

130. Samuel S. Grais was born in 1906. He is a pharmacist by profession, and is president and 50 percent owner of a chain of drug stores in St. Paul. He has been active in professional, civic, and religious organizations. He has had no broadcast experience, and would not participate in the operation of Tedesco, Inc., except as a director.

131. Gerald S. Palmer was born in 1901, and has resided in St. Paul since 1943. He is manager of a department store in St. Paul, and has participated in civic activities there. He has no broadcast experience, and would serve Tedesco, Inc., only as a director.

132. Tedesco, Inc.'s programing schedule and format will be flexible in an endeavor to create programs which will serve the present and future needs of the community. It is proposed to maintain awareness of community needs through continuous contact by corporate personnel with local organizations and leaders.

133. The Tedesco programing proposals were based in part on the broadcasting experience of Nicholas and Victor, and in part on 15 personal contacts with community leaders made by Victor in early December 1961. The proposed programing would be broken down as follows: Entertainment, 49.66 percent; religious, 17.51 percent; agricultural, 6.35 percent; educational, 2.62 percent; news, 13.02 percent; discussion, 5.23 percent; and talks, 5.61 percent. The programing would be 28.97 percent live, 76.81 percent commercial and 23.19 percent sustaining.

134. The specific programs proposed include:

Religious: "Rosary," Monday–Saturday, 6:45–7 p.m., live programs from different Catholic churches in the area; "Religion in the News," Monday–Saturday, 11:05–11:15 p.m., religious news and promotion of church activities; "Reverend Norman Anderson," daily, 12:05–12:15 a.m., live inspirational messages from a Lutheran minister; "Lutheran Program," Sunday, 8–9 a.m., live services from a Lutheran church in Bloomington; "Gospel Temple," live, featuring a Negro pastor, and "Jewish Program," news and events of interest to members of Jewish faith in Jewish language, Sunday, 9:30–9:45 p.m.; "Sacred Heart Program," Monday–Saturday, 6:45–7 a.m., directed to Catholics; "Back to the Bible," Monday–Saturday, 8:30–9 a.m., program for Protestant faiths; "Chapel of the Air," Monday–Saturday, 9–9:15 a.m., Bible readings and organ music; "Morning Devotions," Monday–Saturday, 9:15–9:30 a.m., both Catholic and Protestant guest speakers; "Hymn of the Hour," Monday–Saturday, 1:55–2 p.m., religious music; "Religion," Monday-Saturday, 11:15–12 p.m., Protestant religious programs; "Upper Room," Sunday, 6:30–6:45 a.m., nondenominational religious programs; "Family Hour," Sunday, 6:45–7 a.m., dramatic program produced by a Lutheran church; "Ave Maria Hour," Sunday, 7–7:30 a.m., dramatic program produced by a Catholic church; "Your

Pastor Speaks," Sunday, 7:30–8 a.m., presenting ministers of all faiths; "Reverend Gordon Peterson," Sunday, 9–9:15 a.m., an evangelistic program; "Old Fashioned Revival Hour," Sunday, 9:30–10 a.m., transcribed religious broadcasts; "Local Church Service," Sunday, 10–11 a.m., services of local churches of all faiths; "Church Service," Sunday, 11–12 a.m., local church services; "Polish Bible Students," Sunday, 6–6:15 p.m., religious program in Polish language; "Temple Baptist Students," Sunday, 6:15–6:30 p.m., live from local Baptist church; "Lutheran Hour," Sunday, 6:30–7 p.m., produced by Lutheran laymen; and "Billy Graham," Sunday, 7–7:30 p.m., evangelistic program.

Agricultural: "Rural Roundup," Monday–Saturday, 5:10–5:15 a.m., 5:30–5:45 a.m., farm news, weather reports, etc.; "Livestock Report," Monday–Saturday, 7:25–7:30 a.m., 4:25–4:30 p.m., remote report from St. Paul Livestock Bureau; "Egg Market," Monday–Saturday, 12:20–12:25 p.m., report on egg market; "Farm Hints," Monday–Saturday, 12:25–12:30 p.m., farm news program; "Central Livestock Program," Monday–Saturday, 12:30–12:45 p.m., activities of livestock market; "United States Department of Agriculture," Monday–Saturday, 12:45–1 p.m., USDA program of general interest to farmers; and "Farm News," Monday–Saturday, 6:15–6:30 a.m., recorded general farm news.

Educational: "Bloomington Schools," Monday–Saturday, 4:20–4:25 p.m., school news; "Minnesota College Hour," Sunday, 8–9 p.m., programs by various area colleges; and "Twin City Forum," Sunday, 9–9:30 p.m., program by various departments of education in the area.

News: "News-Weather," Monday–Saturday, 5–5:10 a.m., 8–8:05 a.m., 10–10:05 a.m., 2–2:05 p.m., 3–3:05 p.m.; "Complete News," Monday–Saturday, 6–6:15 a.m.; "News," Monday–Saturday, 7–7:15 a.m., 11–11:05 a.m., 7–7:05 p.m., 8–8:05 p.m., 9–9:05 p.m., 11–11:05 p.m., 12–12:05 a.m., Sunday, 1–1:05 p.m., 2–2:05 p.m., 3–3:05 p.m., 4–4:05 p.m.; "Noon News," Monday–Saturday, 12–12:15 p.m.; "Weather," Monday–Saturday, 12:15–12:20 p.m.; "News-Weather-Sports," Monday–Saturday, 1–1:05 p.m., 4–4:05 p.m., Sunday, 6–6:15 a.m., 10–10:15 p.m., 12–12:05 a.m.; "News-Weather-Sports-Traffic Conditions," Monday–Saturday, 5–5:15 p.m.; "Evening News and Weather," Monday–Saturday, 6:15–6:30 p.m.; "Complete News," Monday–Saturday, 10–10:15 p.m.

Discussion: "Party Line," Monday–Saturday, 10:05–11 a.m., directed toward female audience; "Chamber of Commerce Program, Bloomington," Sunday, 12–12:15 p.m., "Junior Chamber of Commerce, Bloomington," Sunday, 5–5:15 p.m., and "League of Women Voters," Sunday, 5:15–5:30 p.m., a series of programs in which the local organizations can present their affairs and projects; "United Nations Today," Sunday, 10–10:15 p.m., transcriptions from United Nations; and "London Forum," Sunday, 11–11:30 p.m., discussion of world-wide events.

Talks: "Road Reports," Monday–Saturday, 7:15–7:25 a.m., weather, road closings, school closings, etc.; "Sports Headlines," Monday–Saturday, 7:30–7:35 a.m., local scores and sporting news; "Stock

Market Reports," Monday–Saturday, 4:05–4:15 p.m.; "Bulletin Board," Monday–Saturday, 4:15–4:20 p.m., public service announcements for local groups; "Bloomington Affairs," Monday–Saturday 6–6:15 p.m., local events and interviews; and "Sports Highlights," Monday–Saturday, 6:30–6:45 p.m., sports news and interviews.

Entertainment: "Rural Roundup," Monday–Saturday, 5:15–5:30 a.m., 5:45–6 a.m., diskjockey show directed to rural population; "Here Comes The Band," Monday–Saturday, 6:30–6:45 a.m., band music; "Polka Party," Monday–Saturday, 7:35–8 a.m., 3:05–4 p.m., Sunday, 12:15–1 p.m., polkas with local orchestra leaders; "Town and Country Time," Monday–Saturday, 8:15–8:30 a.m., recorded music; "Country Western Time," Monday–Saturday, 9:30–9:45 a.m., diskjockey show; "Gopher Jamboree," Monday–Saturday, 11:05–12 a.m., country music and interviews; "Radio Ranch," Monday–Saturday, 1:05–1:55 p.m., 2:05–3 p.m., Sunday, 1:05–2 p.m., 2:05–3 p.m., 3:05–4 p.m., 4:05–5 p.m., western music and hymns; "Polka Bandstand," Monday–Saturday, 4:30–5 p.m., music by different band each week; "Rhythm Roundup," Monday–Saturday, 5:15–6 p.m., recorded country music; "Country Western Top 40 Show," Monday–Saturday, 7:05–8 p.m., 8:05–9 p.m., 9:05–10 p.m., country and western records; "Polka Time," Monday–Saturday, 10:30–11 p.m., recorded polkas; "St. Johns Lutheran Hospital Choir," Sunday, 6:15–6:30 a.m., 9:45–10 p.m., a nurses' choir; "International Hour," Sunday, 5:30–6 p.m., foreign language and music program; "St. Catherine's College of Music Appreciation Hour," Sunday, 7:30–8 p.m., music by students of college; "National Guard Program," Sunday, 10:30–10:45 p.m., musical entertainment; "Navy Hour," Sunday, 10:45–11 p.m., items of interest to veterans; "Army Program," Sunday, 11:30–11:45 p.m., musical; and "Air Force Program," Sunday, 11:45–12 p.m., recorded music.

135. The applicants agreed not to submit evidence relative to their studios, equipment, or staffing proposals, or to the past broadcast records of their principals. While these subjects are undoubtedly pertinent to a comparative evaluation, the hearing examiner acceded to the applicants' stipulation that no significant differences existed between them, in light of the fact that both applicants were represented by experienced communications counsel thoroughly familiar with the Commission's comparative precedents. Since the evidence which might have been adduced would not go to the applicants' basic qualifications, it was deemed appropriate to rely on the judgment of counsel for the purpose of shortening an already protracted record.

CONCLUSIONS

Issue No. 1

136. The Edina proposal would bring a new daytime primary service to 1,448,203 persons, whereas the comparable Tedesco contour would embrace 2,031,774 persons, including virtually all of those who would be served by Edina Corp. However, all of the persons who would receive a new daytime primary service from either applicant presently receive at least four such services, and most receive consid-

erably more. On the other hand, the Edina nighttime interference-free contour would serve more people than would that of Tedesco, 1,012,642 as compared to 898,328, but these populations also are generally well served at the present time. Neither proposal would bring service to a white or gray area, day or night.

Issues Nos. 2 and 8

137. The Edina proposal contemplates a six-tower array broadcasting a highly directionalized pattern consisting of a major lobe, four minor lobes and five minima. Because the major lobe is not oriented toward Edina from the transmitter site located immediately to the south of the southeast edge of that city, but is directed slightly east of north in the direction of Minneapolis-St. Paul, a portion of Edina lies in one of the minima and would not receive the signal strength prescribed by the Commission's rules. The portion of the city so affected is very small, less than 1 percent of either area or population, but the pattern orientation also results in severely restricted coverage to the areas adjacent to Edina on the south, southwest, and west. Moreover, an alternative site was available approximately 1 mile to the west from which full coverage of Edina could have been obtained. This site was rejected because it would have reduced the population to be served nighttime in the Minneapolis-St. Paul area, and the Edina engineer was of the opinion that good engineering practice required designing an operation which would provide service to the greatest number of persons.

138. While it is undoubtedly true that the most efficient design of a broadcast proposal would tend to maximize the population to be served, the first principal of good engineering practice before this Commission is to design an operation complying as closely as possible with the rules. The instant proposal is violative of rules 73.188(b)(2) and 73.30(c) in that it fails to provide the requisite signal strength over the city of Edina. It is also violative of rule 73.188(a)(1) to the extent that it fails to provide coverage to the areas adjacent to Edina on the south and west. These violations are not gross. Indeed, with respect to the failure to provide service to a portion of Edina, the departure from the rules may be described as minimal. In appropriate circumstances, where the proposal represented the best feasible design to bring service to a community needing such service, the hearing examiner would have no hesitation in recommending waiver of rule violations of this magnitude.

139. However, this is not a situation where the proposal represents the closest practical approach to compliance with the rules. It is impossible to blink the fact that Edina Corp. proposes a relatively high-powered class II operation to bring service to a community of relatively modest size, and that the failure fully to serve that community and its adjacent areas as provided by the rules is engendered by the desire to provide the maximum service to the nearby well-served metropolitan complex. While it is possible for applicants who would be barred by the engineering rules from submitting a proposal for a large city to obtain essentially the same facilities by casting their

106-500—66——9

application in terms of first local service to a nearby smaller community, it is not unreasonable to require such applicants to provide the smaller community with the full service contemplated by the rules, even if it would require some diminution of signal strength over the larger city. Although a transmitter site was available from which full service to Edina and its adjacent areas would be obtained, Edina Corp. failed to specify it. Under such circumstances, it is not deemed appropriate to recommend any waiver of the pertinent rules. Therefore, it is concluded that a portion of Edina lies in an area of maximum signal suppression; that this does not represent good engineering practice; that the Edina Corp. proposal would not provide coverage of the city of Edina as provided in rule 73.188; and that circumstances do not exist which would warrant waiver of the rule.

Issue No. 3

140. Both Edina and Bloomington are incorporated communities of substantial size: Edina with a population of 28,501 persons and Bloomington with 50,498 residents. Each has an independent municipal government employing a substantial staff, and offering to its residents those services normally associated with a municipality. Each has its own newspaper as well as the business and professional offices found in the ordinary city. It is concluded that each is "an identifiable population grouping separate and distinct from the larger community of * * * [Minneapolis-St. Paul]," *Musical Heights, Inc.*, 19 R.R. 49, and that each is a separate community.

141. Nevertheless, it is suggested on the authority of the *Radio Crawfordsville* line of cases [21] that since each of these applicants would transmit a signal over a substantial part of the Minneapolis-St. Paul urbanized area, each should be regarded as an urbanized area station for the purposes of the 10-percent rule.[22] However, examination of the cases applying the *Crawfordsville* doctrine discloses no instance in which the Commission ruled, or indeed considered, that because a proposal would bring service to a metropolitan area the applicant was deprived of the 10-percent rule exception with respect to the suburban community for which he had applied. Rather, the thrust of the cases would appear to be that the Commission will now look at the service characteristics of proposals involved in 307(b) comparisons before deciding whether to award the traditional 307(b) preference accorded to applicants who would bring a community its first local transmission service, and will deny such preference to applicants who have applied for suburban communities but who would bring a reception service to an already well-served metropolitan complex. This is not, of course, to suggest that the *Crawfordsville* rationale cannot be applied to applicants claiming the first local nighttime service

[21] *Radio Crawfordsville, Inc.*, 34 FCC 996, 35 FCC 438; *Speidel Broadcasting Corp. of Ohio*, 35 FCC 75, 35 FCC 755; *Monroeville Broadcasting Co.*, 35 FCC 657, 37 FCC 296; and *Massillon Broadcasting Co., Inc.*, 36 FCC 809.

[22] In that both applicants would receive more than 10 percent interference nighttime, and each relies on the first local service exception to rule 73.28(d)(3) because neither Edina nor Bloomington has an existing standard broadcast station, a conclusion that they are in fact metropolitan area stations would place both applicants in violation of the 10-percent rule.

exception to the 10-percent rule; it is merely to point out that the pleadings cite no case in which the Commission has yet done so.

142. In fact, the only decision construing the issue here under consideration held that where the Commission is concerned with whether a proposal is merely a subterfuge to evade the 10-percent rule it designates an issue plainly worded to delineate the area of inquiry, and that a simple issue as to whether a community is separate for the purposes of rule 73.28(d) (3) is to be decided solely on the basis of objective facts relating to the communities involved, *Golden Triangle Broadcasting, Inc.*, 1 R.R. 2d 167. On that basis, both Bloomington and Edina have been shown to be separate communities within the contemplation of rule 73.28(d) (3).

Issues Nos. 4, 5, 6, 7, and 9

143. The resolution of issue No. 3 in favor of the separate status of Edina and Bloomington has rendered moot issue No. 4, and pursuant to the hearing examiner's order released herein on September 25, 1963, no evidence was taken on issue No. 4. Issues Nos. 5 and 6 were mooted by Mr. Hunter's disposition of his interest in station WCMP. Issue No. 7 was satisfied by the FAA's letter of July 31, 1962, advising Edina that its proposed antenna structure would not constitute a menace to air navigation. The transmitter site photographs submitted by Tedesco disclose that there are no objects in the vicinity which would tend to distort its proposed directional radiation patterns, thereby satisfying issue No. 9.

Issue No. 10

144. Some 94 percent of the population of the Minneapolis-St. Paul urbanized area resides within the Edina 2-mv/m contour, while 74.6 percent of these persons would be within that station's nighttime interference-free contour. Tedesco would include 100 percent of both Minneapolis and St. Paul within its 5-mv/m contour, and 90.5 percent of Minneapolis, as well as 53 percent of St. Paul, would lie within the Tedesco nighttime interference-free contour. These coverages are on the order of those involved in *Massillon Broadcasting Co., Inc.*, 36 FCC 809, wherein the Commission declined to attempt a 307(b) comparison of the communities specified by the applicants and ruled all of them—for the purposes of 307(b)—to be proposals for the urbanized area of which each of the specified communities was a part. The *Massillon* precedent is deemed to govern the instant situation, for here, as in *Massillon*, a realistic evaluation of the proposals involved—"with particular concern for their frequency, power, and coverage"—demonstrates the proposals to be designed to serve the metropolitan complex rather than the smaller suburbs specified by the applicants. Under such circumstances, no 307(b) choice is appropriate, and a selection must rest upon a comparative consideration of the qualifications of the applicants and their respective proposals. Nor is this conclusion modified by a consideration of the relative service areas of the proposals under the efficiency aspects of section

307(b). Neither the daytime advantage of Tedesco, nor the nighttime advantage of Edina, is so substantial as to be deemed a controlling factor. In cases such as this, where both applications have been concluded to be for metropolitan area stations, the choice is better based on comparative factors than on 307(b) advantages accruing from differences in coverage to already well-served areas.

Issue No. 12

145. The failure to award a preference to either Edina or Bloomington under issue No. 10, the 307(b) issue, has rendered moot issue No. 12.

Issue No. 13

146. The Edina transmitter site is located in a single family residential district (R–4) in the city of Bloomington. Radio towers cannot be erected in an R–4 zone unless the applicant secures a conditional use permit or a permitted use permit, or unless the land is rezoned. Rezoning of the land in question is not feasible, since it would involve "spot zoning," which is contrary to the policy of the Bloomington City Council.

147. Edina has endeavored to secure both a conditional use permit and a permitted use permit, and has been rebuffed in each instance. The application for a conditional use permit was rejected by the unanimous vote of the city planning commission, and an appeal of this ruling to the city council was withdrawn by Edina before it could be heard on the merits. The request for a resolution of the city council that Edina is entitled to a permitted use was rejected by the city council.

148. Edina's attorney is of the view that the city council's rejection of the permitted use request must be interpreted as implying approval of a later resubmittal of the conditional use request. However, the hearing examiner joins the city council's legal adviser, the city attorney, in his inability to share the optimism of Edina's counsel. The city attorney was of the view that it is uncertain whether or not a resubmission of the conditional use request would even be considered, and, if it should be considered, it is uncertain whether or not it would be granted. This appraisal is wholly warranted by the record.

149. The best that could be said for Edina's prospect of securing appropriate zoning for its transmitter site is that it has not been proven to be impossible. This falls considerably short of the reasonable expectancy of rezoning required by the Commission, *Massillon Broadcasting Company, Inc.*, 22 R.R. 95. Although the Commission traditionally has been reluctant to intrude itself into zoning matters, believing them to be the province of local authorities, and has not imposed strict standards on land availability from a zoning standpoint, it does require that the applicant have some reasonable ground for believing that his transmitter site will be available for the use specified. This record shows only that present zoning would not permit use of the land, and Edina's efforts to secure rezoning have

encountered uniform rejection. In the face of these facts, the unexplained optimism of the applicant's lawyer will not suffice. Therefore, it is concluded that Edina has failed to carry its burden of proving that it has a reasonable expectancy of obtaining permission from the appropriate authorities for the construction of its proposed directional antenna system.

Issue No. 14

150. When Tedesco, Inc., acquired station KBLO in Hot Springs, Ark., at a bankruptcy sale, it found itself in a delicate position. On the one hand, the order of the district court required it to assume responsibility for the station's operating profits or losses. On the other hand, 47 USC 310(b), as well as Commission rules and policies, promulgated pursuant thereto, precluded it from assuming control of the operation prior to Commission approval of the transfer. These mutually conflicting responsibilities properly should be taken into consideration in evaluating its subsequent conduct, and warrant a tolerant judgment of close decisions made at the time by the Tedesco brothers. Nevertheless, even sympathetic appreciation for the dilemma which confronted the Tedescos will not excuse the deliberate development of the means to exercise control over the station, and the use of such means to accomplish plain acts of domination.

151. By the fall of 1960 the Tedesco brothers were experienced broadcasting executives. They had been the employers of a substantial number of persons, and they were not without understanding of the implications of the employment relationship. They must have known when they discussed with Morris the possibility of his remaining on as station manager, and offered him the job in December of 1960, that he would thereafter recognize that his tenure was dependent on their continued good will. Under such circumstances, he would be most reluctant to disregard any suggestion they might make, and they could not have failed to realize that thereafter they had the means to exercise effective control over the station. Having established such a potential for control by their own voluntary acts, the Tedescos acquired a concomitant obligation to refrain from utilizing it. This they failed to do.

152. Nicholas' letter to Morris of January 20, 1961, regarding the employment of Johnson was a peremptory act of control. Its tone was of command, not request. The direction to discharge an existing employee to be replaced by Johnson was a prerogative of ownership, and could not have even been contemplated by the Tedescos unless they knew that Morris had become subject to their will. The circumstances surrounding Johnson's employment, coupled with his taking directions from Nicholas but not from Morris as to his conduct while at KBLO, and his abrupt departure at the Tedescos' order, establish that in the vital area of employment, the Tedescos were calling the tune to the extent they wished to do so.

153. Nor is the record devoid of other actions compatible with the concept of assumption of control by Tedesco, Inc. The employment of the station's credit to obtain air transportation, the use of Morris' services to negotiate a possible modification of the KBLO facility, the

attempt to secure a group contract for jingles covering KBLO and the other Tedesco stations, and the supervision of KBLO promotion are all consistent with the conclusion that the Tedescos had taken over practical control of KBLO. None of these actions standing alone could be deemed conclusive proof of an unauthorized transfer, but viewed as parts of a pattern—of which the employment of Johnson was but the chief part—the record demonstrates that effective control over the station had passed into Tedesco hands.

154. Nor does the Tedescos' ambivalent position noted at paragraph 150, supra, supply warrant for accepting a more innocuous explanation for their conduct in light of their failure to take prompt action toward securing Commission consent to the transfer. Although Tedesco, Inc., bid the station in at the bankruptcy sale on November 17, 1960, it was not until March 22, 1961—more than 4 months later—that the transfer application was filed. The contention that the preparation of the application reasonably took this much time is entirely unconvincing in view of the fact that Tedesco, Inc., contracted to purchase two other stations at about this same time, and succeeded in preparing and filing transfer applications on these transactions in significantly shorter periods of time, although the information contained therein was much the same as that submitted with the KBLO application. Thus, the interval during which the corporation was subject to both the order of the district court and the strictures of 47 USC 310(b) was protracted by its own voluntary inaction, and by such inaction it has forfeited its right to complain that its conduct was the inadvertent product of an attempt to serve conflicting legal requirements.

155. It is concluded that in material aspects the right of station management inherent in the license of station KBLO was assumed by Tedesco, Inc., without Commission consent, contrary to the provisions of 47 USC 310(b).

156. Nor do the pleadings filed in connection with the KBLO matter in this proceeding reflect credit on Tedesco, Inc. The assertions relative to the appeal from the judgment of the district court contained in the applicant's September 4, 1962, opposition to the Edina Corp. petition to enlarge issues are misleading in the extreme, and, as of the date the opposition was filed, were factually inaccurate. Moreover, the testimony concerning this incident offered on the record by an officer of Tedesco, Inc., does not measure up to the standard the Commission must require of its licensees, and which it is entitled to expect from a member of the bar.

157. Similarly, the affidavits submitted in support of the Tedesco, Inc., opposition of November 28, 1962, to the second Edina petition to enlarge issues display a casual attitude toward the gravity of an oath ill-calculated to insure factual accuracy. The Johnson affidavit was prepared by an attorney who had not even talked to the affiant about his affidavit, and the jurat was affixed prior to the affiant's signature. The affidavit of Nicholas Tedesco, which contains factual inaccuracies as to the extent of his involvement with KBLO and Johnson's employment there, was executed without having been read. The Krawetz affidavit contained a materially inaccurate allegation relating to the timing of the negotiations which led to the compromise

of the appeal from the judgment of the district court. In addition to these affidavits which were actually submitted, an attempt was made through offers of employment and gifts to induce Morris to execute an affidavit which was prepared for him, but which Morris deemed himself unable to sign.

158. At best, these facts would indicate an indifference to an applicant's obligation to present facts to the Commission as accurately as possible. In all the circumstances of this case, it is concluded that the referenced pleadings constituted an effort by Tedesco, Inc., to extricate itself from the consequences of its unauthorized assumption of control of station KBLO by deliberately attempting to mislead the Commission.[23]

159. The Commission, in the discharge of its statutory responsibilities, must rely upon the factual submissions of those who appear before it. It cannot countenance deliberate misrepresentation, nor is the gravity of such conduct mitigated by the fact that it is the product of the fear of discovery of another offense, *Charles W. Stone*, FCC 64–690, mimeo. No. 54390, released July 27, 1964. Here, the Commission is confronted with misrepresentations dealing with specific facts within the knowledge of officers of the applicant corporation, and presented in sworn pleadings and testimony of corporate officers offered for the purpose of influencing Commission action with respect to previous activities of the applicant. It is concluded, on the basis of the misrepresentations relating to the KBLO matter, that Tedesco, Inc., has failed to establish the requisite character qualifications which would warrant a grant of the construction permit it seeks.

Issue No. 17

160. The Commission's policy against trafficking in licenses is of long standing, and has ordinarily been directed against the acquisition of authorizations for the purpose of profitable resale rather than for operation, *Powel Crosley, Jr.*, 3 R.R. 6; *Versluis Radio and Television, Inc.*, 9 R.R. 1123, 1141; *Atlantic Coast Broadcasting Corp. of Charleston*, 22 R.R. 1045. However, on occasion the Commission has included within its definition of trafficking the aquisition of a station for the undisclosed purpose of modifying the facility, *KFNF, Inc.*, 3 R.R. 53, 63. Moreover, in order to determine whether a proposed transaction would constitute trafficking, the Commission looks not only to the transaction itself, but to the applicant's entire history of station ownership to discover whether a pattern of conduct has been established, *Franklin Broadcasting Co.*, 22 R.R. 880.

161. The Tedescos' early history of station ownership, although characterized by numerous transfers, does not disclose a pattern of deliberate impropriety. The brothers were originally unsophisticated in business matters in general and broadcast operations in particular. The acquisitions of the Stillwater, Cloquet, and Owatonna authorizations were the product of enthusiasm for the broadcasting business, and the disposals of Stillwater and Owatonna were the product of an

[23] It should be noted that nothing on this record indicates that the Washington communications counsel who represented Tedesco, Inc., were, or should have been, aware of the deficiencies in the submitted pleadings.

unforeseen clash of personalities with the coowners of those facilities. The subsequent sale of the Cloquet station was the product of a decline in business which the Tedescos reasonably believed could not be corrected under their ownership of the station.

162. Similarly, no improper motivation governing the acquisition of the South St. Paul and Hutchinson stations is shown on this record, and the disposal of the Hutchinson station to Albert Tedesco was the product of an unforeseeable family disagreement. Nor do the circumstances surrounding the Sparta station merit condemnation. There is nothing to indicate that its original acquisition was motivated by anything other than Victor's then new commitment to broadcasting as a career, or that its subsequent sale was contemplated at the time of the acquisition. The fact that it was sold some 7 years later at a profit does not establish such an intent at the time the construction permit was applied for, especially when the sale date is considered in conjunction with the financial demands put on the Tedescos by the improvement of the WISK facilities in St. Paul.

163. The need for cash at St. Paul also supplies the reason for the sale of the Rochester station, and negates the inference that when the construction permit was sought 3 years previously, there was not a sincere intention to operate the station as proposed.

164. The sale of station WISK in St. Paul (originally WCOW, South St. Paul) was the Tedescos' most profitable single transaction. However, profit standing alone does not require the conclusion that a transfer constitutes trafficking, *William F. Rust, Jr., and Ralph Gottlieb*, 23 R.R. 1036, and the other facts surrounding the sale of this station fail to indicate any improper motive in either its acquisition or improvement. It would appear that the ownership of a high-powered station in St. Paul was an aspiration of the Tedescos from early in their broadcast career, and that they expended considerable effort to realize this dream. However, they found their goal expensive of accomplishment, and, initially at least, equally expensive of operation. They did not seek a buyer for the station, and they declined the initial effort to purchase it from them. Only when they were offered a sum which promised them relative financial security did they consent to assign the station. From these facts, it would seem unwarranted to concluded that the St. Paul transaction violated the Commission's policy against trafficking.

165. The record does not indicate that the Red Wing station was purchased for the purpose of profitable resale. Although a substantial profit was ultimately made from the sale of this facility, it should be noted that the profit stemmed from the fact that operating revenues were utilized to curtail the loans made to purchase the station rather than paid out in the form of dividends. Had operating profits been utilized for dividends, and the loans paid off by the Tedescos themselves out of dividend receipts, little or no profit would have been shown on the sale of the station. It does not seem appropriate to infer so serious an offense as trafficking from a profit which is the product of the applicant's choice of bookkeeping techniques. In any event, the potential overlap between the Red Wing station and the facilities

applied for in this proceeding furnish a plausible explanation of the Red Wing sale.

166. The Tedescos' participation in the New Richmond operation bears no indication of trafficking. Their original interest in the station was dropped even before the application for the construction permit was filed because of the demands on their time and money made by their St. Paul station. The subsequent revival of their interest after the St. Paul station was sold evinced no more than a desire to remain in broadcasting, and their sale of the station because of conflicts between it and the instant application, as well as their commitment to Tedesco, Inc., to divest themselves of personally owned radio interests, bears no mark of impropriety.

167. Even as none of the individual transactions considered to this point has been shown to constitute trafficking, no pattern of improper station manipulation has emerged. Nothing on this record indicates that any of the stations were acquired with anything other than the intent to operate them for an indefinite period of time, or were sold other than for reasons which became compelling subsequent to the acquisition. To conclude otherwise on the basis of the multiplicity of the transactions, each of which was approved by the Commission at the time, would be to engage in a mere numbers game. Nevertheless, it cannot be doubted that the net result of the enumerated transactions was a relatively substantial accumulation of capital for the Tedesco brothers, and a keen awareness of the potential for capital gain inherent in radio station ownership. This awareness was reflected in the brothers' subsequent actions.

168. When the Tedescos purchased KFNF in Shenandoah, Iowa, they were aware that the station had a history of operating losses, and also that it was feasible from an engineering standpoint to move the frequency to substantially larger midwestern cities. While they did expend money and effort on making the Shenandoah operation more attractive, they commenced engineering work on moving the station to Council Bluffs and purchased a transmitter site in that city well before they could reasonably have expected their expenditures to transform the losses in Shenandoah into profits. It is concluded that at the time the Tedescos purchased KFNF they considered it probable, if not certain, that they would file an application to move the station from Shenandoah, and that this fact was not disclosed to the Commission. Such action satisfies the definition of trafficking set forth by the Commission in *KFNF, Inc.*, supra.

169. The Tedescos' broadcast activities are now being carried out through the applicant in this proceeding, Tedesco, Inc. While the corporation has not had a sufficiently long history of station ownership to warrant a judgment of its intentions based upon its acts, its concept would appear to be to achieve growth through the profitable trading of broadcast stations. Its solicitation of potential stockholders has emphasized the Tedesco brothers' history of profitable station sales, and has been entirely devoid of reference to either the brothers' operating history or the corporation's operating prospects. Such advertising may be persuasive to potential stockholders seeking capi-

tal gains, but it is not calculated to reassure the Commission as to the corporation's outlook on trafficking.

170. However, Tedesco, Inc., has not attempted to conceal from the Commission its philosophy as to station ownership. In a letter of June 10, 1961, its counsel stated that because of Commission regulations governing the number of stations which can be owned, the corporation aspired to "up-market" the chain of stations it would seek to acquire by selling off successful stations in smaller markets to obtain the capital for buying stations in larger cities.

171. The precedents furnish no clear guide as to whether such a practice would constitute trafficking. On the one hand, it is plainly the Commission's policy to discourage speculators who seek to acquire stations solely or primarily for the purpose of a profitable resale rather than for operation as set forth in the application seeking authority to acquire such stations. On the other hand, the Commission has always recognized the profit motive as one of the chief incentives inducing individuals to enter broadcasting, and it has also recognized that a station's profit potential is not unrelated to the size of the market it serves. The Commission has promulgated no rule or decided no case to indicate that the ultimate composition of a chain of stations must be determined by the amount of capital available at the time the stations initially are acquired. It has never indicated that individual broadcasters should not aspire to operate in ever-larger markets, nor has it specifically ruled that they should not seek to serve such ambition through the use of capital realized by the sale of stations they have developed in smaller communities.

172. An additional complication lies in the fact that there is nothing to indicate that Tedesco, Inc., would implement its "up-marketing" plan by the sale of stations during their initial licensing period. The Commission policy against trafficking is not construed to be directed at station sales at an indefinite time during some future licensing period, for if 47 USC 301 precludes any rights in a licensee beyond the term of the license, it follows that licensee responsibility is of no greater duration. These considerations weigh heavily against a conclusion that Tedesco, Inc.'s plan to grow into major markets by the sale at some indefinite future time of certain of the smaller market stations to be acquired constitutes a violation of the Commission's trafficking policy.

173. It is concluded that, with the exception of the KFNF acquisition, neither Tedesco, Inc., nor its principals have trafficked or attempted to traffic in broadcast authorizations. However, the Tedesco's failure to disclose at the time they acquired KFNF their probable intention to move the station to another community did constitute trafficking, *KFNF, Inc.*, supra.

174. Before endeavoring to formulate conclusions on the comparative issue, it is appropriate to summarize the conclusions heretofore reached on the other designated issues. It has been concluded that Edina and Bloomington are separate communities for the purpose of rule 73.28(d)(3); that the selection between the applicants should not be based on considerations relating to 47 USC 307(b); that the Edina tower would not constitute a menace to air navigation; that the

Tedesco transmitter site is satisfactory with regard to conditions in the vicinity which might tend to distort the proposed antenna pattern; and that issues Nos. 5, 6, and 12 have become moot. Thus, none of these issues stands as a bar to a grant of either application.

175. With respect to the Edina Corp. application, it has been concluded that the proposal does not represent good engineering practice because a small portion of the city of Edina lies in an area of maximum signal suppression, although it was practical to locate the transmitter at a site from which full coverage could be secured; that the proposal would not provide coverage of the city of Edina as required by rule 73.188, and no good cause has been shown for waiver of the rule; and that Edina Corp. has not shown a reasonable expectancy of obtaining zoning clearance for its proposed transmitter site. While none of these conclusions adversely reflect on this applicant's general qualifications to hold broadcast authorizations, they do lead to the ultimate conclusion that Edina Corp. has failed to established its technical qualifications for the specific authorization sought in this proceeding.

176. With respect to Tedesco, Inc., its technical qualifications for the authorization at issue have been established. However, it has been concluded that this applicant violated 47 USC 310(b) in its dealings with station KBLO, and that its attempts to mislead and deceive the Commission in its pleadings and its testimony in this proceeding with respect to the matter precluded the finding that it possesses the character qualifications requisite to a grant of the authorization which it seeks. It has also been concluded that the failure to disclose material facts relative to the acquisition of station KFNF constituted trafficking.

177. Adverse conclusions as to the basic qualifications of both applicants having been reached, no useful purpose would be served by formulating conclusions under the comparative issue.

Accordingly, *It is ordered*, This 4th day of August 1964, 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 section 1.276 of the rules, the applications of Edina Corp. and Tedesco, Inc., for the authorizations applied for in this proceeding *Are denied.*

FCC 66D-20

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of CHARLOTTESVILLE BROADCASTING CORP. (WINA), CHARLOTTESVILLE, VA. For Construction Permit	Docket No. 15861 Title No. BP-15768

APPEARANCES

Stanley B. Cohen and *Robert B. Jacobi* (Cohn and Marks, on behalf of Charlottesville Broadcasting Corp. (WINA); *Donald E. Ward* (Fly, Shuebruk, Blume, & Gaguine), on behalf of WBXM Broadcasting Co., Inc.; *Ranier K. Kraus*, on behalf of O.K. Broadcasting Corp.; *Earl R. Stanley* and *Charles J. McKerns*, on behalf of Sunbury Broadcasting Corp. (WKOK); *Ray R. Paul*, on behalf of WGAY, Inc.; and *John B. Letterman*, on behalf of the Chief, Broadcasting Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER CHARLES J. FREDERICK

(Effective June 16, 1966, pursuant to sec. 1.276)

PRELIMINARY STATEMENT

1. This proceeding involves the application of Charlottesville Broadcasting Corp. (WINA) (hereinafter WINA) for a construction permit to change the facilities of radio station WINA, Charlottesville, Va., from 1400 kc/s, 250 w, 1 kw-LS, U, class IV, to 1070 kc/s, 5 kw, DA-N, U, class II.

2. WINA's application was designated for hearing on February 24, 1965 (released February 25, 1965), together with the mutually exclusive proposal of WBXM) Broadcasting Co., Inc. (hereinafter WBXM) (docket No. 15862, BP-15808).[1] The issues remaining for hearing are as follows:

> 2. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of station WINA, Charlottesville, Va., and the availability of other primary service to such areas and populations.
>
> 3. To determine whether the proposal of Charlottesville Broadcasting Corp. (WINA) would provide coverage of the city sought to be served, as required by section 73.188(b)(1) of the Commission's rules, and, if not, whether circumstances exist which would warrant a waiver of said section.

[1] See memorandum opinion and order (the designation order) (FCC 65-147, dockets Nos. 15861 and 15862) released Feb. 25, 1965. WBXM's application was dismissed on Mar. 24, 1966 (released Mar. 25, 1966). *Charlottesville Broadcasting Corporation (WINA)*, 3 FCC 2d (1966). This action mooted issues 1, 6, 7, and 8, leaving only those applicable to WINA (issues 2, 3, 4, 5, and 9) set out in the text on p. 2 of this decision.

4. To determine whether the proposed nighttime limitation contour of Charlottesville Broadcasting Corp. (WINA) would adequately serve the center of population of the city in which the studio is located as required by section 73.188(a)(1) of the Commission's rules and, if not, whether circumstances exist which would warrant a waiver of said section.

5. To determine whether the proposed operation of Charlottesville Broadcasting Corp. (WINA) would be consistent with note (b) to section 73.24 of the Commission's rules and, if not, whether circumstances exist which would warrant a waiver of said section.

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

3. Prehearing conferences were held on March 16, May 4, July 9, September 15, and November 10, 1965. The hearing was held on October 7, November 4, December 1, and December 2, 1965, and March 3, 1966. The record was closed March 28, 1966.

FINDINGS OF FACT

4. Station WINA, licensed to Charlottesville Broadcasting Corp., is a class IV station at Charlottesville, Va., operating unlimited time on 1400 kc/s with a power of 1 kw daytime and 250 w nighttime. WINA now proposes to change transmitter site and to operate unlimited time as a class II station on 1070 kc/s with a power of 5 kw, directionalized nighttime.

5. Charlottesville, Va., is an independent city not part of any urbanized area. Although located in the center of Albemarle County, Charlottesville is not part of the county. According to the 1960 U.S. census, there were 29,427 persons residing in Charlottesville and the city occupied a land area of 6 square miles. Surrounding Albemarle County had a population of 30,969 persons in a 739-square-mile rural area. On January 1, 1963, Charlottesville annexed adjacent land to increase the corporate area by approximately 65 percent and its population by 4,223 persons. The city's population thus totaled 33,650 persons. It is estimated that the city reached a population of 36,850 persons by July 31, 1964.[2] Other AM stations in Charlottesville are WCHV (1260 kc/s, 1 kw, 5 kw-LS, DA-2, U, class III) and WELK (1010 kc/s, 1 kw, day, class II).

6. The present daytime service area of WINA extends 10 to 17 miles from the center of Charlottesville. Operating as proposed, the station's service area would reach 27 to 35 miles from the city. At night WINA serves only part of Charlottesville and some rural areas adjacent thereto. As proposed, WINA would serve nearly all of the city and more of the surrounding rural area. All of the areas that WINA now serves daytime and nighttime are entirely within the respective areas that WINA's proposal would serve during these time periods. WINA's proposed daytime service area will extend in all directions beyond the station's existing service area by distances varying from 12 to 19 miles. During nighttime hours WINA's proposal would serve additional areas ranging from about 0.75 mile to 2.6 miles beyond that now served by the station. Present and proposed station coverages are as follows:

[2] Source: The State Bureau of Population, Economics, and Research at the University of Virginia.

Contour	Present		Proposed	
	Area (sq. mi.)	Population	Area (sq. mi.)	Population
Day:				
0.5 (normally protected)	700	59,150	3,040	132,990
Interference received	25	930		
0.5 (interference-free)	675	58,220	3,040	132,990
Night:				
21.0 (interference-free)	9	14,700		
31.6 (interference-free)			35	35,100

7. During daytime hours WINA would provide a new service to 74,770 persons in an area 2,365 square miles without loss of existing service. The proposed daytime gain area is all rural in character. WINA serves within Albemarle County a total of 24,520 persons, who constitute 79 percent of the population in a 517-square-mile area, which constitutes 70 percent of the area embraced by the county. Daytime operation as proposed would enable WINA to serve the entire county. At night WINA would make a new service available to a combined urban and rural population of 20,400 persons in an area of 26 square miles without loss of existing service. WINA's nighttime service to Albemarle County under existing and proposed operations is extremely limited—not over 1 percent of the area for the existing operation and less than 3 percent for the proposed operation.

8. The proposed daytime gain area receives primary service (0.5 mv/m or greater) from other stations in the indicated proportions: 75–100 percent from WSVA, 50–75 percent from WANV and WCHV, 25–50 percent from WELK and WHBG, and up to 25 percent from 13 other stations. In the aggregate these stations make available from two to eight services in the various portions of the area. The portions that receive service from 2 stations include 7,400 persons in 115 square miles and from 3 stations 14,760 persons in 520 square miles. At night WCHV in Charlottesville is the only station that provides primary service to any portion of WINA's gain area. As proposed, WINA would provide a first primary service to 4,500 persons in 14 square miles and a second service to 15,900 persons in 12 square miles in the remainder of the nighttime gain area. Pertinent contours of existing WINA were determined on the basis of the WINA proof of performance measurement data filed December 1964. The contours for proposed WINA were based on ground conductivities given on figure M–3 of the rules and on radiations indicated by the design pattern of the directional antenna for nighttime operation, and 430 mv/m as determined by figure 8 of the rules for the daytime nondirectional operation. Service contours of the several other stations were determined by radiations as set forth in the official notification list and ground conductivities depicted by figure M–3. Where directionalized stations were involved, proof-of-performance data for such stations were used.

9. WINA's present transmitter site is located just outside the Charlottesville northeast city limit. The proposed transmitter site is located northwest of the city at a distance of 1.5 miles from the nearest city

boundary and 3.45 miles northwest of the present transmitter site. The principal business district of Charlottesville is an elongated area centrally located within the city. The area extends 1.5 miles southeast to northwest and varies in width from 0.3 mile to 0.5 mile.

10. To establish ground conductivity from the proposed transmitter site toward Charlottesville, field strength measurements were taken on the signal of a test transmitter operated at the proposed site along radials bearing 140°, 163°, and 188° true. These radials passed through the extreme city limits and center of Charlottesville. An analysis of the measurement data established an effective ground conductivity on each radial of 2 mmhos per meter, thereby confirming the value set forth on figure M–3 of the rules. Using this value of ground conductivity, WINA's proposed 25-mv/m contour would encompass all of the principal business area of Charlottesville, and the proposed nighttime interference-free 31.6-mv/m contour would not only include all of the principal business area but also 99.4 percent of the present area of the city. The excluded area lies at the extreme southwest tip of the city, and on the basis of uniform distribution of population would contain 102 persons. (This assumes a total city population of 33,650 persons. Charlottesville as it existed prior to the annexation of surrounding area would be entirely contained by WINA's nighttime interference-free 31.6-mv/m contour, but would be included only in part (54 percent) by the station's present nighttime interference-free 21-mv/m contour.) As presently operating, WINA serves 47 percent of the city area within its nighttime interference-free 21-mv/m contour and 15,816 persons of the 33,650 persons (1963) residing within the city. One small area (2.6 percent) located in the western part of the city is without primary service at night. This area contains 898 persons and would be provided with a first primary service by the proposed WINA station. The proposed station also represents a second service at night to 49.8 percent of the city area and to 16,758 persons therein.[3]

Section 73.24 Issue (Note (b))

11. The nighttime normally protected contour of WINA as proposed operating as a class II station is 2.5 mv/m. The area in which WINA would provide service at night is limited because of interference received to that contained by the 31.6-mv/m contour. Between the nighttime normally protected and interference-free contours, proposed WINA would not provide primary service to 13,200 persons in 375 square miles representing 27.3 percent of the population (48,300 persons) and 91.5 percent of the area (410 square miles) within the 2.5-mv/m normally protected contour. The magnitude of the received interference raises a question as to whether the proposed station's nighttime service would be reduced to an unsatisfactory degree within the meaning of note (b) to section 73.24 of the rules and, if so, whether circumstances exist which would warrant a waiver of the rule. Applicant submits the following to justify a waiver of the rule:

[3] This population is based upon the 1963 population figures furnished by the Virginia State Bureau.

(*a*) Proposed WINA would not cause objectionable interference to any existing station.

(*b*) Proposed WINA would not cause an increase in the nighttime RSS limitation at any location where existing stations presently operate daytime only.

(*c*) Proposed WINA would not cause objectionable interference to any possible future assignment west, north, and northeast of Charlottesville.

(*d*) Proposed WINA will bring a first primary service at night to 898 persons and a second service to 16,734 persons within Charlottesville based on 1963 population figures.

(*e*) Proposed WINA would provide a first primary at night to a total of 4,500 persons and a second primary service to a total of 15,900 persons.[4]

12. Operating as proposed WINA would raise the nighttime RSS limitation in an area extending south from Charlottesville to Charleston, S.C., and east to the Atlantic coast approximately 45 miles north of Cape Charles at Accomac, Va. The area includes the eastern portion of North Carolina, the upper eastern portion of South Carolina, and the lower eastern portion of Virginia. Any assignment in the area would be subject to a nighttime RSS limitation at least as high as that at Charlottesville. Moreover, a nondirectional nighttime operation would not be possible at any place in the area even with the minimum power of 250 w permitted on the channel because of protection requirements toward Canada and other existing stations.

13. A new station may not be assigned to about 20 percent of the delimited area because of daytime interference considerations from adjacent channel stations WEWO, Laurinburg (1080 kc/s, 5 kw, day), and WWDR (1080 kc/s, 500 w, day), Murfreesboro, N.C., and cochannel station WHPE (1070 kc/s, 1 kw, day), High Point, N.C. Approximately 50 percent to 85 percent of the rest of the area would be further precluded from accommodating a new station depending upon which of the three below listed mutually exclusive pending applications for cochannel facilities on 1070 kc/s might be favored for operation in the area:

File No.	Location	Population	Facilities requested
BP-16329 (New)	Jacksonville, N.C	13,491	1 kw, Day.
BP-16563 (WNCT)	Greenville, N.C	22,860	10 kw, DA-2, U.
BP-16604 (New)	Ayden, N.C	3,108	1 kw, Day.

The applications were not timely filed with respect to the WINA application. Since the three applications were filed after July 13, 1964, they are subject to the so-called "go-no-go" rules now in effect.

14. With respect to the three proposals, operation as contemplated at night by WINA would raise the RSS limitation at the respective locations as follows: From 35 to 54 mv/m at Jacksonville; from 33 to 47 mv/m at both Greenville and Ayden. However, a grant for nighttime operation at any one of the three locations would not be

[4] Applicant notes that the WINA application could be accepted by the Commission as a "go" application under the present "go-no-go" rules because WINA operating as proposed would not involve overlap of prohibited contour, daytime would not cause interference to other existing stations, and more than 25 percent of the area that would be served at night is presently without a primary service.

precluded by WINA inasmuch as each of the three stations operating as proposed would furnish a first primary service to at least 25 percent of its nighttime area. Section 73.24(b)(3) now requires that a request for nighttime operation demonstrate that no interference be caused to existing stations, and that the proposed station provide a first primary service to at least 25 percent of the area that would be served nighttime.

15. The three proposed stations in North Carolina would prohibit the establishment of new cochannel facilities within their respective daytime 0.025-mv/m contours because of overlap considerations. Of the three, the station proposed for Jacksonville, N.C. (BP–16329), would enclose the smallest area within its 0.025-mv/m contour and consequently would be the least restrictive in its impact on possible new cochannel station assignments in the delimited area. Urban places (i.e., places with at least 2,500 persons) within the delimited area but outside the 0.025-mv/m contour of the station proposed at Jacksonville include Farmville (population 4,293) and Blackstone (population 3,659), Va.; Enfield (population 2,978), N.C.; and Mullins (population 6,229), S.C. During daytime hours as proposed WINA would preclude a new station in Farmville and Blackstone but not at Enfield or Mullins. The proposed Jacksonville station would foreclose a cochannel assignment at Mullins.

16. In the event the application for a new station at Greenville, N.C. (BP–16563), were granted, its 0.025-mv/m contour would encompass the largest area of the three considered and because of its extent would preclude daytime cochannel assignments at Farmville, Blackstone, Enfield, and Mullins. The station proposed at Ayden, N.C. (BP–16604), would preclude a new cochannel assignment only at Enfield. WINA would not preclude nighttime operation at the several places inasmuch as each station at such location would make available a first primary service to at least 25 percent of the area that would be served nighttime.

CONCLUSIONS

1. The change in station operation that WINA at Charlottesville, Va., seeks to institute requires favorable resolutions of three issues. These issues relate to (*a*) the provision of a signal of at least 25 mv/m over the business or factory areas of Charlottesville (sec. 73.188(b)(1)); (*b*) adequate nighttime service to Charlottesville (sec. 73.188(a)(1)); and (*c*) the question of whether there would be receipt of interference at night to such an extent as to reduce station service to an unsatisfactory degree (note (b) of section 73.24).

2. WINA operates unlimited time as a class IV station on the frequency 1400 kc/s with a daytime power of 1 kw and a nighttime power of 250 w. The proposal of WINA contemplates unlimited time operation on the frequency 1070 kc/s with a power of 5 kw and utilization of a directional antenna during nighttime hours. WINA would be a class II station. Initially, it must be concluded that WINA would provide both day and night a signal of at least 25 mv/m to all of the main business district in Charlottesville in conformity

106–500—66— —10

with section 73.188(b)(1) of the rules. Also, at night, WINA would serve 99.4 percent of the Charlottesville city area within its nighttime interference-free 31.6-mv/m contour and all but 102 persons of the 33,650 persons residing in the city as enlarged by annexation of contiguous areas in 1963. The portion that would not be served at night by WINA lies at the extreme southwest tip of the city. In contrast, WINA's existing nighttime operation serves only 47 percent of the city area and 15,816 persons therein (assuming uniform population distribution within the city). WINA's proposed nighttime coverage of Charlottesville represents virtually complete compliance with section 73.188(a)(1) of the rules.

3. Within its proposed nighttime normally protected 2.5-mv/m contour, WINA would fail to serve 13,200 persons in 375 square miles out of the 48,300 persons in 410 square miles enclosed by the contour. The loss represents 27.3 percent of the total population and 91.5 percent of the total area that would be served but for interference. It is this large loss that WINA would suffer nighttime which gives rise to the question of waiver of note (b) to section 73.24 of the rules.

4. During daytime hours WINA serves 58,220 persons in 675 square miles and the proposed WINA station would serve 132,990 persons in 3,040 square miles. WINA would make a new service available to 74,770 persons in a 2,365-square-mile rural area in which other service is available in any one part from 2 to 8 stations. The "2 service" area contains 7,400 persons in 115 square miles and the "3 service" area contains 14,760 persons in 520 square miles. At night WINA serves within its interference-free 21-mv/m contour 14,700 persons in 9 square miles while WINA as proposed would serve 35,100 persons in 35 square miles. This represents a gain in WINA nighttime service of 20,400 persons in 26 square miles. A portion of the nighttime gain area receives no primary service and the remainder of the gain area is serviced by only one station, namely, WCHV in Charlottesville. The area that is presently without primary service at night includes 4,500 persons in 14 square miles and that which receives only 1 service contains 15,900 persons in 12 square miles. With respect to Charlottesville, WINA would provide a first primary service therein to 898 persons (2.6 percent) and a second service to 16,758 persons (49.8 percent), as per the 1963 population data. In addition to making its service available in new areas, WINA would continue to provide service in all areas now served by the station.

5. Charlottesville is centrally located in, but not part of, Albemarle County. Although WINA's existing daytime operation provides service to 79 percent of the population and 70 percent of the area within the county, WINA as proposed would extend station coverage to all of the county. At night, WINA now serves less than 1 percent of the county area. As proposed, WINA would serve something less than 3 percent.

6. In addition to the need for service that WINA would fulfill in areas that receive only one or no service at all at night, the applicant also urges in support of a waiver of note (b) to section 73.24 that as proposed WINA would not cause objectionable interference to any existing station or any daytime only station that might subsequently

seek additional authorization for nighttime operation. Moreover, the only area where the nighttime RSS limitation would be increased because of WINA's proposal is precluded for station assignment in the event of a grant of an application (BP–16563) for cochannel facilities in Greenville, N.C. Two other applications for cochannel facilities at Jacksonville, N.C. (BP–16329), and Ayden, N.C. (BP–16604), which are in competition with the proposed station at Greenville are a little less restrictive in their effects on possible new assignments in the delimited area.

7. The above-mentioned delimited area covers the southeast quadrant with respect to Charlottesville. Depending upon which 1 of the 3 applications is granted, other station assignments in the area may be considered in 4 communities that have a population in excess of 2,500 persons: Farmville (population 4,293) and Blackstone (population 3,659), Va.; Enfield (population 2,978), N.C.; and Mullins (population 6,220), S.C. An Ayden station would preclude a new facility at Enfield, a Jacksonville station would preclude a new facility at Mullins, and a Greenville station would preclude new facilities at all four places. During daytime hours WINA as proposed would foreclose a new cochannel facility only at Farmville and Blackstone. Nighttime operation as proposed by WINA would not prevent a station operating during such hours from providing a first service to at least 25 percent of the area to be served at all seven locations, namely, Ayden, Jacksonville, Greenville, Farmville, Blackstone, Enfield, and Mullins.

8. Upon a consideration of all of the foregoing factors it is concluded that a waiver of note (b) to section 73.24 of the rules is justified. By relinquishing the frequency 1400 kc/s for the projected operation on 1070 kc/s, the former frequency may have potential for use elsewhere in the area where some community may be provided with a new transmission facility. A grant of the WINA application shall specify the following condition as required by the designation order:

> Pending a final decision in docket No. 14419 with respect to presunrise operation with daytime facilities, the present provisions of section 73.87 of the Commission's rules are not extended to this authorization, and such operation is precluded.

It is further concluded that a grant of the application of Charlottesville Broadcasting Corp. (WINA), conditioned as specified above, would be in the public interest, convenience, and necessity.

Accordingly, *It is ordered*, This 26th day of April 1966, that unless an appeal from this initial decision is taken 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 application of Charlottesville Broadcasting Corp. (WINA) for a construction permit to change the facilities of radio station WINA, Charlottesville, Va., from 1400 kc/s, 250 w, 1 kw-LS, U, class IV, to 1070 kc/s, 5 kw, DA–N, U, class II, *Be, and it hereby is, granted.*

FCC 66-534

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of BIG CHIEF BROADCASTING CO. OF TULSA, INC. (KTOW), Sand Springs, Okla. Has: 1340 kc, 250 w, U Request: 1340 kc, 250 w, 500-LS, U For Construction Permit	BP-16990

MEMORANDUM OPINION AND ORDER

(Adopted June 15, 1966)

BY THE COMMISSION: COMMISSIONER COX ABSENT.

1. The Commission has before it the above-captioned and described application, filed on October 29, 1965, requesting an increase in daytime power from 250 w to 500 w for standard broadcast station KTOW, Sand Springs, Okla., a class IV station. Sand Springs is located 7 miles west of Tulsa, Okla., and is a community of 7,754 according to the 1960 U.S. census.

2. On December 22, 1965, the Commission adopted a "Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities" (FCC 65-1153, 2 FCC 2d 190), outlining the policy to be followed for every application for new or improved standard broadcast facilities proposing daytime 5-mv/m penetration of any community with a population of over 50,000 persons and having at least twice the population of the applicant's specified community. When such a condition is found to occur, a presumption will arise that the applicant realistically proposes to serve the larger community, rather than the specified community. In the instant case the population of Tulsa, Okla., is 261,685, which is more than twice that of Sand Springs, the applicant's specified community. Examination of the applicant's engineering data indicates that the proposed 5-mv/m daytime contour penetrates approximately one-half of the city of Tulsa.

3. On May 28, 1958, the Commission amended its rules to provide, with certain restrictions, that the limit on the daytime power of class IV stations be increased from 250 w to 1 kw (17 R.R. 1541). We concluded that the power increases would enable class IV stations to enhance the signal quality to those areas currently served and to better cope with urban expansion and heightened electrical noise. Subsequently, on December 14, 1960, section 73.28(d)(3) of the rules was amended to exempt existing class IV stations, seeking daytime power increases, from the provisions of that rule. Likewise, in adopting the

new prohibited overlap system,[1] the Commission specifically exempted class IV daytime power increases.

The foregoing rule changes were adopted so that the full benefits to be derived from class IV daytime power increases would not be delayed or impaired.

4. The Commission, upon further consideration of the 307(b) policy statement, finds that if the general policy of encouraging daytime class IV power increases is to be properly implemented, the provisions of the aforementioned policy statement should not be applied to this type of proposal. Therefore, this application and all other class IV stations requesting daytime power increases will be exempt from the provisions of our policy statement. The Commission also finds that the applicant herein is fully qualified to construct and operate as proposed, and that a grant would serve the public interest, convenience, and necessity.

Accordingly, the application of Big Chief Broadcasting Co. of Tulsa, Inc., *Is granted*, subject to the terms and conditions specified in the construction permit.

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

---

[1] *In re Amendment of Part 73 of the Commission's Rules* (FCC 65–657, adopted July 1, 1964), 2 R.R. 2d 1658.

FCC 66-551

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of SAUL M. MILLER, KUTZTOWN, PA.	Docket No. 14425 File No. BP-13844
E. THEODORE MALLYCK AND WILLIAM E. ALLAUN, JR., D/B AS A-C BROADCASTERS, ANNVILLE-CLEONA, PA. For Construction Permits	Docket No. 14440 File No. BP-14890

MEMORANDUM OPINION AND ORDER

(Adopted June 22, 1966)

COMMISSIONER HYDE FOR THE COMMISSION: COMMISSIONER BARTLEY DISSENTING AND VOTING TO AFFIRM THE REVIEW BOARD; COMMISSIONER COX NOT PARTICIPATING.

1. The Commission has before it for consideration an application for review of the Review Board's decision (FCC 65R-242, released June 25, 1965), filed August 9, 1965, by E. Theodore Mallyck and William E. Allaun, Jr., d/b as A-C Broadcasters (A-C); oppositions thereto filed August 31, 1965, by Saul M. Miller and the Broadcast Bureau; an application for review of the Board's decision and its memorandum opinion and order (FCC 65R-414, released November 23, 1965), filed December 30, 1965, by Saul M. Miller (Miller); an opposition thereto filed January 26, 1966, by the Broadcast Bureau; and a reply to the opposition filed February 14, 1966, by Miller.

2. The Miller application for review is denied. Review of A-C's application is granted to the extent hereinafter shown.

3. A-C's application was heard on the following issues, here pertinent: (*a*) To determine whether its proposal for dual city identification with the two cities of Annville and Cleona "is consistent with the requirements of section 3.30(b) [now 73.30(b)] of the Commission's rules, to warrant an authorization for dual city operation"; and (*b*) to determine the efforts made by A-C to ascertain the programing needs and interests of the community and area to be served, and the manner in which it proposes to meet such needs and interests (*Suburban* issue). Hearing Examiner French concluded that A-C had met the technical requirements of section 73.30(b) and had sustained its burden on the *Suburban* issue, and recommended a grant of the application. A panel of the Review Board, Members Berkemeyer and Slone, with Member Kessler dissenting, denied the application on the grounds that "A-C has failed to meet its burden under both the *Suburban* issue and the 73.30(b) issue."

4. The Board majority on the evidence of record reversing the examiner concluded that A-C failed to show that single city identifi-

cation would create an unreasonable burden either from a programing or economic standpoint and that it failed, therefore, to make the necessary showing required by section 73.30(b) that an unreasonable burden would be placed on the station if it were licensed to serve only one city. However, A–C has now requested that we waive the rule in order to permit the establishment of a first local transmission service in both Annville and Cleona. The request for waiver was not before the Board for consideration, although the dissenting Board member was of the view that the rule should be waived in this case, and she set forth a number of reasons supporting waiver and reexamination of the rule. In view of the Board's denial of the competing Miller application for Kutztown, and since no issue under section 307(b) of the act now remains, we believe that in the particular circumstances of this case it is in the public interest to take review in order to consider the matter of the dual city identification requirements of the rule, including possible waiver thereof. Furthermore, in particular view of the interrelationship on this record of this dual city identification issue to the *Suburban* issue as to the ascertainment and serving of community needs, we are also accepting review of this issue so that there may be a comprehensive Commission determination upon the Annville-Cleona application.

5. In addition to the matters raised in the statement of the dissenting Board member, the record shows the following matters bearing on this question of dual city identification. Annville, with a population of 4,264 persons, and Cleona, with a population of 1,988 persons, are located in Lebanon County with Cleona adjoining the east boundary of Annville; in addition to their geographic proximity, the two communities are merged into the Annville-Cleona school district which operates schools attended by students from both communities; the high school auditorium, located in Annville, is the largest in the two communities and is used by area organizations and also by Cleona businessmen; a public library in Annville is also used by Cleona residents; the Annville-Cleona swimming pool is owned and operated by the Annville-Cleona recreation association; both communities are served with electric power, gas, and telephone by the same utility companies; the two communities employ the same solicitor and the same engineer for municipal business; and membership rolls in the churches and civic organizations of these communities are composed of residents of both communities.

6. In view of the foregoing, it appears clear and we so conclude that Annville and Cleona have an identity of interests for programing and other purposes sufficient to warrant dual city identification. In light thereof, and since no 307(b) issue now remains, we are here called upon to determine whether a grant of the Annville-Cleona application would be consistent with the public interest as expressed in our dual city identification rule 73.30(b). We conclude that it would be.

7. The decisions herein of both the Review Board and the hearing examiner include and turn upon a review of our past AM decisions applying this dual city principle to determine whether that standard has here been met. The Commission believes that in light of the overall factual record herein, such a detailed search among these general

precedents is neither required nor warranted. We conclude, rather, that to the extent rule 73.30(b) may be held to apply hereto, and even assuming, arguendo, applicant's failure to make a sufficient evidentiary showing thereunder, that our waiver of this rule 73.30(b) requirement would clearly be in the public interest.

8. Such waiver reflects our appropriate recognition of the interrelationships between these 2 communities as well as their small size (which combined is less than 6500 persons), and the compelling fact that waiver would secure them their first local transmission facility. Our conclusion that waiver is warranted in any event makes it unnecessary for us to decide whether the requisite economic hardship to meet that requirement might not properly be presumed upon only these facts of community size and interrelationship, or was otherwise sufficiently shown by the uncontested testimony of applicant's principals. However, in taking review and granting waiver we also seek to make clear that in circumstances such as these the interests of both effective procedure as well as our precedents in this area call for this issue to be decided upon the totality of practical and public interest facts of record concerning the proposal, rather than upon a mechanistic application of data limited to a highly technical factor such as economic hardship per se.

9. The remaining *Suburban* issue in this proceeding deals with two matters, namely, the efforts made by the applicant to ascertain programing needs and interests of the community and area to be served, and the manner in which the applicant proposes to meet such needs and interests. A–C's program proposal was originally formulated at the time it proposed to serve Lebanon and Lebanon County, and before the application was amended to specify nearby Annville-Cleona. The efforts made by A–C to determine the programing needs and interests of the communities and area to be served after the formulation of its original program format are extensive and realistic and are not in dispute (see pars. 30–34 of the Board's decision). The Board's conclusion that A–C failed to meet its burden under the issue is based primarily on its finding that A–C failed to "document its program submissions showing how specific programs reflect specific needs."

10. The record shows that, based upon discussions and the answers to a questionnaire by 20 individuals contacted, A–C concluded upon a further review of its preplanned program schedule that no changes were required in that schedule, and that its program proposal was sufficiently flexible and diversified to serve the needs of the area. A compilation of the signed forms shows an expressed need for the following types of programs: Educational, teenage, public affairs, children's, local expression, local news, local talent, and religious. A–C's exhibit 10 sets forth the percentages of time it proposes to devote to various types of programs.

11. A–C's exhibit 10 also shows that it proposes to meet the area's expressed needs in the following manner: (*a*) The expressed need for educational programs by the broadcast of a 20-minute show, 3 days a week; (*b*) the expressed need for teenage programs by a 10-minute program entitled "Teen Age Topics" to be broadcast 6 days a week, and by devoting additional time to the teenager in its daily "What's Your

Opinion?" show, and its Sunday "Discussion Time" program; (*c*) the expressed need for public affairs programs by its daily program entitled "What's Your Opinion?" and its weekly "Discussion Time" program each Sunday; (*d*) the expressed need for children's programs by modifying its entertainment "County Clock Time" program to be broadcast in the morning when local TV stations are not showing children's programs; and (*e*) the expressed need for local news and local talent shows by devoting three segments a day to local news, and by its proposed Sunday afternoon program "Town and County Talent Time."

12. We believe that an applicant's demonstration of how it intends to meet the needs and interests of the community and area proposed to be served should provide the Commission with a reasonable basis for judgment. (See *Elektra Broadcasting Corp.*, FCC 66–94, released February 4, 1966, 2 F.C.C. 2d 470, 471.) Here, the examiner found that while the preparatory effort of A–C initially was less than adequate, its subsequent efforts were such as to warrant that "a reasonable basis exists for concluding that the programing proposal meets the needs of the area to be served." Likewise, the dissenting Board member was of the view that "the 'manner' in which the applicant proposes to meet these needs is reasonably responsive to the needs of the area." We agree.

13. Based on a review of all the pertinent factors, we find and conclude that A–C has demonstrated the manner in which it proposes to meet the needs and interests of the communities and area to be served with sufficient clarity and specificity to provide a reasonable basis for judgment that it has met its burden under the *Suburban* issue.

14. Since A–C has been found to be legally, technically, financially, and otherwise qualified to be a licensee, we find that a grant of its application for a new standard broadcast station at Annville-Cleona would serve the public interest.

15. Accordingly, *It is ordered*, This 22d day of June 1966, that the above-referenced application of Saul M. Miller for review of the Review Board decision *Is denied;*

16. *It is further ordered*, That the request of E. Theodore Mallyck and William E. Allaun, Jr., d/b as A–C Broadcasters, for waiver of the dual city identification requirements of section 73.30(b) of the Commission's rules, *Is granted;* and that their above-captioned application for a construction permit for a standard broadcast station at Annville-Cleona, Pa., to operate on 1510 kc/s with a power of 5 kw, using directional daytime, *Is granted*, subject to the following condition:

> Pending a final decision in docket No. 14419 with respect to presunrise operation with daytime facilities, the present provisions of section 73.87 of the Commission's rules are not extended to this authorization, and such operation is precluded.

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

FCC 66-533

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of FREDERICK ECKHARDT, TR/AS MANSFIELD BROADCASTING CO. (WCLW), MANSFIELD, OHIO For Construction Permit	File No. BP-16348

MEMORANDUM OPINION AND ORDER

(Adopted June 15, 1966)

BY THE COMMISSION: COMMISSIONER COX ABSENT.

1. The Commission has before it for consideration a petition for reconsideration, filed April 11, 1966, by Kittyhawk Broadcasting Corp., and pleadings in opposition and reply thereto. The petition is filed under section 405 of the Communications Act of 1934, as amended, and is directed against the Commission's memorandum opinion and order of March 9, 1966 (FCC 66-247, released March 11, 1966), which denied petitioner's motion for consolidation [1] and granted the above application without hearing. Kittyhawk requests that the Commission set aside its grant of the Mansfield application and designate it for hearing with Kittyhawk's pending cochannel application (file No. BP-16603) for a new station at Kettering, Ohio.

2. Kittyhawk's position throughout this case has been that its proposal for a new station and the proposal of WCLW were mutually exclusive by virtue of prohibited overlap (as defined by section 73.37 (a) of the Commission's rules) of the respective 0.025- and 0.5-mv/m contours. A finding by the Commission that such overlap would result from simultaneous operation of the two proposals would require a consolidated hearing under the *Ashbacker* doctrine.[2] If Kittyhawk is able to establish that its proposal conflicts with Mansfield's, Kittyhawk would be severed from a larger group of applications by virtue of the Commission's "cut-off" rule, section 1.571(c). In denying Kittyhawk's motion for consolidation, the Commission found that the Mansfield field intensity measurements showing no prohibited overlap were entitled to preference over those of Kittyhawk which indicated that prohibited overlap would occur.

3. The Mansfield measurements were included in an amendment to its application which changed the proposed directional antenna pattern. The amendment was filed December 9, 1965. In a previous effort to avoid prohibited overlap, Mansfield, on June 11, 1965, had filed an

[1] At the same time, the Commission also denied a similar motion for consolidation by another applicant, Lawrence County Broadcasting Corp. (file No. BP-16602). However, Lawrence County has not sought reconsideration.

[2] *Ashbacker Radio Corp.* v. *F.C.C.*, 326 U.S. 327 (1945).

amendment reducing its proposed power from 500 to 250 w. Kittyhawk asserts that Mansfield abused Commission process in filing the last amendment. Mansfield had requested a 30-day delay in designation for hearing for the purpose of taking additional measurements. According to Kittyhawk, Mansfield's real purpose in seeking the delay was to give it time to prepare the amendment.

4. Kittyhawk also contends that, since section 1.227(a)(2) requires consolidation of any applications presenting "conflicting claims," the Commission, without holding an evidentiary hearing, should not have ruled on the overlap question. Instead, the Commission should have immediately designated the applications for hearing to determine, inter alia, whether prohibited overlap would actually occur. According to Kittyhawk, the issue presented is not which set of data are to be preferred, but whether or not a conflict exists.

5. Furthermore, Kittyhawk asserts that the Commission, in failing to consolidate, has violated the *Ashbacker* doctrine,[3] because Kittyhawk has now been placed in the position of a newcomer seeking to displace an established broadcaster. Finally, Kittyhawk reiterates its arguments with respect to the engineering data and claims the Commission erred in finding no overlap.

6. The petition for reconsideration will be denied. First, we find that Kittyhawk's charge that Mansfield abused Commission process lacks foundation. Not only may an applicant amend as a matter of right pursuant to section 1.522—a fact that Kittyhawk readily concedes—but also it is equally clear that amendments which seek to remove potential conflicts are encouraged by the operation of section 1.571(j)(1) of the rules.[4] Under this section an applicant may amend without losing the original file number so long as he does not propose a change in frequency, an increase in power or hours of operation, a change in station location, or an engineering modification involving new interference problems. Certainly Mansfield cannot be faulted for filing the very type of amendment the Commission has long encouraged and the mere fact that Mansfield, in addition to submitting the supplemental engineering data, may have used part of the time to modify its proposed radiation pattern does not persuade us to conclude that our processes have been abused.

7. We also take exception to Kittyhawk's interpretation of section 1.227(a)(2).[5] There is no language in that rule requiring the Commission to consolidate applications the moment a conflict appears. Furthermore, the words "where such action will best conduce to the proper dispatch of business," when read in conjunction with sections 1.522 and 1.571(j)(1), leave no doubt that the Commission may withhold immediate consolidation, thereby affording an applicant the opportunity of removing an existing conflict by amendment at the

---

[3] Note 2, supra.

[4] "In fact, certain types of engineering amendments would, in some cases, facilitate the processing of applications *as well as the final disposition thereof* (emphasis added) by eliminating conflicts which would otherwise result in a chain reaction involving other proposals. *In the Matter of Amendment of Sections 1.331, 1.334(g) and 1.354(h)(1)* [now 1.571(j)(1)], FCC 60-280, released Mar. 28, 1960, 19 R.R. 1599.

[5] Section 1.227(a)(2) states:

"(a) The Commission, upon motion or upon its own motion, will, where such action will best conduce to the proper dispatch of business and to the ends of justice, consolidate for hearing: * * * (2) any applications which present conflicting claims."

prehearing stage. In this way many expensive and protracted hearings involving a single engineering issue have been avoided. We also find that Kittyhawk has construed too broadly the meaning of the term "conflicting claims" as it applies to proposed use of the broadcast band. Apparently, Kittyhawk believes that any claim of conflict between two proposals must be resolved by an evidentiary hearing. We disagree. The determination of whether two proposals actually involve conflicting claims must be made by the Commission on an informal basis after careful review of all available data. Failure to make such a determination would amount to an abdication of administrative responsibility, and would result inevitably in the consolidation of applications involving mere allegations of conflict rather than actual conflict. The only other alternative would be to hold a hearing to determine whether a hearing was necessary—an equally injudicious and wasteful process. Such procedures would effectively destroy the administration of our entire prohibited overlap system by forcing hearings for the sole purpose of determining whether an application was acceptable for filing. Of course, situations may arise, unlike the present case, where the Commission cannot, as a practical matter, resolve engineering disputes short of hearing. In those cases we would designate the applications for hearing. But this does not mean that conflicting engineering studies, ipso facto, present conflicting claims within the meaning of the rule. The pertinent contours proposed must actually involve overlap. If not, only a claim of a conflict exists and the applications do not present actual conflicting claims to spectrum space.

8. We turn now to Kittyhawk's contention that the grant to Mansfield deprived it of its *Ashbacker* rights. If the two applications were mutually exclusive so that it could be said that a grant to Mansfield effectively precluded a subsequent grant of the Kittyhawk application, we would agree with Kittyhawk's theory. However, the opposite is true. In deciding that the two applications did not involve prohibited overlap, we found, in effect, that both proposals were, vis-a-vis each other, eligible for grants without hearing. Having so ruled, we are certainly not going to prejudice the Kittyhawk application by placing it in hearing to determine whether the proposal would cause prohibited overlap to the recently granted Mansfield operation.

9. Although Kittyhawk reiterates its original engineering arguments that prohibited overlap would occur, no new data has been filed nor have any additional facts been presented which persuade us to reconsider our original findings. Those findings have been set forth in detail in our previous opinion and need not be repeated here.

Accordingly, the above petition for reconsideration by Kittyhawk Broadcasting Corp. *Is hereby denied.*

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

FCC 66R-235

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of JAMES L. HUTCHENS, CENTRAL POINT, OREG.	Docket No. 16525 File No. BP-16640
FAITH TABERNACLE, INC. (KRVC) ASHLAND, OREG. For Construction Permits	Docket No. 16526 File No. BP-16745

MEMORANDUM OPINION AND ORDER

(Adopted June 20, 1966)

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSENT.

1. This proceeding involves the applications of James L. Hutchens (Hutchens) for a new standard broadcast station at Central Point, Oreg.; and Faith Tabernacle, Inc. (KRVC), to change the frequency, power, hours of operation, and class of its existing standard broadcast facility at Ashland, Oreg. By order, FCC 66-238, released March 16, 1966, these mutually exclusive applications were designated for hearing on issues concerning areas and populations; Hutchens' financial qualifications; and section 307(b). KRVC, in the subject petition, requests the addition of a 307(b) separate communities issue, or alternatively a *Boardman* issue, a site availability issue, a programing issue, and the broadening of the present financial issue.[1]

2. 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), KRVC first requests an issue to determine whether Hutchens will realistically provide a local transmission facility for his specified station location or for another larger community. In support of this request, KRVC points out that Central Point, Oreg., a community of 2,298 persons, is located 4 miles from Medford, Oreg., which has a population of 24,425 persons, and that Hutchens' proposal will place a 5-mv/m signal over Medford. Attached to KRVC's petition are affidavits from officials of six broadcast stations serving Central Point, all of whom state that their individual stations meet various local needs of Central Point. KRVC argues that the engineering facts together with the affidavits constitute the "threshold showing" required to warrant addition of a separate community issue. As an alternative, KRVC contends that its showing warrants that the issues be enlarged as they were in *Boardman Broadcasting Co., Inc.*, FCC 64R-21,

[1] The Review Board has the following pleadings under consideration: (*a*) Petition to enlarge issues, filed on Apr. 4, 1966, by KRVC; (*b*) opposition, filed on Apr. 28, 1966, by Hutchens; and (*c*) Broadcast Bureau's comments, filed on Apr. 29, 1966.

1 R.R. 2d 931, to determine the extent to which the programing of nearby existing stations meets the local needs of Central Point.[2]

3. Hutchens, in his opposition, contends that he has no desire or intent to serve Medford, and that his programing is directed toward the needs and interests of Central Point. The allegations contained in the affidavits submitted by KRVC are, Hutchens contends, conclusionary and insufficient to warrant the addition of a separate community issue. The Bureau also opposes the addition of a separate community issue. However, the Bureau recommends that a *Boardman* issue be added, contending that the affidavits submitted by KRVC constitute a threshold showing sufficient to warrant an inquiry into the extent to which the needs of Central Point are being met by existing stations.

4. The policy statement is directed primarily to suburban applicants who will not realistically provide a local transmission service for their respective specified communities. According to the policy statement, in situations where an applicant's proposed 5-mv/m daytime contour penetrates 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, a presumption arises that the applicant realistically proposes to serve the larger community rather than the specified community. In those instances where the presumption would not arise, a separate community issue could be added if a "threshold showing" is made that a proposal will realistically serve primarily a community other than the specified community.

5. Since Medford is a community of under 50,000 persons, the presumption does not apply, and the Board finds that KRVC's showing is insufficient to warrant the addition of a 307(b) separate community issue. Hutchens is applying for a class IV station with 250 w power and a nondirectional antenna. These facts tend to counter any inference that may be drawn from his proposal's proximity to and coverage of Medford. Even were the allegations contained in the affidavits furnished by KRVC accepted as establishing that needs of Central Point are already being met by existing stations, it would not follow that Hutchens does not realistically intend to serve Central Point. The request for a separate community issue will therefore be denied.

6. The Board will hold in abeyance KRVC's alternative (to the separate community issue) requests for an issue to determine whether existing stations satisfy the needs of Central Point, and for an issue to determine the nature of KRVC's program service and the need for such service. Both of these requested issues relate to the 307(b) determination between the applicants' specified communities. There is presently pending before the Board, however, a joint request for approval of agreement, filed by KRVC and Hutchens, looking toward the dismissal of KRVC's application. In the event that the joint

[2] KRVC suggests that the issues flowing from the policy statement have superseded the issue added in the *Boardman* case. The Board disagrees. The issues from the policy statement are directed toward a determination of whether an applicant will realistically provide a local transmission service for its specified community, whereas the *Boardman* issue is directed toward a determination of the needs of the specified community for a local transmission service.

request is approved and KRVC's application is dismissed, a 307(b) choice between communities will be unnecessary, and the programing and *Boardman* issues, requested by KRVC, will become moot. Therefore, the Board will dispose of the request for these issues at the time it acts on the joint request for approval of agreement.[3]

7. KRVC's request for an issue to determine the availability of Hutchens' antenna site is based on the fact that Hutchens' application contains a site option specifying an expiration date of June 10, 1966. KRVC argues that the site may prove to be unavailable at the time of construction because the option makes no provision for renewal and contains a "time of the essence" clause indicating that the option shall be null and void if it is not exercised prior to the expiration date. As pointed out by the Bureau, KRVC's objections were untimely on the date its petition was filed, since the option was then in effect. Moreover, the Commission does not require a binding agreement to satisfy the requirement of the site availability; it requires only that there be a reasonable assurance that the site will be available for the purpose proposed. *Eastside Broadcasting Company*, FCC 63R–528, 1 R.R. 2d 763. We note, however, that since the filing of KRVC's petition, the time limits under the option have expired. Therefore, unless Hutchens submits information updating its showing of site availability, an appropriate request to add a site availability issue will be favorably considered by the Board.

8. Finally, KRVC requests that the financial issue designated against Hutchens be broadened to include a determination of whether Hutchens is financially qualified to construct and operate for 1 year. In support of this request, KRVC points out that Hutchens is a party in three other applications, and that his financial statement indicates current liabilities in excess of current assets. Since Hutchens' personal income for 1963 is shown in his application to be less than $7,000, KRVC argues that Hutchens may not have sufficient funds to meet his commitments in all four applications now pending before the Commission. The Bureau and Hutchens both argue that Hutchens' financial qualifications were specifically considered by the Commission in the designation order, that KRVC has furnished no facts which were not before the Commission at that time, and that therefore the request for the enlarged financial issue should be denied.

9. In the designation order, the Commission noted that Hutchens has three other applications pending for construction permits, that Hutchens' financial statement shows current liabilities in excess of current assets, and that Hutchens' father has committed himself to lend Hutchens $27,500 for each of these proposals. The Commission further noted that it could not be determined from the information submitted whether Hutchens' father had sufficient liquid assets available to meet these commitments. Appropriate issues inquiring into the ability of Hutchens' father to meet these commitments, and if he is unable to do so, of Hutchens' ability to finance the proposal, were specified. Thus, the Board finds that the matters upon which KRVC

[3] There is also pending before the Board a petition to enlarge issues filed on Apr. 1, 1966, by Hutchens against KRVC. However, in the event that the above-described joint request for approval of agreement is approved, this petition will also become moot.

relies for its request to broaden the financial issue not only were specifically considered by the Commission, but also resulted in the inclusion of issues under which the matters raised by the petition can be adequately explored. The request will therefore be denied.

Accordingly, *It is ordered*, This 20th day of June 1966, that action on the requests for issues to determine (*a*) the nature of the program service proposed by Faith Tabernacle, Inc., and the need for such service within its proposed service area, and (*b*) the extent to which the programing of existing stations in Medford, Oreg., and nearby cities meets the needs and interests of Central Point, Oreg., contained in the petition to enlarge issues, filed on April 4, 1966, by Faith Tabernacle, Inc., *Is held in abeyance;* and that in all other respects said petition *Is denied.*

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

FCC 66R-236

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

MEMORANDUM OPINION AND ORDER

(Adopted June 20, 1966)

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSENT.

1. The above-captioned applications were designated for hearing by Commission order, FCC 66-281, released April 11, 1966. The Commission found both of the applicants to be legally, financially, and otherwise qualified to be the licensee of a radio broadcast station. However, because of certain questions with respect to interference to existing stations and the necessity to choose which of the two proposals would best carry out the objectives of section 307(b) of the Communications Act, they were designated for hearing. H. H. Huntley (hereinafter referred to as Huntley) has filed a motion to enlarge the issues in this proceeding.[1]

2. In support of this motion Huntley alleges that an examination of section III of Cosmopolitan Enterprises' application shows an estimated cost of construction of $91,575, and an anticipated first year's operating expense of $95,000, for a total financial requirement of $186,575. To meet this requirement Cosmopolitan will rely upon existing capital of $1,000, a bank loan of $150,000, and deferred payments on equipment of $41,250, totaling $192,250. But, argues Huntley, this fails to take into account the necessity to make some payments of principal and interest on the equipment during the first year, which Huntley calculates to be $15,081, as well as interest on the bank loan which Huntley calculates to be $9,000. Thus, Huntley argues, Cosmopolitan's total financial requirement for construction of the station and the first year of operation is $210,656, $18,406 more than is available to Cosmopolitan. In these circumstances, if Cosmopolitan is to construct and operate its station for the first year, it must rely upon revenue for $18,406. This being so, and since Cosmopolitan has not provided an adequate showing to support its esti-

[1] The Board has before it a motion to enlarge issues, filed by H. H. Huntley, Apr. 29, 1966; a petition in support of motions to enlarge issues, filed May 19, 1966, by International Broadcasting Corp.; an opposition to petition to enlarge issues, filed by Cosmopolitan Enterprises, Inc., May 24, 1966; Broadcast Bureau's support of motion to enlarge issues, filed May 24, 1966; and a reply to opposition, filed by H. H. Huntley, June 3, 1966.

106-500—66——11

mated cost of construction, operating expenses, and revenues for the first year of operation, Huntley argues the "Ultravision" issues must be included in this proceeding with respect to Cosmopolitan. Both the Bureau and International support this motion. The Bureau, however, would not permit an inquiry as to the estimated costs of construction and first year's operating expenses, since Huntley had raised no specific questions concerning those items.

3. In its opposition, Cosmopolitan denies that it failed to account for equipment payments, interest on equipment, and interest on its bank loan. In support of this position it notes that its proposed operating expenses for the first year of $95,000 as contrasted to Huntley's proposed expenses for the first year of $48,716 provides sufficient funds to meet all of its obligations. Cosmopolitan further states in its opposition that in any event should there be a need for additional funds, the three principal stockholders, Morris J. Hyak, Marty Hyak, and Victor Alkek, would lend $50,000 to Cosmopolitan at any time during its first year of operation. This offer is evidenced by a letter signed by these stockholders, which states their intention to make the loan, and declares that each of them has sufficient quick current assets over and above liabilities to meet his commitment. Moreover, each of the three stockholders submitted a partial financial statement which shows current assets over liabilities in amounts substantially greater than would be required by each to meet his commitment to the corporation.

4. Cosmopolitan has not as yet undertaken to amend its application to reflect the additional financing discussed above. While it would have been better practice had Cosmopolitan simultaneously tendered an amendment to its application to reflect the new financing upon which it intends to rely, this procedural deficiency does not preclude the Board from considering the facts as it finds them. Huntley argues that the documents submitted by the Hyaks and Alkek did not establish that each of them had available in liquid assets (cash or listed securities above current liabilities) his one-third of the $50,000 which they had promised to lend to Cosmopolitan. The documents submitted, although somewhat less persuasive than a complete financial showing for these individuals, are, when examined in conjunction with the financial data submitted in section III of the application, adequate to convince us that each of the three stockholders has sufficient liquid assets to advance his share of the $50,000 loan commitment if it is called for by Cosmopolitan. Even assuming, as did Huntley, that Cosmopolitan did not provide for some necessary payments of principal and interest, it is quite clear, in view of the additional $50,000 now available, that Cosmopolitan now has available to it adequate funds to construct the proposed station and finance its operation for the first year. Cosmopolitan's estimates as to cost of construction and first year's operating expenses are not unreasonable, and Huntley has raised no specific questions concerning these estimates (sec. 1.229 of the rules). In view of the foregoing, and consideration of the fact that it will not be necessary for Cosmopolitan to rely upon revenue for its first year of operation, the motion to enlarge issues will be denied.

Accordingly, *It is ordered*, This 20th day of June 1966, that the motion to enlarge issues in the above-captioned proceeding, filed April 29, 1966, by H. H. Huntley, *Is denied.*

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

FCC 66R-242

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of FLETCHER R. SMITH AND MADGE P. SMITH, D/B AS WILKESBORO BROADCASTING CO., WILKESBORO, N.C.	Docket No. 16310 File No. BP-16466
PAUL L. CASHION AND J. B. WILSON, JR., D/B AS WILKES COUNTY RADIO, WILKESBORO, N.C.	Docket No. 16311 File No. BP-16556
For Construction Permits for New AM Station, 1240 kc, 100 w, U	

MEMORANDUM OPINION AND ORDER

(Adopted June 22, 1966)

BY THE REVIEW BOARD: BOARD MEMBER SLONE ABSTAINING.

1. Before the Review Board is a petition for leave to amend, to retain file number, and to remain in hearing status, filed April 12, 1966, by Wilkes County Radio (County); a joint petition for approval of agreement and for dismissal of the application of Wilkesboro Broadcasting Co. (Broadcasting), filed April 12, 1966, by County and Broadcasting; and a petition to accept late reply and reply, filed May 13, 1966, by County.[1] County and Broadcasting are each applicants for a new standard broadcast station (1240 kc, 100 w, U, class IV) at Wilkesboro, N.C. The applications were designated for hearing by order, FCC 65-1049, released November 26, 1965, under issues inquiring as to areas and populations; whether the proposals comply with section 73.188(a)(1) of the rules, and, if not, whether a waiver of this rule is warranted; and which of the proposals would better serve the public interest. The Commission also noted that both applicants were under a "heavy burden" in view of the Commission's general policy to discourage applications for 100 w proposals.[2]

[1] Before the Board are: (*a*) Petition for leave to amend, filed Apr. 12, 1966, by Wilkes County Radio (County); (*b*) opposition, filed Apr. 21, 1966, by WKBC; (*c*) comments, filed Apr. 21, 1966, by the Broadcast Bureau; (*d*) joint petition for approval of agreement, filed Apr. 12, 1966, by County and Wilkesboro Broadcasting Co. (Broadcasting); (*e*) opposition, filed Apr. 25, 1966, by WKBC; (*f*) comments, filed Apr. 27, 1966, by the Broadcast Bureau; (*g*) reply, filed May 13, 1966, by Wilkes County Radio; (*h*) petition to accept late reply, filed May 13, 1966, by Wilkes County Radio; (*i*) opposition, filed May 16, 1966, by WKBC; and (*j*) reply, filed May 19, 1966, by County. The amendment is an integral part of the withdrawal agreement submitted to the Board. Because of this, the Board, rather than the hearing examiner, is ruling on the amendment. *Emerald Broadcasting Corp.* (*KPIR*), 1 FCC 2d 1523, 7 R.R. 2d 92 (Rev. Bd. 1965).

[2] Subsequent to the release of the designation order, the Commission, in *Amendment of Part 73 of the Rules*, FCC 66-506, released June 3, 1966, adopted rules barring applications for 100 w proposals. However, pending applications for 100 w proposals were specifically exempted from the rule.

AMENDMENT

2. In its petition for leave to amend, County seeks permission to adopt the transmitter site and other engineering aspects specified in Broadcasting's application.[3] To show good cause for the amendment, County states that its new transmitter site would improve its coverage of the city, thereby reducing its "heavy burden" (supra, par. 1). It further points out that no new considerations would be introduced, since the engineering proposal to be adopted has already been processed by the Commission's staff. County also alleges that the event which prompted its amendment could not be foreseen, stating that the right to use the site specified by Broadcasting arose only after merger negotiations with Broadcasting "fell through" and Broadcasting then indicated a willingness to dismiss.

3. Wilkes Broadcasting Co. (WKBC) opposes the amendment and alleges the following: Title to the site proposed by Broadcasting is actually in the Wilkes County Board of Education; an examination of the public records of the county and the board of education indicates that no arrangements have been made for the sale of the property to anyone; and North Carolina law requires that any surplus school land be sold at public auction. Therefore, WKBC claims, a site availability issue will have to be added. Furthermore, WKBC says that the inherent deficiency of the proposal (i.e., failure to cover the community) will not be removed since the Broadcasting specifications are also deficient in this regard. Finally, WKBC states that County has not shown how its financial status would be altered by the amendment.

4. The Bureau also opposes the amendment, claiming that there is no showing that County could not have obtained this site or an equally efficient one prior to designation. The Bureau questions why County could not have obtained an option on the site, even though Broadcasting already had an agreement to obtain the site. Nor is there any showing, alleges the Bureau, that County made an attempt to improve the inherent shortcoming in its proposal caused by the policy against 100 w stations.

5. In its reply, County submits, among other things, an affidavit from its president, indicating that "the site originally designated by Wilkes County Radio was chosen after consultation with its consulting engineer who felt that the proximity to the river bottom would offer the best propagation of the sites investigated," and that the principals of County had no knowledge of the availability of the site specified by Broadcasting until after it commenced negotiations with Broadcasting; and an option agreement from the school board agreeing to lease the proposed site for 1 year to County for location of its transmitter. County contends that the good cause requirement is to prevent (*a*) one applicant in a comparative proceeding from gaining an advantage; and/or (*b*) the proceeding from becoming more complicated. Neither of these factors, says County, is present here.

[3] County's proposal would provide a nighttime interference-free contour of 18.5 mv/m; Broadcasting would provide a nighttime interference-free contour of 19.7 mv/m. Both proposals fail to cover the entire city of Wilkesboro within their respective nighttime interference-free contours and waivers of the Commission's city coverage requirements have been requested.

6. Numerous allegations concerning County's existing and proposed sites were made in the oppositions to the proposed amendment, the joint request for approval of agreement, and the request to accept the late filed reply. We will deal with all of these allegations here. The Board disagrees with the contention that a site availability issue is required.[4] Since no such issue was specified in the designation order, there was no obligation on the part of Broadcasting to introduce evidence at the hearing regarding the availability of its proposed site. The lease agreement submitted by County effectively rebuts any inference that could be drawn from the fact that North Carolina law may prohibit the sale of this property except at auction and dispels any question relating to County's character qualifications. The fact that the lease agreement runs for only 1 year is not sufficient to justify the inclusion of an issue, particularly in view of County's statement that both parties intend to renew the lease on a year-to-year basis. Finally, we do not think it was incumbent on County to establish that the site originally specified by Broadcasting was unavailable to County. County states that its original site was chosen on the advice of its engineer, and, in the absence of evidence to the contrary, we do not think it was unreasonable for County to assume that the site specified by a competing applicant was not available to it.[5]

7. The basic purposes of the requirements for post-designation amendments contained in section 1.522(b) of the rules are to facilitate the hearing process by delineating the issues and scope of the hearing, and to permit adequate preparation and presentation by all of the parties. See *Charles County Broadcasting Co., Inc.*, FCC 63R–33, 24 R.R. 496; and *Amendment of Sections 1.311, 1.354(g) and 1.354(h) (1)*, FCC 60–280, 19 R.R. 1599. County's proposed amendment could in no way frustrate these purposes since it is not introducing into this hearing any new or changed engineering, but rather adopting the existing engineering proposal of the other applicant to this proceeding. Moreover, the proposed amendment would not result in prejudice to any party, would not result in the addition of new parties or issues,[6] would not change existing issues, and was filed with due diligence after the agreement between the applicants was reached. While the proposed amendment will not obviate the need for a hearing, it will, together with the proposed agreement, clearly simplify and shorten the proceeding by eliminating one of two competing applicants, thereby doing away with the need for a comparison of applicants, and allowing what appears to be the more satisfactory engineering proposal to remain. Thus, the proposed amendment can only benefit the public, and will not have any adverse effect on the hearing process

[4] We also note that WKBC's request is inappropriately contained in an opposition pleading, and that it therefore need not be considered. See *Midwest Television, Inc.*, FCC 65R–370, 1 FCC 2d 1184. However, since the objections raised concerning the proposed site formed much of the basis for all of the oppositions, the Board will consider this matter on the merits.

[5] In this connection the Board notes that County's application was filed subsequent to that of Broadcasting.

[6] County's original application specifies that its transmitter site would be leased; no rental figure was given but this fact did not prompt the Commission to question County's financial qualifications. The option on the new site provides for a rental figure of $600 per year. In the Board's view, the greater specificity now provided raises no significant problems with regard to County's financial proposal.

or the parties to the hearing. We conclude that good cause for amending exists and the amendment will be accepted.

AGREEMENT

8. In the petition for approval of agreement, County and Broadcasting indicate the events leading up to the agreement and allege that legal and engineering expenses totaled $3,856. The amount to be reimbursed under the agreement is $3,000. WKBC opposes the agreement for the following reasons: No affidavits are supplied verifying the amount of expenses; the explanation of events preceding the agreement is totally lacking in detail; there is no showing of how the public interest will benefit; and since neither applicant informed the Commission of North Carolina law regarding disposition of board of education property, a character question is raised. The Bureau also opposes approval of the agreement due to the lack of expense affidavits and an incomplete explanation of the "terms, conditions, circumstances, and considerations involved in County's acquisition [of Broadcasting's] site and engineering * * *." Without this information, the Bureau alleges, it cannot be determined if the agreement is in the public interest. With its reply, County submits affidavits from its attorney and engineer verifying expenses of over $3,000 and a more detailed explanation of the negotiations and consideration flowing between County and Broadcasting.

9. The Board finds that the information submitted comports with the requirements of section 1.525(a) of the rules. The amount specified by the parties is within that sworn to have been expended in connection with the application. The details now given in the affidavit as to the negotiations appear to be complete. As discussed above (supra, par. 7), the agreement is in the public interest in that it will simplify and shorten the hearing procedure and may hasten the inauguration of a new service in Wilkesboro. As previously indicated, no character question is raised against County in regard to the site arrangements, since a lease option has been shown to exist. The agreement will be approved.

LATE FILING OF REPLY PLEADING

10. One other matter remains. On April 29, 1966, the Board released an order, FCC 66R–167, extending the time in which County could reply to the opposition to petition for leave to amend to and including May 11, 1966. On May 13, 1966, County filed a reply to the comments of the Bureau and the opposition of WKBC to the joint petition and the petition for leave to amend. On the same date, County filed a petition to accept the late reply. In its petition to accept late filing of reply, County states that an affidavit of the principal of Broadcasting was inadvertently held up and the filing could not be made on time. WKBC, in its opposition to the petition to accept the late filed reply, urges that the Board adopt a strict approach to rule 1.45, dealing with filing periods. It further states that "neither of the joint petitioners requested or obtained an extension of time for

a reply, and none was filed, *with respect to the joint petition matter.*" (Emphasis added.) WKBC contends that additional problems will be created in that "an alleged lease" is now submitted and rent figures listed in the pleading and the option are not consistent. It further alleges that the fact that North Carolina law prohibits leases of over 1 year on public land raises the question of concealment and character once again. The County reply to the opposition to the petition to accept late filed pleading admits an error in the rent figure which should be $600 and states that both County and the school board contemplate a year-to-year renewal of the lease.

11. The Board will not refuse to accept that portion of County's reply that deals with the matters contained in the opposition to the petition to amend merely because it was filed 2 days late. County's explanation that a necessary affidavit was unavailable is regarded by the Board as an acceptable reason for the short delay. That portion of the reply dealing with the opposition to the joint request for approval of agreement will also be accepted. As stated by the Bureau, the amendment is an integral part of the dismissal agreement. The Bureau's substantive objections to both were contained in one pleading, and WKBC challenged the availability of the proposed site in both of its oppositions.[7] Under these circumstances, it would be unfair to penalize County merely because its request for extension of time was phrased in terms of the amendment, rather than the amendment and the joint request. Moreover, the Board has, in the past, afforded parties to a joint request for approval of agreement an opportunity to cure specific deficiencies. No useful purpose would be served by disallowing an agreement in the public interest because the additional information was filed a few days after the expiration of time for filing a reply.

Accordingly, it is ordered. This 22d day of June 1966, that the petition to accept late filing of reply, filed May 13, 1966, by Wilkes County Radio *Is granted;* that the petition for leave to amend, to retain file number, and to remain in hearing status, filed April 12, 1966, by Wilkes County Radio *Is granted,* and the amendment *Is accepted;* that the joint petition for approval of agreement and for dismissal of Smith application, filed April 12, 1966, by Wilkes County Radio and Wilkesboro Broadcasting Co., *Is granted,* and such agreement *Is approved;* that the application of Wilkesboro Broadcasting Co. (BP–16466) *Is dismissed;* and that the application of Wilkes County Radio (BP–16556) *Is retained* in hearing status.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[7] The lease agreement submitted in County's reply resolves various questions raised in the oppositions, and therefore does not constitute a new matter as alleged by WKBC.

FCC 66D–22

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of H. M. GRIFFITH, JR., AND C. V. LUNDSTEDT, A PARTNERSHIP D/B AS THE KENT-SUSSEX BROADCASTING CO. For Renewal of License of Station WKSB, Milford, Del.	Docket No. 15995 File No. BR–2885

APPEARANCES

Lewis I. Cohen, on behalf of The Kent-Sussex Broadcasting Co.; *Herbert M. Griffith, Jr.*, on behalf of Herbert M. Griffith, Jr.; *Charles V. Lundstedt*, on behalf of Charles V. Lundstedt; and *Larry M. Berkow* and *Vergil W. Tacy*, on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER H. GIFFORD IRION

(Effective June 20, 1966, pursuant to sec. 1.276)

PRELIMINARY STATEMENT

1. This proceeding involves the application of H. M. Griffith, Jr., and C. V. Lundstedt, a partnership d/b as The Kent-Sussex Broadcasting Co., for renewal of license of standard broadcast station WKSB, Milford, Del.

2. By order and notice of apparent liability released May 11, 1965 (FCC 65–370), the Commission designated WKSB's renewal application for hearing on the following issues:

1. To determine the nature and extent of the violations of the rules of the Commission and the terms of its license committed by WKSB for which official notices of violations have been issued between July 20, 1960, and July 7, 1964, and the licensee's responses to the official notices of violations;

2. To determine the nature of the control or supervision exercised by the applicant over the operation of station WKSB between on or about July 20, 1960, to July 7, 1964;

3. To determine whether or not by written or oral statements to the Commission with respect to the above matters, the applicant misrepresented facts to the Commission or was lacking in candor;

4. To determine the reasons for licensee's failure to file annual financial reports for 1961, 1962, and 1963;

5. To determine whether licensee possesses the requisite financial qualifications;

6. To determine whether forfeiture in the amount of $10,000 or some lesser sum should be ordered;

7. To determine whether, in the light of all or any of the above, a grant of the above-captioned application would serve the public interest, convenience, or necessity.

By order released July 20, 1965 (FCC 65R–270), issue 4 was enlarged to include "1964."

3. Prehearing conferences were held on June 11 and September 8, 1965. The hearing was held on September 13 and 14 and October 5, 1965. The record was closed on October 5, 1965. Proposed findings were filed on December 3, 1965, by the applicant and the Broadcast Bureau. On December 20, 1965, a reply to the Bureau's findings was filed by the applicant.

FINDINGS OF FACT

4. Station WKSB in Milford, Del., commenced operations in 1953 when it was licensed to the present partnership of H. M. Griffith, Jr., and C. V. Lundstedt. The station was authorized to operate on 930 kc with 500 w, daytime only, with a directional antenna, and it is the only standard broadcast station in Milford, Del.

5. In the first years of operation, Lundstedt worked as chief engineer and Griffith handled sales. Lundstedt holds a first-class radiotelephone license. In 1958 Lundstedt left the station as a result of disagreements with his partner and accepted employment with NASA at Wallops Island, Va., as a space engineer. In the years since that time, Lundstedt has not been active in the station's affairs nor has he maintained any kind of supervision except for a brief period during the latter portion of this proceeding. He received no copies of Commission correspondence concerning inspections by the Field Engineering Bureau but occasionally he returned to Milford and discussed station problems with his partner and with members of the staff. Griffith made no effort to keep Lundstedt informed as to conditions at WKSB, and his testimony indicated that he did not regard Lundstedt as being equally responsible for the enterprise. Griffith, however, continued as the active partner and general manager. He has handled all sales, billing and payrolls for the station. Griffith lives in Milford and has no other employment.

6. When an application for renewal of license of WKSB was filed on July 6, 1960, the engineer-in-charge of the Baltimore regional office of the Commission's Field Engineering Bureau (FEB) undertook a routine inspection of the station. The engineer, Mr. H. A. Cohen, expressed the opinion that from a technical point of view the operation of WKSB was unsatisfactory. He is a graduate electrical engineer with a degree from Johns Hopkins University and was employed by the Commission from 1929 until his retirement in 1964. He was engineer-in-charge of the Baltimore office of FEB from 1946 to 1964. As a result of the inspection an official notice of violation was sent to The Kent-Sussex Broadcasting Co. and it specified with particularly a number of violations of the Commissioin's rules which were noted in the inspection. These were as follows:

> 1. WKSB, which operates with a directional pattern, was being operated on the inspection date by an unqualified operator (a restricted permit holder). (Sec. 3.93(a).)
> 2. Transmitter interlock inoperative. (Sec. 3.40(b).)
> 3. Transmitter was consistently modulated above 100 percent. (Sec. 3.55.)
> 4. Tower lighting was controlled manually but not lit continuously. (Sec. 17.25(a)(1).)

5. Paint on tower was dull and peeling. (Sec. 17.23.)
6. The phase monitor was inoperative. (Noncompliance with terms of current authorization.)
7. Transmitter performance measurements, curves, and intensity of harmonic or spurious radiations were not available. (Sec. 3.47.)
8. File containing requests for political broadcasts not available. (Sec. 3.120(d).)
9. A receiver suitable for interception of Conelrad alerts was not available. (Sec. 3.931.)
10. Entries that sponsored programs were announced as such generally were omitted from the program log. (Sec. 3.111(a)(3).)
11. Entries in the operating log show the antenna current at various times to be as high as 3.25 amp. Either these entries are incorrect or this station is at times being operated with an output power in excess of 700 w. (Sec. 3.57.) (Sec. 3.11(b)(4)(ii).)
12. No entries in the operating log from February 1 until August 30, 1959, of required phase monitor meter readings. (Noncompliance with terms of current authorization.)
13. The logkeeper, Vincent J. Modugno, at the time of inspection was recording phase monitor readings when the phase monitor was inoperative. (Sec. 3.113.)

7. At that time the chief engineer of WKSB was a Mr. Welch, who was a first-class license holder but was on vacation. Welch later reported to the inspector that the station was operated without the service of a first-class license holder from May to August 1959.

8. Ordinarily a standard broadcast station receives an inspection only once during a license period, but when technical violations are observed, as was the case here, more frequent inspections are made. Mr. Cohen made a second inspection of WKSB on October 11, 1960, and another notice of violation was sent to the partnership listing seven violations which had been observed, including the fact that the transmitter was being operated by an unqualified operator and that the log indicated such operation since the previous inspection of July 20, 1960. Mr. Griffith replied to this notice on October 25, 1960, and advised the Commission that the deficiencies were being corrected. A further inspection by Mr. Cohen on May 16, 1961, revealed that the violations previously noted had been corrected but also disclosed that unqualified operators had operated the directional pattern for long periods. On May 17, 1961, the Commission granted the application for renewal of license for a term to end August 1, 1963.

9. Four months after the renewal was granted Mr. Cohen made a follow-up inspection which again disclosed that the operation was being conducted in violation of several rules.[1] Another notice of violation pointing out these discrepancies was sent to the partnership on September 22, 1961. In this instance, Mr. Griffith did not respond to the notice so a revocation warning was sent to the partnership on November 29, 1961. It was sent to 141 School Place, Milford, Del., and on December 14, 1961, Griffith replied.

10. The revocation warning inadvertently listed only two violations and omitted seven others which had been noted during the inspection.

[1] These rules are: Sec. 3.93(a): Failure to have qualified personnel operating the transmitter. Operating logs not properly maintained; Sec. 17.39: Antenna towers improperly painted; Sec. 3.111(b): Operating logs left blank on certain dates; Sec. 17.38(d): Required entries showing keeping of tower light mechanism were not made; Sec. 3.47: Equipment performance measurements not available; Sec. 3.57(b): Base current ratio deviated from that specified in the license; Sec. 3.92(b): Unlicensed operator on duty at transmitter; Sec. 3.93(a): Unqualified person standing transmitter watch.

In his reply, Griffith commented on the two violations mentioned in the warning but made no response to the seven which had been listed in the notice of September 22. At the same time, he notified the Commission of a change of address to P.O. Box 444 in Milford, Del. On January 9, 1962, the Commission addressed a letter to this number by certified mail with return receipt requested. In this letter Griffith's attention was directed to the fact that he had not explained the seven discrepancies which had been inadvertently omitted in the revocation warning and an amended warning containing all nine items was included. This letter was returned to the Commission marked "unclaimed."

11. On August 29, 1962, Mr. Cohen made another inspection which disclosed nine major violations of the rules and a notice was duly sent to The Kent-Sussex Broadcasting Co., P.O. Box 444, Milford, Del. Among the violations was operation of the transmitter by unqualified personnel for the entire period since the last inspection of September 14, 1961. The other violations were generally the same as the ones which had been previously noted. During the inspection Cohen visited Griffith at the latter's home and discussed the discrepancies which had been noted. Cohen received the impression that Griffith was "very little concerned about the matter," but he specifically emphasized to Griffith that a first-class operator had to be on duty at all times and that if a qualified operator was not available in an emergency, the licensee should request a waiver. Inasmuch as no response was received to the August 29 notice of violation the Commission sent a revocation warning by certified mail to station WKSB, P.O. Box 444, Milford, Del. This was likewise returned to the Commission on October 22 marked "unclaimed."

12. In instances where a station with a directional antenna is lacking a first-class operator, the proper procedure is to request a waiver. The waiver is a temporary excuse and is usually issued by the field office for 15 days with possible renewal for 30 days. In Cohen's experience, which includes the inspection of hundreds of directional antennas, there were about a half dozen cases where a station did not have a first-class operator on duty. In every case, other than station WKSB, a waiver was requested and granted. The Baltimore field office, as a matter of policy, does what it can to assist a station in obtaining properly qualified personnel by referring the licensee to radio schools and the like. At no time during Cohen's tour of duty did The Kent-Sussex Broadcasting Co. request a waiver of this requirement. In other instances, first-class operators were generally available and were engaged within the waiver period. It was Cohen's belief that the operation of station WKSB was unique in its history of noncompliance with Commission regulations.

13. When Mr. Cohen retired early in 1964 he was succeeded by Rudolph J. Macey as engineer-in-charge of the Baltimore office. Mr. Macey first inspected station WKSB on July 7, 1964, and he found numerous violations. As a result, an official notice of violation was sent to the licensee at a new address (Rt. 14, Milford-Harrington Road, Milford, Del.) which was set forth in the station authorization. It was also Mr. Macey's recollection that he had asked Griffith about

the address since previous correspondence from the Commission had been returned. He was told by Griffith that so long as correspondence was addressed to The Kent-Sussex Broadcasting Co. or the station's call letters it would automatically be delivered to the proper party. Nonetheless, no response was received to the July 13 notice. Accordingly, a revocation warning was sent on August 7, 1964, addressed in the same manner, but it was sent by certified mail with return receipt requested. Since no reply was received to the warning, a second one was sent on August 21 by registered mail. The registered letter, however, was returned by the post office on September 2, 1964, and Macey thereupon notified his superiors in Washington as to Griffith's failure to reply.

14. At the same time, Macey telephoned the station and spoke to Griffith. Griffith stated that he had replied to the July 13 notice (form 793) and requested copies of the other correspondence. According to Griffith, this reply had been sent to the Washington office of the Commission but no copy was sent to the Baltimore field office. On September 25, 1964, Griffith sent Macey a memo which stated:

> As per our phone conversation of September 7th. I am enclosing attached "my" copy of the original reply to the official notice of violation, which was sent in duplicate to the Commission in D.C. on 22 July 1964, but which has not been located (at least as of our phone call of 9/7).
>
> I have executed the "duplicate" copies of the original notice, on the current basis, which I believe you will be want [sic] for record. This will establish the progress made in rectifying the violations.
>
> The letter in duplicate simply confirms our telephone call in re: the original reply to the original notice. I trust you will find this in order.

He also enclosed a copy of the letter which had allegedly been sent directly to the Washington office and it listed steps which Griffith said were taken to remedy the violations. This letter was unsigned.

15. Although Griffith insisted that he had sent a letter dated July 22, 1964, to the Washington office of the Commission there is reason to doubt the veracity of his statement. In the first place the violation notices and revocation warnings all contained instructions that replies were to be sent to the field office—in this case the Baltimore field office. In previous correspondence regarding violations, Griffith had consistently addressed his letters to the Baltimore office. Furthermore, a diligent search was conducted by the acting chief of the Commission's Mail and Files Division pursuant to which the secretary of the Commission, Mr. Ben F. Waple, certified that no record or entry was found showing the receipt of any such letter. Macey also inspected the files of the FEB and was unable to locate any reply to the July 13 notice of violation. In addition to this an inspection was made of the license file of station WKSB and it did not contain the July 22 letter which Griffith claimed he had sent.

16. Mr. Macey testified that from a technical point of view and based on many years of experience in inspecting stations for the Commission, WKSB would be rated poor. According to Macey, it was one of the worst that he had ever inspected. The most serious violation was operation without qualified personnel, but Macey also considered serious the failure to have proper beacon lights on the northeast

tower because this constituted a menace to air navigation. The Dover Air Force Base has an approach corridor which is in the path of the WKSB towers. Another serious violation was the excess ratio of antenna currents. In a directional antenna system this ratio is required to be within 5 percent of that specified by the license but during the inspection it was found to exceed the licensed ratio by 22 percent. The significance of this, according to Macey, was that the licensee had no idea of his radiated field and would thus not know whether the authorized pattern was being maintained.

17. Shortly before the hearing a further inspection of the station was made on August 26, 1965, by Mr. Freeman, assistant engineer-in-charge of the Baltimore office, in the company of Mr. Berkowitz, who by then was engineer-in-charge. The technical performance of the station was again rated as unsatisfactory and an advisory notice together with a notice of violation was sent to the licensee. Operation by other than qualified personnel was again observed and according to the logs this had been continuing on a daily basis for some time. Logs also indicated that the frequency meter was out of service, the weekly external frequency measurements had not been made, appropriate entries in the logs had not been made, and there was no record of notifying the engineer-in-charge of the Baltimore office as to this situation. (Sec. 73.60.) The Alert receiver (formerly the Conelrad receiver) was not maintained in a state of readiness and was, in fact, defective in that the relay would not hold when it was tuned to any other station than WKSB. This receiver was actually being used as a station monitor for WKSB on 930 kc/s. (Sec. 73.922.) Both safety interlocks on the transmitter were disabled. (Sec. 73.40(b).) At the time of the last required equipment performance on May 24, 1965, the measurements made were incomplete in that they did not show sufficient suppression of spurious radiations including radio frequency harmonics. In addition the measurements did not include the description of the instruments and the procedure used. Antenna ammeters at the base of the towers were installed in such a manner as to be a safety hazard to the operators who were required to read them. (Sec. 73.40(b)(4).) The station did not maintain a maintenance log as set forth in section 73.114 of the rules and no record was available to indicate that the required daily transmitter inspection was made. Furthermore, the tower lights were not operating properly.

18. Freeman, who testified at the hearing, has been with the FEB for more than 5 years and has conducted in excess of 200 inspections of AM and FM broadcast stations. He is a graduate engineer with a Bachelor of Science degree in electrical engineering.

19. On August 27, 1965, a notice of violation was sent by certified mail to WKSB. Freeman testified that on September 9 he telephoned the Milford Post Office because a return receipt had not been received in the Baltimore office. He was informed that the letter had not been claimed by the addressee, Mr. Griffith, and that it would be returned unclaimed on Monday morning, September 13. This was the first day of the hearing in Milford so Freeman requested the postal official to hold the letter. On that same day it had not yet been picked up but after the hearing session Griffith finally went to the post office and

claimed the mail which included the revocation warning which had been mailed on September 10 to follow up the notice of violation. One further incident occurred during the August 27 inspection which is indicative of Griffith's general attitude. At one part of the day during the inspection, the station was being operated by Mr. Borden Smith, who holds only a restricted permit. In Mr. Smith's presence, Freeman explained to Griffith that this was in noncompliance with the rules but Griffith suggested that the inspecting engineer discuss the matter with Mr. Brickhouse, the chief engineer, inasmuch as he, Griffith, had a dental appointment. On the morning of the hearing Mr. Freeman stopped at the station and found that Borden Smith was again on duty alone. The lights on the north tower were still extinguished although they should have been lit because the morning was overcast. A light-sensitive device should have been installed so that the lights would automatically turn on in that kind of weather. Freeman asked Brickhouse where the device was and was told that the station did not have one but had ordered one.

Nature of the Violations

20. The degree of seriousness of the several violations of Commission rules has already been mentioned in the preceding paragraphs but a recapitulation is desirable at this point. First of all, however, it should be stated that Griffith freely testified that all of the violations contained in the various notices had actually occurred. Thus there is no dispute as to whether the licensee was actually guilty of noncompliance with the rules. The most serious of these was the failure to have qualified personnel in charge of the transmitter. Mr. Lundstedt, who at one time was the chief engineer of the station, testified that station WKSB ought to have two full-time licensed operators and possibly a part-time relief. He added, however, that his partner, Griffith, had always seemed disposed to have no more than one licensed operator employed. In this connection it must be noted that Lundstedt did not absolve himself from responsibilities as a licensee by leaving the station in 1958. Lundstedt did attempt to dispose of his interest but was thwarted by Griffith's obstinacy. At first there was a dispute as to the value of the one-half interest in the station but at another time Griffith made it known to a potential buyer that no portion of the station was for sale. Despite all this, Lundstedt apparently made no genuine effort to ascertain whether the station was being operated in accordance with the rules nor did he inform the Commission as to conditions.

21. Operation without a first-class radiotelephone operator in charge occured on several occasions and for extended periods of time. After Lundstedt left the station, Mr. Welch, who was a first-class ticket holder, was employed from September of 1959 to early November of 1963. During that period, two other qualified operators were hired for relatively short periods. When Welch left, Mr. Crammond was employed and he stayed until April 1964. From that time there was no first-class operator until the employment of Mr. Brickhouse, who was chief engineer until the time of the hearing. While all of the foregoing personnel held first-class tickets, the evidence shows that they

were not at all times in charge of the transmitter. At no time, however, did the station request a waiver.

22. WKSB was cited for having an inoperative phase monitor and one inspection revealed that station personnel were entering phase monitor records in the log at a time when the monitor was not operating. There is no evidence, however, that Griffith knew of this falsification. Nevertheless, Griffith, in his reply to the notice of violation, stated that the phase monitor was operative at all times, had been checked and rechecked, and showed the proper reading set forth in the license.

23. The station was required to have a receiver suitable for the interception of Conelrad alerts. The purpose of this was to provide for alarm in connection with civil defense and the receiver was to be tuned to another station which could be received in Milford in the event of an emergency. There was such a receiver at the station but it was being used to monitor broadcasts from WKSB.

24. Griffith testified that he made a conscientious effort to secure the services of qualified operators by answering or placing ads in "Broadcasting Magazine" and by calls to technical schools in Philadelphia and Washington. While Griffith was sure that he had placed ads in the trade journal he failed to produce any other evidence by way of confirmation. He had no correspondence with reference to securing qualified engineers but stated that his inquiries had all been by telephone. It was the testimony of Cohen, Macey, and Freeman that stations ordinarily were able to secure qualified personnel within the time allowed by a waiver and this time seldom exceeded 90 days.

25. According to Freeman, during the last year alone, the Baltimore office had issued 123 new first-class operator licenses and had renewed 180 existing ones. The area covered by this field office encompasses Maryland, Delaware, West Virginia, and portions of Virginia. According to its records, the office had had a request for temporary waiver of the first-class operator rule only once during the past 2 years. This was from a single station but it occurred on a number of occasions when operators had been forced to leave for apparently legitimate reasons. The waivers were granted for short periods of time up to 30 days.

Testimony of Brickhouse

26. At the time of the hearing, Aubrey Brickhouse was chief engineer for WKSB and had been in that position since he came to the station September 1, 1964. He is a qualified operator but when he arrived in Milford there was no first-class operator employed nor has another one been employed since. Inasmuch as Brickhouse had a 2-week vacation in June of 1965, the station had no qualified operator during that period. Mr. Brickhouse also has announcing duties at WKSB.

27. When Brickhouse returned from his vacation, he discovered that the lights on the north antenna tower had gone out because of a short circuit. He disconnected the cable which was found to have deteriorated because the rubber had rotted. In order to replace the cable, it was necessary that someone climb the tower. Griffith was informed of this but Brickhouse did not know if any effort was made to secure

a climber other than one individual who was unable to perform the task because of a hernia operation. Brickhouse also volunteered to notify the FAA in Salisbury that the tower lights were out but Griffith said that he would take care of the notification himself. About 2 weeks later another employee of the station suggested to Brickhouse that he should make sure FAA knew of the extinguished lights. Accordingly, he telephoned the FAA and was told that they had received no notification. Griffith, however, testified that he had made the call so that the evidence on this point is contradictory.

28. During examination by Bureau counsel, Brickhouse stated that the frequency meter was still inoperative as of September 14, 1965, because of a defective thermostat. Sometime previously Brickhouse ordered a new thermostat from Gates Manufacturing Co. to be sent C.O.D. Griffith was notified of this and apparently approved. Although the part cost only about $14 it was not picked up at the post office by Griffith, who was the only individual authorized to open the station's postal box. It remained in the post office for 30 days and was then returned to the manufacturer although Griffith knew that the part was needed and was available at the post office. The same thing happened with respect to a distortion meter which had been sent back to the factory for repair. Upon inquiry at the post office Brickhouse learned that it was available and he accordingly notified Griffith, but the part was never picked up and was finally returned to the factory. Eventually, however, Brickhouse received the part although the record does not reveal how this was done.

Failure of Griffith To Respond to Notices of Violations

29. At the commencement of the hearing Griffith appeared to take the position that letters from the Commission which had been returned marked "unclaimed" had been sent to the wrong address. He said that going back approximately 2 years the Commission had three different addresses for the station and that one time a letter had not been picked up but since that time "to my knowledge they have been picked up." At this point in his testimony he admitted that there was a certified letter or notice in his box on the previous Saturday (September 11, 1965). This was the notice of violation referred to in paragraph 19, supra. He then stated that there were two letters which he had not received of which he had knowledge and added: "Now one of them I did not pick up. I do not know why. And the other one I never received notice of to my knowledge."

30. At a subsequent hearing session, Griffith contended that the mail had been lost or mislaid due to carelessness on the part of postal employees. Employees of the Milford Post Office testified at the hearing and it was their uniform opinion that although a letter might be misplaced in the wrong post office box there was very little probability of this happening. Each of the individuals concerned was acquainted with The Kent-Sussex Broadcasting Co., station WKSB, and Mr. Griffith as an individual. Each was familiar with the station's post office box. On occasions this box had been closed for failure to pay rent but the postal officials stated that on such occasions

106-500—66——12

any mail would have been retained in general delivery for a period of 10 days. The likelihood of mail being dropped on the floor or otherwise becoming lost was considered extremely remote. Thus, while there was a possibility of the station's mail being misdirected, the chance of this occurring as often as Griffith professed to believe is negligible. Taken with other evidence of Griffith's indifferent attitude, especially in connection with the remedying of conditions at the station, it must be found as a fact that Griffith was seriously remiss in accepting and answering official communications from the Commission.

31. The population of Milford is 5,795 persons and station WKSB is the only standard broadcast station in town. The mail is sorted by name rather than address and testimony of the postal employees made it clear that even if letters were addressed incorrectly or to former addresses, they would be placed in the station's current postal box which is now Box 356. This would be so if letters were addressed to the licensee or if they contained either the call letters or Mr. Griffith's name. All postal employees who testified at the hearing were men of lengthy experience in the Milford Post Office.

Financial Qualifications

32. Issue No. 5 inquires into whether the licensee possesses the requisite financial qualifications. At the outset it can be stated that Griffith (and the partnership) completely failed to meet the burden of proof under this issue. A bit of history must be recited in this connection.

33. Lundstedt, who it must be noted was far more concerned about the seriousness of this proceeding than was his partner, undertook to engage legal counsel as soon as he learned of the designation for hearing. On May 19, 1965, he made a visit to the Commission offices and consulted with Mr. Berkow (Bureau counsel) as to "what the hearing was all about." Mr. Berkow suggested that he should make inquiries through his own attorney. Accordingly, Lundstedt engaged the firm of Cohen & Berfield to represent the partnership. After three scheduled meetings with the attorney at which Lundstedt was present but Griffith was absent, a fourth meeting was held and Griffith appeared. He was asked to supply information for preparation of a current financial statement. Inasmuch as Griffith failed to supply this information the legal counsel withdrew from the case on August 12, 1965.

34. In the latter part of August, Bureau counsel met with Griffith, who was at this time not represented by counsel, and outlined the situation with emphasis on the fact that the applicant was obligated to bear the burden of proof on the financial issue. Bureau counsel offered to help Griffith put his exhibits in proper form if Griffith did not thereafter obtain counsel but also suggested that Griffith come to Washington during the ensuing week for assistance. Griffith, however, did not show up. At the hearing session in Milford, Griffith was again advised as to the necessity of presenting proper exhibits to demonstrate the financial qualifications of the applicant, including

a current balance sheet. At this time Griffith conceded that he did not have such a balance sheet but said that he could have one prepared. The personal financial statements of Griffith and Lundstedt were, however, introduced and received into evidence on September 14, 1965. Griffith pleaded that at that time his secretary was on vacation and that he needed additional time to prepare a proper financial statement so the examiner continued the hearing to October 4 in Washington, D.C., for the express purpose of receiving this statement. He explained that there had been two accountants in Milford who had died within the last 6 months so that it was difficult to get someone who was qualified to prepare the statement. He, nevertheless, offered to call on Mr. Berkow in about 10 days and bring in "the figures and help him to work the thing out." The date of September 20 was agreed upon for an informal conference between Griffith and Berkow. On that date Mr. Berkow received a letter from Griffith stating that he would not be able to attend the meeting and he added:

> **Since you departed from Milford we have been hard at it on many fronts. I am coming along fairly well on developing financial reports, but getting the corrective measures on the technical on the record [sic] plus trying to catch up on the lost 2 days last week on selling and bill collecting find me not quite ready.**
>
> **I trust you will arrange to see me either next Wednesday or Thursday, September 29 or 30. I can call you Tuesday for a definite appointment to meet your convenience. (Tr. 252.)**

35. Two days later Mr. Berkow attempted to set up another meeting for Wednesday, September 29, but on that day he received a call from the station's Washington engineering consultant informing him that Griffith was ill but would call the following morning and set up another appointment. The following morning was September 30 but no call was received from Griffith.

36. At the last session of the hearing on October 5 (there having been a continuance) Griffith appeared and presented a rough copy of a profit and loss statement for the last portion of 1965. He did not, however, offer a balance sheet. The profit and loss statement indicated that there was a slight operating loss, but further testimony by Griffith revealed that there were several bills owed by the station which were still unpaid. Long-line telephone service had been discontinued because of nonpayment of the bill and this prevented the receiving of remote broadcasts. There were still outstanding bills for legal and engineering services. In brief, the whole of Griffith's testimony indicated that the station was far from being current in payment of its debts. The foregoing constitutes the only showing made under the financial qualifications issue.

Failure To Publish

37. Griffith received the order of designation for hearing on May 14, 1965, and the order contained provisions requiring the licensee to publish notice of the hearing in accordance with section 1.594 of the rules and section 3.11(a)(2) of the Communications Act of 1934, as amended. Griffith admitted that no publication had been made either in a newspaper or on the radio station. His excuse was that he had

no idea such publication was required but he said that he knew that there should be a notice giving the date of the hearing because his attorney had so instructed him. Although he said he read the order of designation, he took no action with respect to publication because he turned it over to an attorney.

38. Evidence was adduced, however, that the attorney who was engaged at that time by Mr. Lundstedt to represent the partnership did in fact send Griffith a letter setting forth specific instructions with regard to broadcasting notice of the hearing at least once daily on 4 days in the week and the language of the announcement to be read was fully set forth.

39. Mr. Lundstedt, who does not reside in Milford, said that his first notice of the hearing was from seeing the news item in "Broadcasting Magazine." He thereupon secured Washington counsel to represent both himself and his partner. The record reveals, however, that these attorneys withdrew from the case because Griffith did not cooperate with them. Griffith endeavored to excuse his failure to publish on the grounds that no definite date had been set for the hearing which was originally scheduled for July 28, 1965, and then was postponed until September 8. The letter from his attorneys, however, very clearly instructed him that publication should specify the July 28 date which was then in order.

Filing of Financial Reports

40. Issue No. 4, as amended, seeks to inquire why the licensee did not file annual financial reports for 1961, 1962, 1963, and 1964. A report for 1964 was belatedly filed after the issue was added. Reports, however, were not filed for the 3 preceding years by Mr. Griffith's own admission. When asked why he did not file annual financial reports for those years, he stated: "I guess I just did not get around to it."

CONCLUSIONS

1. The applicant partnership seeks a renewal of license for station WKSB in Milford, Del. The application must be denied for a number of reasons, each of which will be discussed briefly.

2. In the first place, the applicant failed to sustain its burden of proving financial qualifications. Although Griffith was offered assistance, first by his attorney and later by Bureau counsel after the attorney had withdrawn from the case, his attitude was one of complete indifference. No balance sheet for the station was ever tendered in evidence and such data as was produced by the partners with respect to their personal financial situation was too incomplete to form the basis of any findings favorable to the applicant. Such evidence as Griffith did produce with regard to the financial condition of the station was that it was currently operating at a loss and that it has failed to pay a number of long-standing obligations. There is thus a basic defect and it cannot be concluded that the Kent-Sussex Broadcasting Co. is financially qualified.

3. Mr. Griffith has actively managed the station since 1958 when his partner, Lundstedt, departed for employment at NASA in Wallops

Island, Va. By this act, Lundstedt did not relieve himself of his responsibility as a member of the partnership for seeing to it that the station was operated in accordance with all applicable rules and regulations. It should be noted in this connection, however, that Lundstedt manifested a far more serious concern for the way in which the station's business was conducted and the numerous derelictions which have occurred were not attributable to any overt act on his part nor is there anything in the record which would reflect adversely on his character. The whole saga of the operation of station WKSB in recent years is one which reflects ineptitude rather than character deficiencies.

4. There is no dispute that the violations of technical rules which were alleged in official notices from the Commission to the partnership did actually occur. Not only did the inspecting engineers testify as to these violations but their existence was conceded by Griffith himself. These violations obviously vary in the degree of seriousness but the one which was most persistent and most culpable was the failure to have the transmitter operated at all times by a first-class radiotelephone operator. From the time the original authorization was granted to this partnership in 1953 until 1958 Mr. Lundstedt acted as chief engineer. Lundstedt was a qualified first-class ticket holder but he left the station in the care of his partner owing to personal differences and financial losses. From the date of his departure until the date of the hearing there were three chief engineers each of whom held the necessary qualifications (see par. 21 of the findings) but it frequently occurred that technical operations were left in the hands of individuals who did not possess first-class operator licenses. During the entire period from September 21, 1961 to August 29, 1962, unqualified personnel were operating the transmitter. At no time did Griffith ever request a waiver and his attempts to secure first-class ticket holders were not shown to have been assiduous. The record contains only his unsupported statement that he had placed ads in trade journals and made telephone calls. The record does, however, contain evidence from the field engineers which indicates that stations in this same general area have always been able to secure qualified engineering personnel within a period of approximately 30 days or at the most 90 days.

5. Station WKSB operates with a directional antenna and it goes without saying that carelessness in supervising the technical aspects could result in serious departures from its licensed authority. In the opinion of Griffith's own partner, the station requires two full-time first-class operators and possibly one for part-time work. Notwithstanding repeated warnings from the Baltimore field office, including personal admonitions from the engineers who were conducting inspections, Griffiith's attitude remained indifferent. (Personal observation of Mr. Griffith by the hearing examiner during the hearing itself did nothing to dispel this conclusion.) There were occasions on which the station's phase monitor was inoperative and during one inspection it was disclosed that readings from the phase monitor were being entered into the log even though the equipment was not working. Lights on the northeast tower were dark for a consider-

able period and thus constituted a menace to air navigation. The permissible ratio of antenna currents was being seriously exceeded during the inspection by Mr. Macey of the Baltimore field office. Each of the field engineers who inspected the station rendered the opinion that it was poorly operated and one of them, Mr. Cohen, stated that the record of WKSB was unique in its history of noncompliance with Commission regulations.

6. Despite the fact that these serious derelictions were called to Griffith's attention by notices of violations and revocation warnings, he either took no action or failed to remedy conditions permanently. When the station's license was up for renewal in 1960, the violations which had been noted at an inspection made on October 11 of that year were corrected, yet a follow-up inspection in September of 1961 disclosed that many of the same faults existed.

7. Griffith's attitude toward his stewardship of the station was one of apathy and this is indicated by a number of things besides his failure to comply with Commission rules. The first of these relates to the history of the notices of violations and revocation warnings (see pars. 9 through 13 and 29 through 31 of the findings). On several occasions notices were returned unclaimed to the Commission although they had been addressed in accordance with instructions from Griffith. On at least one occasion, by his own admission, Griffith neglected to pick up his mail and in the other instances the evidence is overwhelming that he avoided receiving violation notices. His explanations were wholly unconvincing and the testimony of employees from the Milford Post Office makes it quite evident that the mail could not have been lost or mislaid as frequently as Griffith appeared to contend. In brief, his conduct with respect to making prompt replies to Commission warnings was not consistent with his licensee responsibilities.

8. In another respect Griffith's attitude was displayed. The station, of course, was required to submit annual financial reports. No such report was filed for the years 1961, 1962, or 1963. Griffith accounted for this by saying simply that he just did not get around to it. (Par. 40 of the findings.) A report for 1964 was filed only after the matter had been designated for hearing and a specific issue had been added on this point. It was likewise characteristic of Griffith's nonchalant attitude that he caused no notice of the hearing to be published as required by section 3.11(a)(2) of the Communications Act and section 1.594 of the rules. Griffith had been specifically instructed by his counsel as to the required procedures, including the text of the notices, but he took no action whatsoever.

9. This is not a case where an absentee owner had delegated responsibility to inefficient personnel. Griffith resides in Milford and has no other employment besides his supervision of station WKSB. The various defects in the operation were called to his attention not only by Commission inspectors but by the station's engineering personnel. As shown by the testimony of Mr. Brickhouse, there were two occasions when the chief engineer ordered necessary equipment and failed to receive it. (Par. 28 of the findings.) On both occasions the equipment was received in the post office and merely awaited the payment of charges for its delivery. On both occasions Griffith was notified that

the equipment had arrived yet he failed to pick it up. It is noteworthy that on one of these occasions the cost of the equipment was merely $14.

10. All of these matters reveal a sorry picture of operations at station WKSB but they do not necessarily demonstrate a lack of character in the partners. Issue No. 3 calls for a determination as to whether Griffith misrepresented facts to the Commission or was lacking in candor. There is evidence that Griffith was something less than honest in that he claimed to have responded to a notice of violation in a letter addressed to the Commission's Washington office. (Par. 15 of the findings.) After a diligent search was made in the Commission's files, it was reported that there was no trace of such a letter. Furthermore, Griffith knew or should have known that replies ought to have been directed to the Baltimore field office and he had in fact addressed previous correspondence to that office. The most charitable view would be to say that Griffith did not intend to misrepresent anything but his entire conduct can only be described as one of complete ineptitude. Had there been any evidence of a sincere attempt to rectify existing violations, to respond promptly to Commission inquiries, or to file requisite reports, there might still be justification for faith that WKSB would be more properly operated in the future. In such a situation, assuming that Griffith had at least displayed elementary effort, the hearing examiner would have been disposed to conclude that a forfeiture in some amount would atone for past guilt. On the basis of this record, however, there is no reason to assume that any improvement would occur in the future. In view of the magnitude of the violations as well as their repetition for more than 5 years, it would not be too much to say that renewal of any authority to Mr. Griffith would be hazardous. An inadvertent failure to file a financial statement is understandable but a persistent disregard for the proper maintenance of equipment, especially when this involves safety of life (see par. 17 of the findings), safety of aircraft (see par. 16 of the findings), and safety of the public in the event of an emergency from enemy attack (see par. 17 of the findings), can only be assessed as a deplorable absence of sense of obligation. Consequently, for these reasons it is concluded that no renewal of license should be issued to the partnership of Lundstedt and Griffith so long as Mr. Griffith is part of that company.

It is ordered, This 28th day of April 1966, that, unless an appeal from this initial decision is taken by any of the parties or unless 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 H. M. Griffith, Jr., and C. V. Lundstedt, a partnership d/b as The Kent-Sussex Broadcasting Co. (BR–2885), for renewal of license of station WKSB, operating on 930 kc with 500 w, daytime only, with a directional antenna, in Milford, Del., *Is denied.*

FCC 66-550

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of ARTHUR A. CIRILLI, TRUSTEE IN BANKRUPTCY (WIGL), SUPERIOR, WIS. For Renewal of License of Station WIGL	Docket No. 16476 File No. BR-4080
QUALITY RADIO, INC. (WAKX), SUPERIOR, WIS. For Construction Permit	Docket No. 16477 File No. BP-16497
ARTHUR A. CIRILLI, TRUSTEE IN BANKRUPTCY (ASSIGNOR) AND D.L.K. BROADCASTING CO., INC. (ASSIGNEE) For Assignment of License of Station WIGL	Docket No. 16478 File No. BAL-5627, BALRE-1336

MEMORANDUM OPINION AND ORDER

(Adopted June 22, 1966)

BY THE COMMISSION:

1. The Commission has before it for consideration: (*a*) A petition, filed March 30, 1966, by Quality Radio, Inc. (Quality), requesting partial reconsideration of our designation order (FCC 66-183, released March 1, 1966); (*b*) an opposition, filed April 13, 1966, by the Broadcast Bureau; and (*c*) a reply, filed April 20, 1966, by Quality.

2. As set forth in our memorandum opinion and order, 2 FCC 2d 692, released March 1, 1966, designating the above-captioned applications for hearing, the application of Quality for a construction permit will be considered comparatively with that of D.L.K. Broadcasting Co., Inc. (DLK), for assignment of license of station WIGL.

3. Quality seeks reconsideration of our designation order to the extent that, in the event Quality receives a grant, its construction permit would include a condition precluding presunrise operation pending final action in a rulemaking proceeding, docket No. 14419. Quality contends that the presunrise condition should be deleted, because no such condition is to be imposed upon DLK in the event of a grant of DLK's application. We agree that under the peculiar circumstances of this comparative case, basic fairness warrants our placing both applicants on equal footings with respect to prospective presunrise operation. We are, therefore, deleting from the order of designation the presunrise condition specified therein as to Quality.

4. *Accordingly, it is ordered*, This 22d day of June 1966, that the petition for partial reconsideration, filed on March 30, 1966, by Quality

Radio, Inc., *Is granted*, and that the presunrise condition contained in our memorandum opinion and order, 2 FCC 2d 692, released March 1, 1966, *Is deleted*.

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

FCC 66–414

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C. 20554, May 4, 1966.

RADIO STATION WHAZ,
Troy, N.Y. 12180
RADIO STATION WEVD
117 W. 46th St., New York, N.Y. 10036

GENTLEMEN: This refers to your petition for reconsideration filed March 7, 1966, asking the Commission to reconsider its action of February 4, 1966 (2 FCC 2d 481), dismissing assignment application BAL–5581, which proposed to assign the daytime broadcast hours of WHAZ to the Troy Record Co., and the nighttime hours to WEVD, and responsive pleadings thereto. The application had asked us to approve the assignment of the daytime hours of WHAZ to the Troy Record Co. and its right to operate Monday night to WEVD.

As we stated in our memorandum opinion and order, your assignment application (BAL–5581) was dismissed because it involved a change in the share-time agreement to operate nighttime hours on 1330 kc in New York, in face of the petition to deny filed by WPOW, a party to the agreement. We cited section 73.78 of the rules, which provides that

> **If the licensees of stations authorized to share time are unable to agree on a division of time, the Commission shall be so notified by statement to that effect filed with the applications for *renewal of license*. (Emphasis supplied.)**

In dismissing the application, we noted that your renewal applications were not then before us, and that therefore the proposed change against the wishes of WPOW was not timely.

Our decision was followed by your petition for reconsideration and responsive pleadings. In addition, all parties to the share-time agreement, WEVD, WHAZ, and WPOW, have filed their renewal applications.

Although the various renewal applications (WEVD, BR–270), (WHAZ, BR–260), (WPOW, BR–263), do not express dissatisfaction with the presently existing share-time agreement, from the very fact of the assignment application and petition for reconsideration, it is apparent that WEVD and WHAZ would like a change in the Monday night broadcasting rights. From WPOW's opposition pleadings, it is also apparent that if there is to be a change in these hours, station WPOW would like to operate that time segment. In effect, although not clearly articulated, the parties do have a disagreement as to the Monday night broadcasting hours.

In view of these facts, we would designate the WEVD and WPOW renewal applications for hearing to determine how the Monday night hours on 1330 kc New York should be allocated. But, we find that the contract between WHAZ, WEVD, and the Troy Record Co. on which the application for assignment is based is inseparable. In other words,

the contract fails if a grant is not made to both WEVD and the Troy Record Co. Therefore, if, as a result of a hearing, a grant of the Monday night hours were to be made to WPOW, WHAZ or WEVD could render the Commission's action a nullity by withdrawing the assignment application. The hearing would then have been a useless administrative process and we cannot sanction such a procedure. It is clear, therefore, that we must sustain our previous action and dismiss the above application. As an alternative, however, if the parties indicate their consent within 10 days of the date of this letter, we would make a partial grant of the application to allow the assignment of WHAZ's daytime hours to the Troy Record Co. Having separated the daytime hours by grant, we would then designate the WEVD and WPOW renewal applications for hearing to determine the allocation of all broadcast hours in New York on 1330 kc.

If we fail to hear from you, or if the parties refuse to separate the WHAZ daytime hours from the Monday night hours within 10 days, we will issue a memorandum opinion and order sustaining our previous action.

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

Dissenting Statement of Commissioner Robert T. Bartley

I dissent and vote to set the renewal applications of WHAZ, WEVD, and WPOW for hearing as required by section 73.78 of our rules.

Renewal applications of these stations were set for hearing in 1962 because the parties failed to agree on a distribution of time. The parties reached a new agreement, and the hearing was terminated.

The renewal applications are again before us, and the parties once more are not in agreement on the distribution of time. All three operate on 1330 kc. WEVD and WPOW, both in New York City, share time day and night. WHAZ Troy, N.Y., does not share time days but does share time at night with WEVD and WPOW; i.e., operating Monday nights from 6 p.m. to midnight. WHAZ has an agreement to sell the daytime portion of its operation to Troy Record Co. for $15,000 and the nighttime portion of its current share-time agreement to WEVD for $50,000. WPOW opposes such distribution, pointing out that any revision of the basic agreement requires participation by all signatories thereto and that WPOW also would like to have the Monday night operation.

Section 73.78 of our rules requires that "Upon receipt of such statement [parties are unable to agree on a division of time] the Commission will designate the applications for hearing and, pending such hearing, the operating schedule previously adhered to shall remain in full force and effect."

Accordingly, the WEVD, WPOW, and WHAZ applications for renewal must be set for hearing.

FCC 66–532

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of A. B. CORUM, JR., TR/AS LOUDON COUNTY BROADCASTING CO. (WBLC), LENOIR CITY, TENN. For License To Cover Permit Authorizing the Construction of a New Standard Broadcast Station	File No. BL–10974

MEMORANDUM OPINION AND ORDER

(Adopted June 15, 1966)

BY THE COMMISSION: COMMISSIONER COX ABSENT; COMMISSIONER LOEVINGER CONCURRING IN THE RESULT.

1. The Commission has before it for consideration the above-captioned application of A. B. Corum, Jr., tr/as Loudon County Broadcasting Co., for a license to cover construction permit (BP–15512, as modified) granted October 21, 1964, and various pleadings filed in connection therewith.[1]

2. A petition to deny the above application was filed August 12, 1965, on behalf of WLIL, a competing station in Lenoir City, Tenn. Although petitions to deny do not lie against an application for license, the Commission may elect, as it does in this instance, to consider the questions raised by the petitioner on the merits. *West Michigan Telecasters, Inc.*, 4 R.R. 2d 218 (1964).

3. The gist of WLIL's complaint is that Corum (WBLC) has failed to fulfill his programing commitments. In his application for the above construction permit, Corum proposed the following program types and percentages: Entertainment (56 percent), religion (14 percent), agriculture (4 percent), education (3 percent), news (16 percent), discussion (0.5 percent), and talks (6.5 percent). Corum began operations under program test authority granted June 14, 1965. The WLIL staff monitored the new station's programing from the beginning, and an analysis was made of Corum's signal for 1 full week, July 29 through August 4, 1965. According to WLIL, this study reveals that during such period Corum broadcast no agricultural, educational, discussion, or talk programs of any kind. Only 5.9 percent was devoted to religious programs, and this consisted solely

[1] (*a*) Petition to deny, filed Aug. 12, 1965, by WLIL, Inc.; (*b*) opposition to petition to deny, filed Aug. 16, 1965, by WBLC; (*c*) petition to deny or designate for hearing, filed Aug. 27, 1965, by WLIL; (*d*) opposition thereto filed Aug. 27, 1965, by WBLC; (*e*) motion to strike petition to deny or designate for hearing, filed Aug. 27, 1965, by WBLC; (*f*) reply to opposition to deny, filed Sept. 3, 1965, by WLIL; and opposition to motion to strike, filed Sept. 3, 1965, by WLIL. In response to a Commission letter, Corum filed a supplemental pleading on Mar. 7, 1966, updating earlier information concerning WBLC's programing practices.

of recorded music. Moreover, no live programing was carried during the week in question, although 24.3 percent of station time had been allocated to such programing.

4. Initially, Corum neither confirmed nor denied these allegations, observing that since WBLC had been on the air only 45 days prior to the monitoring study and only 67 days prior to the filing of the petition to deny, there was no adequate measure for evaluating the station's performance.

5. Inasmuch as it is reasonable to expect that a new station will need some time to round out its program format, particularly in those areas requiring consultation with civic, religious, and other groups, we feel that Corum's supplemental pleading of March 7, 1966, offers a more accurate representation of the station's performance.

6. With respect to program sources, Corum's analysis of the week of January 23–29, 1966, shows 10.6 [2] percent "local live" as opposed to 24.3 percent originally promised. Entertainment is 72 percent, as opposed to 56 percent originally proposed.[3] By way of explanation, Corum states that the original estimate, made some 5 years ago, has not proved to be realistic in view of the community's limited talent resources and the fact that the station has already sustained a loss of $15,000. He concedes that it would be difficult ever to achieve the 24.3 percent of live programing originally promised, and that this objective must be adjusted downward in light of the existing market and other considerations. It is to be noted that the construction permit held by Corum did not grow out of a comparative proceeding in which this type of overestimate might have been a decisional factor.

7. Our concern with the broad question of promise versus performance is well known and need not be repeated here. *Voice of Charlotte Broadcasting Company*, 1 FCC 2d 957 (1965); *Report on AM–FM Program Forms*, 5 RR 2d 1773, 1776 (1965). We recognize however, that in the area of live programing with local participation there are inescapable uncertainties, particularly during the period of initial station operation. The problem here is somewhat deeper, in that Corum now concedes that an unrealistic assessment was made in the beginning, and that in all likelihood the 24.3 percent of live programing originally proposed is unachievable even on a long-term basis.

8. Our review of the matter leads us to the conclusion that a hearing on Corum's license application, as requested by WLIL, is not warranted.

Accordingly, *It is ordered*, That WLIL's petition to deny *Is dismissed.*

It is further ordered, That the above-captioned license application *Is granted.*

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

---

[2] A reply to Corum's supplemental pleading was filed by WLIL on Mar. 21, 1966, asking that this figure be verified by the submission of program logs. Under the circumstances of this case, we see no justification for taking this type of extraordinary action.

[3] Other program types and percentages: Religion: 9 percent v. 14 percent promised; agriculture: 2.5 percent v. 4 percent promised; education: 0.5 percent v. 3 percent promised; news: 11.5 percent v. 16 percent promised; discussion: 0 percent v. 0.5 percent promised; and talks: 4.5 percent v. 6.5 percent promised.

FCC 66–545

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
COMPLAINT OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AGAINST STATION KTYM, INGLEWOOD, CALIF.

MEMORANDUM OPINION

(Adopted June 17, 1966)

BY THE COMMISSION: COMMISSIONER COX DISSENTING AND ISSUING A STATEMENT.

The Commission is renewing the license of station KTYM, Inglewood, Calif., in circumstances which make some comment and explanation appropriate. Renewal of this license was opposed by the Pacific Southwest Regional Office of the Anti-Defamation League of the B'nai B'rith (ADL) on the ground that broadcasts of "Richard Cotten's Conservative Viewpoint" on October 7, 1964, and May 17 and 18, 1965, over KTYM disseminated anti-Semitic material and contained personal attacks on the ADL and its officers and staff. In addition to the ADL complaint, the Commission had received the response of KTYM to the complaint, a reply to the response, and numerous statements and exhibits associated with these documents. All of the documents filed with the Commission in this matter have been considered in reaching a conclusion, and it appears that the facts are fully presented by the documents before the Commission.

The Commission has concluded that the Cotten broadcast of October 7, 1964, contained a personal attack on the ADL and its general counsel, Mr. Forster. The other broadcasts referred to did not contain personal attacks on ADL or its officials, but did contain statements that can be regarded as anti-Semitic, and that will surely be highly offensive to many persons of the Jewish faith as well as to fairminded people of other faiths. In order to preclude any possibility that the ruling of the Commission might be construed by anyone as indicating a contrary view, it is hereby declared that the individual Commissioners wholly disapprove of broadcasts which encourage bigotry or prejudice against any race, religion, or group. Individual Commissioners joining in this opinion have the strongest personal feelings against the views represented by the assailed broadcasts, and others similar to them, but believe that the action of the Commission must be governed by legal principles rather than the personal feelings of the Commissioners.

Following the complaint of the ADL, station KTYM offered the ADL an opportunity to reply to the Cotten broadcasts. It appears

that ADL was offered equal and comparable time to that of the broadcasts complained of. ADL took the position that it should not be required to, and would not, reply to anti-Semitic broadcasts, but that such broadcasts are so contrary to the public interest that a licensee which permits them to be made is thereby disqualified to hold a broadcast license.

This controversy has engendered deep, understandable, and proper emotions on both sides, and these have resulted in a mass of documents and discussion. However, the issue that is now presented is relatively simple: Should the Commission act to suppress the expression of views which it abhors or to require the opportunity for the expression of opposing views? From the viewpoint of the broadcaster, does a licensee fulfill his legal duty when he offers adequate and comparable time to reply to broadcasts containing allegedly defamatory and false comment or has a broadcast licensee a legal duty to prevent broadcast on his facilities of comment containing defamation or falsehood?

The issue presented here is not whether the broadcasts in question were proper, or were false and defamatory, or were anti-Semitic, or were in the public interest. Although these issues are of greatest interest to the parties, lend themselves to the most dramatic and forceful statements, and may attract the most attention, they are not legal issues that are properly before the Commission in this proceeding. The Commission cannot put such matters in issue without becoming the censor of broadcasting, which it is forbidden to do. If the Commission were to undertake to judge in this proceeding that certain broadcasts are false, defamatory, and anti-Semitic, and therefore contrary to the public interest, it would soon be called upon to make similar judgments that other broadcasts are false and defamatory to Negroes, to Socialists, to Catholics, to pacifists, to militarists, and eventually to the members of every ethnic, religious, and political grouping.

The Commission has long held that its function is not to judge the merit, wisdom, or accuracy of any broadcast discussion or commentary but to insure that all viewpoints are given fair and equal opportunity for expression and that controverted allegations are balanced by the presentation of opposing viewpoints. Any other position would stifle discussion and destroy broadcasting as a medium of free speech. To require every licensee to defend his decision to present any controversial program that has been complained of in a license renewal hearing would cause most—if not all—licensees to refuse to broadcast any program that was potentially controversial or offensive to any substantial group. More often than not this would operate to deprive the public of the opportunity to hear unpopular or unorthodox views.

It is the judgment of the Commission, as it has been the judgment of those who drafted our Constitution and of the overwhelming majority of our legislators and judges over the years, that the public interest is best served by permitting the expression of any views that do not involve "a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Terminiello* v. *Chicago*, 337 US 1, 4 (1949); *Chaplinsky* v. *New Hampshire*, 315 US 568; *Ashton* v. *Kentucky*, —— US ——, 34 LW 4398 (1966). This most assuredly does not mean that those who up-

hold this principle approve of the opinions that are expressed under its protection. On the contrary, this principle insures that the most diverse and opposing opinions will be expressed, many of which may be even highly offensive to those officials who thus protect the rights of others to free speech. If there is to be free speech, it must be free for speech that we abhor and hate as well as for speech that we find tolerable or congenial.

In broadcasting it is required that controverted or controversial matters be subject to fair and adequate opportunities for reply by those of differing viewpoints. The details of this doctrine are discussed in other Commission statements and are not in issue here. In this case it is plain that the licensee has offered and has affirmed his intention to continue to offer fair and reasonable opportunity for the expression of conflicting and opposing viewpoints to those of the broadcasts complained of. This is all that the law requires. We cannot make the right to a license renewal dependent on our judgment as to whether the assailed broadcasts were in themselves false and defamatory or not. *Near* v. *Minnesota*, 283 US 697 (1931). We do not hold that these broadcasts, or any similar broadcasts, were in the public interest, but rather that it is in the public interest to have free speech on all subjects on licensed broadcast facilities, provided only that all viewpoints are afforded a fair and equal opportunity for expression.

Action is being taken by a letter addressed to KTYM, a copy of which is attached.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary*.

STATEMENT OF COMMISSIONER KENNETH A. COX DISSENTING TO THE GRANT OF RENEWAL WITHOUT HEARING

The majority's decision to grant a renewal of license to station KTYM on the record before us, and without hearing, is to me incredible.[1] The station has broadcast, without inquiry into its truthfulness, material which is patently defamatory and apparently composed of deliberate untruths. It proposes to continue this practice in a new license period. The Commission does not find that such broadcasts are consistent with operation in the public interest. It does not find such material is protected by the Constitution. It does not hold that a responsible broadcaster, faithful to his public trust, could carry such material without even checking its factual foundations. But it holds, contrary to every relevant precedent of the courts and the Commission itself, that it is no proper concern of the Commission whether the broadcasts were or were not consistent with the public interest. It holds, in short, that it is no proper concern of the Commission whether the station operates in the public interest or not.

[1] I agree that KTYM's presentation of the Richard Cotten program broadcast October 7, 1964, contained a personal attack on the ADL and on its general counsel, Arnold Forster. The Commission's letter to the licensee correctly points out the station's failure to send them a transcript of the attack with an offer of time to respond, as required by the Commission's fairness doctrine. We have previously made clear that a licensee cannot properly sit back and wait for complaint where he has broadcast a personal attack. I would therefore also censure the station for this failure to discharge its responsibilities as a broadcast licensee.

I think it clear that the licensee of station KTYM has failed to exercise even the beginning of proper licensee responsibility for the use of his station, and that he has broadcast, with reckless disregard of its truth or falsity, viciously defamatory matter which is not protected against Commission concern by the first amendment. Because the questions presented are so important to the administration of the Communications Act, I feel it is necessary that I set forth my views in some detail. However, to reach the serious questions which the majority ignores, it is first necessary to clear away any misconception as to our duty.

In an unbroken line of decisions, this Commission and the courts of the United States have enunciated the Commission's authority and, indeed, its duty to deny a renewal of license where the station's program service has not been in the public interest. Where, as here, the material is maliciously harmful, and is so lacking in any possible social value as to be beyond the protection of the Constitution, the Commission's duty is clear. Such action by the Commission is not forbidden prior censorship, and is not in contravention of any constitutional right.

Over a period of almost 35 years the courts have agreed that program service is an essential part of operation in the public interest. Thus, under the Radio Act of 1927 with exactly the same standards as the present Communications Act, the Federal Radio Commission was sustained in *Trinity Methodist Church, South* v. *Federal Radio Commission*, 61 App. D.C. 311, 62 F. 2d 850, cert. den. 284 U.S. 685, 288 U.S. 599, decided in 1932, when it denied a renewal of license because the licensee had, inter alia, "abused [the license] to broadcast defamatory and untrue matter." The court was at pains to point out that *Near* v. *Minnesota*, 283 U.S. 697, which prohibited prior censorship by government, did not operate as a bar to denial of renewal of a license based on the licensee's past conduct. See also *KFKB Broadcasting Ass'n* v. *Federal Radio Commission*, 60 App. D.C. 79, 47 F. 2d 670.

In 1952, the Commission was again sustained in refusing to grant an initial license to one who made defamatory attacks. *Independent Broadcasting Co.* v. *Federal Communications Commission*, 89 U.S. App. D.C. 396, 193 F. 2d 900, cert. den. 344 U.S. 837. In 1964, the Commission was sustained in its denial of renewal based upon the broadcast of deceptive "treasure hunts." *KWK Radio, Inc.* v. *Federal Communications Commission*, 119 U.S. App. D.C. 144, 337 F. 2d 540, cert. den. 380 U.S. 910. The year before it had been sustained in a denial of a renewal based in large part upon similar programing excesses. *Immaculate Conception Church* v. *Federal Communications Commission*, 116 U.S. App. D.C. 73, 320 F. 2d 795, cert. den. 375 U.S. 904. And should the Commission have to be reminded that as recently as March 25, 1966, the court of appeals directed it to hold a hearing on a renewal involving complaints of improper discriminatory programing (going beyond the mere failure to put on both sides of controversial issues)? *Office of Communication of the United Church of Christ* v. *Federal Communications Commission*, —— U.S. App. D.C. ——, —— F. 2d ——, No. 19,409. The majority does not even mention

106-500—66——13

these cases when it tells us that the Commission cannot determine whether a station's program service has been, or will be, consistent with the public interest. It has simply thrown out the statutory standard which Congress has commanded us to apply.

The Commission several times states that it is not holding that these broadcasts were in the public interest. The statute imposes a duty upon the licensee to operate in the public interest and a duty upon the Commission to grant a renewal of license only if it finds that operation is in the public interest. See sections 307 (a), (d). What became of these duties? The reason given by the majority for sloughing aside its duty—the desire "* * * to have free speech on all subjects * * *"—ignores the vital consideration that there is no public interest in a pattern of calculated, reckless falsehoods concerning individuals or groups—in wantonly ruining lives and reputations. The Supreme Court in recent cases[2] has made clear that such speech has no constitutional protection and may properly be the subject of damages, actual and punitive, in State courts. There is thus no basis for the majority's view that first amendment considerations render it, the Federal agency charged with seeing to it that radio stations operate in the public interest, helpless to act.

With that out of the way, let me turn to the issues in the case, first giving the necessary background.

1. BACKGROUND

This matter came to our attention through a complaint of October 25, 1965, filed by the Pacific Southwest Regional Office of the Anti-Defamation League of B'nai B'rith (ADL), which claimed there was a serious question whether the license of standard broadcast station KTYM, Inglewood, Calif., should be renewed. The complaint alleged in substance that station KTYM has fallen short of its responsibility as a licensee by presenting programs in a recorded series entitled "Richard Cotten's Conservative Viewpoint," which contained intemperate and false attacks on the Jewish community.

The Commission requested the licensee's comments, directing particular attention to the statement that Mr. A. J. Williams, president and sole owner of the licensee, had stated that he had no power to censor any broadcast. The response of station KTYM, filed on December 3, 1965, asserted that any controversial program of a political nature is bound to displease some people; that the Cotten broadcasts had been almost unanimously supported in letters received by KTYM, which indicated that they served a public need; that the Anti-Defamation League had been offered free time to answer the Cotten broadcasts—without acceptance by that organization; and that in view of the great importance of freedom of speech, the licensee would exercise its right to reject programs of the nature involved here with great restraint, and not at the "prodding of a group of paid professionals whose view-

[2] See particularly *Garrison* v. *Louisiana*, 379 U.S. 64, discussed within.

point and interests are specific to its [i.e., the ADL's] own personal self-interest * * *."[3]

On January 13, 1966, the ADL filed a response, in which it stated the essence of its complaint to be "that by permitting its facilities to be used for the dissemination of several blatantly anti-Semitic broadcasts, the said licensee had caused serious question to be raised as to the propriety of renewing its license. The complaint charged that the licensee had allowed one Richard Cotten to make a calculated appeal to anti-Semitic prejudice by attempting falsely to equate communism and Judaism."

Finally, the licensee filed a further response on February 7, 1966. This response reiterated that the ADL could have answered the Cotten broadcasts on free time offered by the station, and that this is the fair solution where people have conflicting viewpoints. It stated that the licensee would not set himself up as a judge of the programs because he could not accept the Anti-Defamation League's credentials against those of Cotten to censor Cotten, and that "when a commentator on KTYM spends his full time and talent to prepare a 15-minute broadcast per day (on 25-plus stations) that commentator must be reasonable and practical. In 2 years of broadcasting and of uttering lies and libel, he would have long since been discredited." The response also urged that Cotten could be stopped in court if he deliberately lied, and that the licensee cannot make such judgments, which should be left to public opinion.

I have set forth above the essentials of the dispute, and will develop certain key facts at greater length in the discussion which follows. I am also attaching as appendix B hereto copies of Richard Cotten's broadcasts on KTYM of October 7, 1964, and January 6, 7, and 8, 1965.[4]

2. THE LICENSEE'S FAILURE TO EXERCISE RESPONSIBILITY AS TO A DEFAMATORY SERIES OF BROADCASTS BASED ON CALCULATED FALSEHOOD OR RECKLESS DISREGARD OF THE TRUTH

In my view, the essential allegations of the ADL, corroborated as they are by KTYM, make it impossible for the Commission to find at this time that the public interest would be served by the grant of a renewal of license to KTYM. The facts before us, which ought to be the subject of a full public hearing, demonstrate that the owner of KTYM has failed to exercise the basic responsibility of a licensee for material broadcast over his station by presenting, without reasonable investigation, material which defames a religious group and as to which there is a serious question whether it is based on calculated falsehood or reckless disregard of the truth.

[3] Pages 24 through 29 of the KTYM response, which represent the principal statement of Mr. Williams' views on his responsibility for material he broadcasts, are appended hereto as appendix A, exclusive of two exhibits therein referred to which show that KTYM has carried spot announcements for the United Jewish Welfare Organization, and that the KTYM contract form reserves to the station the right to cancel any contract for the broadcast of matter over its facilities. Other statements by Mr. Williams on this central issue will be referred to later.

[4] In addition, ADL complained, at various times, of programs broadcast on May 7, 1964, June 1, 1965 (first mistakenly identified as presented on May 17 and 18, 1965), and November 26, 1965, alleging that all of these contained anti-Semitic matter.

Two things must first be made absolutely clear. One is that we are concerned here with a series of programs whose general character was known to the licensee. We are not dealing with an isolated program; with a debate, where the licensee may not know in advance what the participants will say; or with a broadcast by a candidate for public office, the only class of program as to which Congress withheld from the licensee his normal censorship powers. The specific programs of which complaint was made were identified and called directly to the attention of Mr. Williams. As to at least one of them—the program of October 7, 1964, which was the basis for ADL's original complaint to the station—he says that he had the program auditioned before it was aired and listened to it on the day it was broadcast.[5]

The other is that the broadcasts here at issue (i) are defamatory, in that they unquestionably attempt to tie Jews and Judaism to communism, and thus to attack the reputations and the place in society of millions of Americans, and (ii) on the record before us, are based on calculated falsehood or reckless disregard for the truth. A consistent theme of the four broadcasts, whose scripts are appended hereto as appendix B, is that Jews are pro-Communist. Thus, they repeatedly utilize quotations by Jews, whose religion is particularly pointed out by Mr. Cotten, and who apparently state, "from the horses mouth no less" as the January 6, 1965, broadcast puts it, that Judaism is the same as Marxism or socialism, and that anticommunism is the same as anit-Semitism. The quotations are from two publications of the early 1940's, "Jewish Voice" and "Jewish Life"; from Rabbi Stephen Wise, who died in 1949; and from a book by the poet Israel Zangwill about the London ghetto, written in the 1890's.[6] This material is described by Mr. Cotten in the broadcasts as extremely significant, and is used to substantiate his apparent thesis that it is an inherent kinship of Judaism and communism which explains the attacks by such organizations as the ADL against groups which Mr. Cotten believes are dedicated only to the fight against communism and socialism (deemed by him to be the same; e.g., in the broadcast of January 6, 1965, he said, after again quoting from "Jewish Voice" and "Jewish Life," "You see, my friends, we know that communism and socialism are one"). The ADL claims that Mr. Cotten's attempt to link communism with Jews by means of such material is calculated falsehood because the quotations are either untrue (e.g., there is no substantiation for the Rabbi Wise quotation), or dishonestly used (e.g., the statements of a character in the Zangwill book are misleadingly imputed to Zangwill himself, and "Jewish Voice" and "Jewish Life" were Communist publications not shown to be representative of Jewish opinion).

What is the licensee's responsibility in these circumstances? A broadcast licensee's responsibility for all matter carried on his station,

[5] Response filed Feb. 7, 1966, p. 18.

[6] The Oct. 7, 1964, broadcast also quotes from a letter from Joseph P. Kamp "to the United States Government" written some time before Oct. 20, 1951, which stated with respect to Arnold Forster, general counsel of the ADL, that, "If you can get President Truman to let you look at the FBI files, you will discover that Forster's right name is Fastenburg and that he was a member of the Communist spy ring."

ADL says the Forster spy charge is wholly false, and has submitted on affidavit by Mr. Forster categorically denying that he was a member of a Communist spy ring, or that he has ever been a Communist, a member of the Communist Party or a Communist sympathizer.

other than broadcasts by political candidates, is clear.[7] But no one would argue that he must prescreen or preaudition all material carried, nor would I suggest that he must examine the source for every statement made on his station before permitting it to be broadcast. This is not feasible, for example, with respect to news items coming from reputable news services, or in the case of a debate or panel show. There are a host of situations where the licensee presents spokesmen whose conflicting views on public issues can and should properly be left to public scrutiny and resolution, so long as both sides are heard. To impose a more stringent requirement of a prior check on the accuracy of all statements in these situations, which of course do not exhaust the list, would inhibit the free dissemination and discussion of news and ideas that is the underlying objective of the first amendment and the public interest standard of the Communications Act.

Thus, I fully agree with the majority that to "require every licensee to defend his decision to present any controversial program that has been complained of in a license renewal hearing would * * * operate to deprive the public of the opportunity to hear unpopular or unorthodox views." My disagreement is that the majority does not recognize the distinction between this general principle and what the public interest requires, and the Constitution permits, in the case of calculated or reckless falsehoods concerning individuals or groups. Defamatory material, based on calculated falsehood or reckless disregard of the truth, stands on an entirely different footing with respect to the first amendment and the public interest. Such material serves no public good, can ruin reputations and lives, and is therefore peculiary abhorrent. It has no proper place in the operations of a public trustee. Therefore, the public interest does require that where there is a pattern of broadcasts defaming individuals and groups, based on use of source material that may be deliberately false or embody a reckless disregard of the truth—the licensee must make the judgment that the material is within reasonable bounds of accuracy and in the public interest, based upon his own study of the material sought to be broadcast and of such other material as may be necessary to make a reasoned judgment. If the material is based upon calculated falsehood or

[7] *Report on Chain Broadcasting* (May 2, 1941), p. 66: "The licensee is obliged to reserve to himself the final decision as to what programs will best serve the public interest. We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory."

Regents of New Mexico v. *Albuquerque Broadcasting Co.*, 158 F. 2d 900, 906 (C.A. 10, 1947): "[I]t is the right and nondelegable duty of the [licensee], acting reasonably, to determine whether a program offered by [an outside party] is in the public interest * * *."

Report and Statement of Policy Re: Commission en Banc Programing Inquiry, 20 Pike & Fischer, Radio Regulation 1901, 1912–13 (1960), "Broadcasting licensees must assume responsibility for all material which is broadcast through their facilities * * *." Only with respect to broadcasts by candidates for political office did Congress relieve the licensee of this responsibility by stripping him of the power to censor. Sec. 315 of the Communications Act, 47 U.S.C. 315; *Farmers Union* v. *WDAY*, 360 U.S. 525 (1959). Furthermore, sec. 3(h) of the Communications Act (47 U.S.C. 3(h)) expressly provides that a broadcast station is not a common carrier. This freedom from a carrier's obligation to transmit everything tendered to him necessarily imposes on the broadcaster responsibility for choosing among the various programs offered to him. See also *Churchill Tabernacle* v. *Federal Communications Commission*, 81 U.S. App. D.C. 411, 160 F. 2d 244 (1947); *Simmons* v. *Federal Communications Commission*, 83 U.S. App. D.C. 262, 169 F. 2d 670 (1948), cert. den. 335 U.S. 846; *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F. 2d 597, 600 (C.A. 3, 1945), cert. den. 327 U.S. 779 ("* * * Congress has confided the selection of program material to be broadcast to the taste and discrimination of the broadcasting stations").

reckless disregard of the truth, it cannot properly be presented, consistent with the public interest. Indeed, I cannot conceive how anyone can argue that a pattern of deliberately false programing, designed to defame individuals or religious or racial groups, can be said to serve the "public interest in the larger and more effective use of radio" (sec. 303(g) of the Act).

The Supreme Court has made clear that calculated or reckless falsehoods concerning individuals or religious or other groups have no constitutional protection. In *Garrison* v. *Louisiana*, 379 U.S. 64, a case involving the alleged defamation of public officials, an area where the Court has been most careful to preserve the freedom to criticize government, the Court stated at p. 75:

> The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the first amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an adminstration. Cf. Riesman, Democracy and Defamation: Fair Game and Fair Comment I, 42 Col. L. Rev. 1085, 1088–1111 (1942). That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality * * *." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth do not enjoy constitutional protection.

In addition to this clear statement, it is relevant to note that the Supreme Court in 1952 sustained the validity of a State statute making it a crime to distribute a publication which "portrays depravity, criminality, unchasity, or lack of virtue of a class of citizens, of any race, color, creed, or religion" and which "exposes the citizens of any race, color, creed, or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots * * * ." *Beauharnais* v. *Illinois*, 343 U.S. 250.

Since the material here broadcast by KTYM over a period of several months was patently defamatory, Mr. Williams had the duty on his own initiative to inquire into the truthfulness of the source material. He could have asked the commentator for his sources and taken other reasonable steps to check the accuracy of asserted bases for the defamatory statements. Further, even assuming a situation where there was justification for an initial failure to inquire, there is, I believe, an absolute duty to make inquiry with respect to future material of the same nature, and from the same source, where the licensee is given notice by other parties that the material may not have a truthful base.

But the record before us demonstrates that this licensee did not inquire into the validity of the material before it was broadcast, and

has no intention of doing so in the future.[8] The majority does not hold to the contrary. In short, the licensee informs the Commission that he will continue to follow a pattern of operation whereby defamatory broadcasts of this nature may, or will, be presented and that he will not concern himself with the truth or falsity of the source material used for the defamatory purpose—and the Commission responds by finding that such a pattern of operation will serve the public interest, convenience, and necessity.

Let me make clear precisely what the Commission is here authorizing. Suppose that Mr. X approaches a station licensee in a small town to seek time for a series of broadcasts, explaining that he believes Mr. Y is ruining the town by maintaining brothels and bribing police officers, and he wants to give the details on the radio. The majority has told the licensee that it need be of no concern to him whether Mr. X can corroborate these very serious charges—that without making the slightest inquiry in this respect, he may present Mr. X, and simply notify Mr. Y of his opportunity to respond. Further, since the licensee need not make any inquiry, it is presumably irrelevant under the majority's view what Mr. X's response might be to any inquiry about corroboration. Thus, the licensee could present the program even though Mr. X responded that he had no corroboration and urged instead that the program would be popular, that Mr. X has a right of free speech, that Mr. X had said similar things before without being sued, and that the licensee should let Mr. Y answer instead of censoring Mr. X. Further, even where the licensee is told of very substantial questions concerning the truth of the charges, he can continue to present such programing without making the slightest inquiry. I simply do not see how anyone can seriously contend that this is responsible licensee conduct, or that such a pattern of operation is in the public interest.

Further, the majority decision does not advance the general public's right of free speech. Every licensee is in fact a censor with the power to deny others the use of the airwaves to express their views; only an unlimited supply of frequencies or of time could make it possible for everyone to have his say—in effect making broadcasters common carriers. The Commission's decision does not change this, and it does not expand or preserve anyone's access to the airwaves.

What the Commission's action does do is strip the present system of any rational foundation by authorizing the licensee to deny or grant the right to speak in these circumstances at his whim. If the licensee need not, but may, examine and judge what defamatory material he carries, he may say no to a Mr. X one day, and yes to another Mr. X the next day. This furthers no one's free speech. Moreover, it seems to me intolerable, for it leaves no standard to gauge the licensee's execution of his trusteeship. No licensee can possibly (or, of course, should) say yes to every Mr. X without checking Mr. X's material.

Even KTYM does not quite contend that that is its policy. Then on what basis does KTYM decide whether to check first, or to permit Mr. X to go ahead, truthful or not, and let Mr. Y answer if he can?

[8] I have set forth in appendix C what the record shows in this respect, together with the statements of the licensee on this question and my comments upon them.

The only correct approach is for the licensee to check such material in every situation before he uses it, or else not permit it to be broadcast. The alternatives are either mindless, arbitrary decisions as to who shall speak and what the public shall hear, or else dishonest ones dependent upon the licensee's personal views.

Finally, I shall comment briefly with the licensee's defenses.[9] The licensee's main standard of decision is that his responsibility ends with affording time to one who disagrees with matter he has presented. In effect, the licensee is claiming the right to stand aside—to present a series of programs which, for all he knows, irresponsibly purport to link a religious group to communism and an individual to a Communist spy ring, and to do so without bringing to bear his own judgment, on the ground that if complaint is made, he will afford time to answer. I do not believe a licensee can force upon an individual or a group the obligation to respond to an attack which, if he had discharged his responsibilities, would never have been broadcast. This position misconceives the congressional scheme and ignores the public interest. In light of the principles set forth above, and the nature of the material, what was required here was the licensee's own judgment that the series of broadcasts were not based on inaccurate or misleading source material and that they constituted programing "in the public interest." (*Regents of New Mexico* v. *Albuquerque Broadcasting Co.*, supra.) To determine this may be a burden, but if so, it is the burden accepted by a broadcast licensee when he accepts his public trust.

A licensee may not accept the great power of choice his license confers upon him and simultaneously deny it any meaning. Every licensee, Mr. Williams included, accepts some material and rejects other. When a program is carried, a choice has been made just as surely as if the program had been rejected. When the material is of the sort we are dealing with here, the requirement that the choice be the licensee's, and that it rest upon his own informed judgment, is the necessary heart of a licensing system under which a Federal agency places in a perilously few hands the tremendous power to determine who shall speak on radio and television and who shall not.

3. THE USE OF KTYM TO BROADCAST MALICIOUS DEFAMATION

The licensee therefore had a duty in these circumstances to make a reasonable effort to determine the truth or falsity of the source mate-

[9] Since sec. 315 of the act is inapplicable because no appearance of a candidate for public office was involved, the alleged political aura of the broadcasts did not relieve the licensee of his responsibility. Nor did the receipt of letters indicating that many listeners liked the programs excuse his failure to make a judgment—there is probably a substantial audience for obscene programing. The suggestion that Mr. Cotten must be accurate and responsible because he had not been "stopped" in court is, in the circumstances, clearly insubstantial in the context of the concept of licensee responsibility. Neither is it reasonable to assume, as Mr. Williams does (response of December 3, 1965, p. 5; response filed February 7, 1966, p. 54), that one who is slandered or libeled always sues. In fact, this remedy affords very little protection in many situations—a fact known to all too many polemicists. In any event, the licensee's special statutory responsibility to operate in the public interest in the broadcast field is not met by reference to private law remedies. Nor could the station disclaim responsibility by suggesting that Cotten has a constitutional right to use KTYM, no matter what he says. No right of Cotten's is abridged by the exercise of an informed judgment by the station not to afford him time. As the court said in *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F. 2d at 600–601, "True, if a man is to speak or preach he must have some place from which to do it. This does not mean, however, that he may seize a particular radio station for his forum." No one has a right to time for the presentation of his views over a broadcast station unless (i) he is a candidate for public office whose opponent has been permitted to use the station, or (ii) he has been personally attacked over the station.

rial and whether presentation of the programs was in the public interest. If, upon the exercise of his responsibility, he found that the programs were based on the use of calculated or reckless falsehoods, they could not be presented, consistent with his statutory duty to operate in the public interest. It is, I think, axiomatic that a pattern of broadcasts of calculated or reckless falsehoods concerning individuals or groups is not in the public interest.

Since the licensee here did not exercise his responsibility, and has indicated that he would not do so in the future, the threshold and critical issue in this case is the failure of the licensee of KTYM to exercise proper responsibility for the use of his station. Accordingly, it is not necessary to reach the question whether, had he examined into the truthfulness of the defamatory material being broadcast and determined that it should be presented, the resulting pattern of operation would be consistent with the public interest. The majority, however, has ignored the question of licensee responsibility and has simply found that the broadcasts in question can be presented to promote "* * * free speech on all subjects * * *." This holding cannot be made on the record before us or in light of pertinent public interest and constitutional considerations.

While the matter can only be resolved by hearing, the record before us, at the very least, raises substantial questions whether these broadcasts do not defame an individual and a religious group through the use of deliberate lies or reckless disregard of the truth or falsity of the statements made. Granted that the licensee has great leeway to make reasonable judgments in this area, we cannot say, on the material before us, that a pattern of broadcasts of this nature could reasonably be presented in the public interest.

I believe it important to go over some pertinent facts as to the present record, for that record squarely presents the question of whether the licensee of KTYM proposes to continue a pattern of broadcasts of falsehoods which are either deliberate or reckless against individuals or religious groups. Thus, he has now received from Mr. Cotten in January of this year a letter concerning the Rabbi Wise quotation, in which Cotten, while giving other reasons for his belief that Rabbi Wise was a Socialist, fails to give any purported source for the statement attributed to Rabbi Wise in the broadcasts. This statement therefore appears to have been made up out of whole cloth.

Mr. Cotten also deceived his audiences in his use of the Zangwill book, by palming off the statements of a character in the book as the direct statements of Zangwill himself. This was done on the January 6, 1965, broadcast in two ways. It was done first by a deceptive reading of the quotations from "Children of the Ghetto." Cotten first described Zangwill as a poet and then read what "the poet" had said, giving the impression of direct exposition of views by Zangwill. The truth is that "the poet" who made the statements was a fictional character called "the poet" in the novel, and, indeed, a character who, I am told, is treated contemptuously by Zangwill. However, since the broadcast mentioned no poet other than Zangwill, no KTYM listener was likely to realize this. The same erroneous impression was given later in the same broadcast, when Cotten told his audience to remember "the thinking indicated by Israel Zangwill, socialism is Judaism and

Judaism is socialism, and a bit further, 'My brothers, how can we keep Judaism in a land where there is no socialism?'" This immediately follows his statement that "communism and socialism are one." The next day, Cotten similarly misused the same material, stating: "We quoted the famous Jewish poet, Israel Zangwill, who seemingly revealed that he deemed it impossible to 'keep Judaism' in a land where there was no 'socialism'! Now personally I believe this is pretty near the 'root of the matter.'"

The use of the quotations from "Jewish Voice" and "Jewish Life," whose significance to his theme Cotten strongly emphasized, also clearly raises a question of good faith. The ADL claims that these publications, probably long since defunct, were Communist publications whose views were not representative of Jews generally. That this is so is apparently recognized even by Mr. Williams himself. In a letter of January 18, 1965, to Mr. Cotten, after the broadcasts in question, he indicated that he had mentioned the ADL complaint to Cotten 3 days earlier, and again mentioned to Cotten the ADL complaint and "the statement that a quotation from the 'Jewish World' [10] (a Communist publication which they abhor), taken by itself on a later broadcast, might lead the average listener into thinking it is representative of Jews in general." (Exhibit 6, KTYM reply of December 3, 1965.) There is no evidence of any reply, or that Mr. Williams pursued the matter further.

In the circumstances, it is unreasonable to find that no substantial issue is raised as to whether a pattern of operation of this nature is consistent with the public interest. The deliberate attempt has been made to defame an entire religious group through the use of material which is either patently unrepresentative, deliberately distorted, or, on the record before us, simply nonexistent. I have always believed in the fullest expression of ideas, controversial or otherwise, on and off the airwaves, and have never approved of Commission action on the basis that I found views disagreeable or that they were offensive to some listeners. What I am concerned about here is the systematic use of calculated lies broadcast to large audiences to defame an entire religious group.

No decision by any court that I know of holds that the Commission is to find such use of radio in the public interest, or beyond our reach on constitutional grounds. No reasonably relevant holding commands our inaction.[11] I see no social value in deliberate defamation of a religious group, and the Supreme Court has already told us in *Garrison* v. *Louisiana*, supra, that the Constitution does not protect it. But the Commission majority finds it consistent with the public interest.

---

[10] Mr. Williams did not even give the names of the publications correctly. However, Mr. Cotten presumably knew to what he was referring.

[11] *The Editorializing Report*, 13 F.C.C. 1246, relied upon by the majority, does not equate deliberate defamatory falsehood with controversial discussion. In fact, par. 17 reads as follows:

"It must be recognized, however, that the licensee's opportunity to express his own views as part of a general presentation of varying opinions on particular controversial issues does not justify or empower any licensee to exercise his authority over the selection of program material to distort or suppress the basic factual information upon which any truly fair and free discussion of public issues must necessarily depend. The basis for any fair consideration of public issues, and particularly those of a controversial nature, is the presentation of news and information concerning the basic facts of the controversy in as complete and impartial a manner as possible. A licensee would be abusing his

I wish to make it clear that we are not concerned here with isolated good-faith mistakes in judgment, for which I would not urge denial of renewal, but with a persistent refusal to discharge the basic responsibility of a licensee and the knowing continuation of programming based on falsehood. Nor are we concerned with the entirely different situation of a licensee who presents the views of the far left or far right as part of a documentary or similar program dealing with the role of organizations and individuals espousing such views. Clearly such a program would not be in the same category as the series of broadcasts by Mr. Cotten here in question. Finally, I am not saying that none of Mr. Cotten's programs should be carried by broadcast stations. I have confined myself to particular elements in the specific broadcasts about which complaint has been made. The ADL specifically states that it raises no question as to Mr. Cotten's broadcast views on a variety of other issues. My opinion is limited to the facts of this case, and it would be unwise to speculate as to what might be sound policy in other situations.

I have limited my holding to the facts of this case, and so presumably has the majority. But even as so limited, let no one be deceived as to the importance of the action taken by the majority. It is, in the circumstances, a major step away from the concept of licensee responsibility so central to the scheme of the act. In light of the history of the world in our century, these programs stand as a bald attack upon the lives, the fortunes, and the sacred honor of millions of our fellow countrymen. The Communications Act does not permit a grant without hearing when substantial public interest questions are raised. I dissent from the grant of a renewal of license to station KTYM and vote to set the renewal application for hearing.

APPENDIX A

THE ANSWER TO THE COMMISSION'S QUESTION ABOUT KTYM'S POWER TO CENSOR

KTYM is gratified that it has the opportunity to express its feelings in this regard. KTYM in its approach to censorship recognizes and interprets five separate guidelines.

1. *The first amendment to the Constitution:* "Congress shall make no law respecting an establishment of religion, or prohibit the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." KTYM recognizes this law as one of the keystones of

---

position as public trustee of these important means of mass communication were he to withhold from expression over his facilities relevant news or facts concerning a controversy or to slant or distort the presentation of such news. No discussion of the issues involved in any controversy can be fair or in the public interest where such discussion must take place in a climate of false or misleading information concerning the basic facts of the controversy."

In *Pacifica Foundation*, 36 F.C.C. 147, also relied upon, there was no issue of deliberate or reckless disregard of the truth. Furthermore, that decision is contrary to the majority's position in this case, since in *Pacifica* the Commission emphasized the requirement of licensee responsibility for the program content there in question.

Other relevant Supreme Court decisions are similarly consistent with the views I have expressed. *Terminiello* v. *Chicago*, 337 U.S. 1, decided before *Beauharnais*, holds only that a city may not broadly make speech a crime merely because it "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." And *New York Times Co.* v. *Sullivan*, 376 U.S. 254, does not immunize even criticism of public officials where a defamatory falsehood is made with knowledge of its falsity or reckless disregard of whether it is true or false. There is, at the very least, a substantial question here, needing resolution in a hearing, of whether the licensee of KTYM has not brought himself directly within this standard. See also *Trinity Methodist Church, South* v. *Federal Radio Commission*, 61 App. D.C. 311, 62 F. 2d 850, cert. den. 284 U.S. 685, 288 U.S. 599; *Independent Broadcasting Co.* v. *Federal Communications Commission*, 89 U.S. App. D.C. 396, 193 F. 2d 900, cert. den. 344 U.S. 837.

our way of life, and reads into the first amendment, into especially that portion—"* * * Congress shall make no law * * * abridging the freedom of speech * * *," the interpretation that any creature of Congress, which makes laws, cannot make any law which will abridge freedom of speech. On a personal level, KTYM therefore treats the right, which KTYM has as an individual, much in the light of the supreme law of the land. KTYM as a licensee recognizes that it has a right to accept or reject programs, but KTYM exercises that right with great restraint, and certainly does not intend to bow to the prodding of a group of paid professionals whose viewpoint and interests are specific to its own personal self-interest, regardless how magnanimously it announces its objectives.

2. *The statement of Commissioner Loevinger, of the Federal Communications Commission*, who said in essence: "Freedom of speech does not mean letting a man voice only that with which we agree, but means letting him voice that which is entirely loathesome to us * * *." Taking its cue from one of the heads of the Federal Communications Commission, KTYM again chooses to exercise its right to censorship with great restraint, and again, certainly does not intend to bow to the prodding of a group of paid professionals whose viewpoint and interests are specific to its own personal self-interest, regardless of how magnanimously it announces its objectives.

3. *Section 315 of the Communications Act of 1934, title 47, chapter 5, U.S.C.A.*, which law states in part: "Such licensee shall have not power of censorship over material broadcast under the provision of this section." This part of the Communications Act applies to programs broadcasting on behalf of qualified candidates for public office.

In cooperation with the intent of the law, KTYM will consider (and especially around election time) certain broadcasts to be ones "* * * on behalf of a qualified candidate * * *" even when the name of the candidate is not spelled out. There is obvious reason why the names of the candidates are not spelled out when certain tax-free foundations support a candidate. If the foundation were to openly endorse a particular candidate, the foundation would stand a chance to lose its tax-free status. KTYM is not in the business of writing or interpreting Internal Revenue Service precedent, but the management of KTYM is not so naive as to recognize the presence of political views or pressure when couched in the name of high-sounding zealots.

KTYM has broadcast the voices of Mr. Eisenhower, Mr. Kennedy, Mr. Johnson. Though KTYM obviously cannot side with two divergent views at the same time, KTYM would silence neither. In good conscience, then, KTYM always thinks a long time before it censors an uncomfortable view, and again, certainly does not intend to bow to the prodding of a group of paid professionals whose viewpoint and interests are, on occasions, unmistakably political, though they are paraded under a neutral pious cloak.

4. *The personal feelings of the licensee with regard to censorship:* The licensee was brought up in a home where Czechoslovak was spoken, and has complete command of that language. Two years ago the licensee, while visiting Communist Czechoslovakia, was capable of being assimilated into the country as few other Americans have had the opportunity. The Communist way of life, at best, is quite unpalatable. The lack of amenities are annoying, but tolerable. But towering above all the other irritation was the restriction placed on free speech. This was the one facet of Communist existence which was entirely and utterly intolerable—to the natives and especially to the licensee.

The privilege to speak freely is one of the sweetest gifts of freedom. Though the privilege to speak freely has built into it the possibility of much abuse, and may most certainly breed inequities—on balance the benefits far outweigh the abuses and inequities.

The licensee would not enjoy living in a world proposed by certain elements of our society, if he were not permitted to voice an objection. Without doubt, the opposing viewpoints must feel the same way. For this reason KTYM treads very gingerly whenever censorship is considered, and to repeat, does not intend to respond to the prodding of a group of paid professionals whose viewpoint, apparently, is to silence the opposition, without making an attempt to reply to or to take a stand in the courts against "* * * defamatory and untrue attack

on the Anti-Defamation League and some of its principal officers and staff * * *."

5. *The fairness doctrine:* Without being precisely legal about it, there is one facet of the communications law which requires a licensee to offer opportunity for an "injured" party to reply. Assuming that the "injured" party chooses to reply, the licensee has theoretical discretion to reject the broadcast. But in its naked essence, the fairness doctrine requires that an opposing view must be aired in some way—whether the licensee likes it or not. This, then, is forced censorship in reverse. To this the licensee does not object, inasmuch as he believes that both sides of a controversy should and must be heard: "* * * regardless how loathesome the opposing viewpoint * * *."

But to determine what is in fact "an attack," the licensee is at a loss. KTYM considers it patently unfair to ask any man who is not a member of a particular organization which may be dedicated to fostering its own particular brand of prejudices as against the prejudices of other people and organizations to develop the same sensitivity to criticism of the precepts of the offended organization, as would the members of that offended organization.

Protestants do not respond to the same remarks as Catholics. Democrats do not object to Mr. Goldwater being branded "trigger-happy." Republicans do not object to Mr. Johnson being called an "arm-twister." Each individual and each organization has its own sensitivities, and these are tied up with the basic fears, insecurities, and bias of the individuals making up the group. Where in the United States an individual might shrug off the criticism of his neighbors, the individual under different conditions in a foreign country may be worried, apprehensive, or even frightened by the same criticism when he is in the minority. Where in the United States he may be mildly irritated, under other circumstances he might be violently afraid. Thus, being "attacked" is a subjective thing. Consensus on what constitutes attack is a myth. There are as many shades of opinion as there are people.

Seek to make your viewpoint or sensitivity preeminent over your fellows, and you are in danger of his doing the same thing. Feel that your opinion is more holy, and our opponent may succeed in forcing his brand of holiness upon you.

In view of the foregoing, the writer, as licensee of KTYM, feels an august and awesome duty to be discharged, whenever he has to solemnly say to an individual: "You cannot go on the air." See bottom of KTYM contract (exhibit No. 19). See also affidavit for United Jewish Welfare broadcasts on KTYM (exhibit No. 20).

APPENDIX B

TRANSCRIPT OF RICHARD COTTEN BROADCAST

KTYM—OCTOBER 7, 1964

(*Music—America the Beautiful*)

This is Richard Cotten, spokesman for the Committee of Christian Laymen of Kern County, Calif., and wholly dedicated to exposing socialism, commUNism, one-worldism, and any other form of totalitarianism that is undermining our way of life. We are for individual responsibility, for a return to constitutional government, for less centralization of power, for States' rights, and we are for exposing the Federal Reserve. We are for the sovereignty of the United States of America and are unalterably opposed to any plan to surrender our God-given republic to any form of totalitarian rule. Now, won't you join us and take one more look at the ever-increasing evidence that we are indeed being surrendered to a one-world government.

(Music ends) Our previous program dealt in detail with the newly organized Council for Civil Responsibility and their intent to do great harm to the ultra-conservative. Today, I will mention another group. It will be B'nai B'rith's Anti-Defamation League. I will be treading on forbidden territory. By some unwritten rule, it is not considered the thing to do to criticize this organization or indeed to criticize anything having to do with the Jew. May I make myself clear? Even as the National Council of Churches does not speak for all Christians, so also, the Anti-Defamation League does not speak for all Jews. I'm about to draw upon an extensive article in the Fresno Bee, Saturday, Septem-

ber 19, wherein the Anti-Defamation League is organizing a campaign to expose the same groups that we outlined yesterday in our program relative to the so-called Council for Civil Responsibility. Surely, one should have a right to defend oneself. The close of the article, in speaking of the Anti-Defamation League, states as follows: "The Anti-Defamation League, founded in 1913, is a Jewish organization formed specifically to combat anti-Semitism and to 'secure justice and fair treatment for all citizens.'"

I am well aware this sounds reasonable, but may I add two quotes. The New York publication, "Jewish Voice," July and August of 1941, page 23, states as follows: "Anti-communism is anti-Semitism." Another quote, this from the publication "Jewish Life," also New York, "Scratch a professional anti-Communist and you will find an anti-Semite." Now, I have probably never brought you any single message more important than the preceding. "Anti-communism is anti-Semitism," and "Scratch a professional anti-Communist and you will find an anti-Semite." Where do we go from here? Do we bow our necks because of the smear or do we do the best we can to expose those who would subvert our Constitution, our way of life, and trust the facts can stand on their own two feet? I know not what course you choose to follow, but for me, I choose the latter. If Dan Smoot, and the Church League of America, and the Conservative Society of America, and similar groups are to be considered radical right by the ADL, then surely the voice of the right should be free to speak for itself.

Let's get back to my newspaper article. We learn that the ADL considers the radical right a growing threat to democracy and the Nation. Good. We don't live in a democracy, and, finally, some of us are finding it out. Next, Dore Schary, I guess it is, producer and playwright, who is the League's national chairman, said the "radical right is a magnet for bigots, rejects the traditional tolerance of our two-party system, and tends to see history as a conspiracy of evil and faithless men," and I say, "So be it." Yes, there is a conspiracy and it is as old as time, and it is openly and avowedly anti-Christian. As for the two-party system, the conservative is fighting for nothing more than a return to constitutional government, a government of law. As for the magnet for bigots, what is his definition of a bigot? Is it a person with racial pride and integrity? And it is not by chance that the word bigot rhymes with maggot, and it is intended to leave an unpleasant connotation.

The article then advises that a document that has been in preparation for 4 years and should not be considered an attack on the Republican Party or its presidential candidate is about to be published. The report, entitled "Danger on the Right," was written by a man who Mr. Schary called Arnold Forster, who happens to be the ADL's legal counsel.

Now, in the "Congressional Record," on the date of October 20th, of '51, in an article relating to how "Communist spies misuse committees of Congress," Representative Clare E. Hoffman of Michigan in the House of Representatives denounced a plot to suppress the campaign against communism. He read sworn charges and promised to fight un-American treatment of Joseph P. Kamp in the interest of justice and fair play. And he told how the Red smear influenced the jury. A part of the sworn testimony to which this refers was a letter from Mr. Kamp to the United States Government wherein he outlined specific charges. I will read three paragraphs verbatim.

"Three months ago the Anti-Defamation League of B'nai B'rith issued its annual report in the form of a smear book which made violent and vicious false attack against the leading movements fighting communism in the United States. The book, 'A Measure of Freedom,' was plugged day after day by Walter Winchell.

"The author of the book and the chief director of the ADL is a man who calls himself Arnold Forster. If you can get President Truman to let you look at the FBI files, you will discover that Forster's right name is Fastenburg and that he was a member of the Communist spy ring."

Now that seems to me to be highly relevant. If the allegation is correct, one should be so advised as he pursues the ADL's new volume. The book that Mr. Kamp alludes to is quite a book. It is interesting to find the organizations that they consider as anti-Semitic. It includes Upton Close and Merwin K. Hart of the National Economic Council. It includes an endless listing of organizations which include in their titles the word "Christian." As you know, we include both the publications, "Closer Up," which is the outgrowth of Upton Close's work,

and the National Economic Council Newsletter on our list of vital publications.

Merwin K. Hart passed away just a few months ago, universally loved and respected in knowledgeable conservative circles. It is disturbing to find patriots labeled in this fashion. If your library has the volume, "A Measure of Freedom," I would commend it to your persual (sic). It will serve as an excellent background for the pending "Danger on the Right," written by the same author.

So now comes the problem. I want you to learn a great deal in this area, and radio has its limitations. However, politics are in the air and I believe I have a solution. First of all, you should know more about Joseph P. Kamp and his trials and tribulations. He went to jail for you. Yes, he did. Pressured by infiltrated congressional committees, he refused to reveal the names of his supporters. He was jailed for contempt, and the ADL took the credit.

All right. That's history, but if he was wrong, you should know it, and if he was a hero, he's entitled to recognition, and I think we'll let you be the judge.

Recently the organization that published Mr. Kamp's booklets came out with one that is very revealing. It is entitled "Why Goldwater Must Be Destroyed" and it will make "Choice Not An Echo" look like a middle-of-the-roader. The pamphlet gets to the root of the problem. You are going to be besieged with "Danger on the Right." Possibly this will give you some helpful answers. It is said, "A word to the wise is sufficient." I assure you this is powerful ammunition, and if you get this booklet, it will include a little list of other booklets available. One of these, "The Bigots Behind the Swastika Spree," is absolutely a classic.

Now, the ADL or Anti-Defamation League does not like Joseph Kamp, and, in fact, they call him a jailbird, but you be the judge. Send for this booklet; we will get it for you to see.

Now, what I've just done is this: I will be labeled an anti-Semite for having mentioned the ADL and especially for having something good to say about Joseph P. Kamp and his material. So be it. The bugaboo of not being able to comment upon smears by Jewish organizations simply is getting old fashioned. And when the ADL openly attacks the conservative movement, it is high time you were given enough information as to make an intelligent decision. I might mention another excellent pamphlet distributed by the same organization. "Catholics, Communism and the Commonweal" has a wealth of information.

For those who would like to criticize things Catholic, this will show communistic control over one of their publications. And, adversely, it will show the Christian devotion and loyal patriotism of the author, an Irish Catholic named Brophy.

Anyhow, let's show a little courage. Joseph Kamp's writings fill a needed niche, and he knows a lot about those who must destroy Goldwater. No matter what other books you have read on the political picture, until you read this pamphlet, you have not a rounded picture, in fact have been kept in almost total ignorance. I would also commend to your reading the entire eight page article from the "Congressional Record." I am not in a position to reproduce it at this moment, but copies of our broadcast will give sufficient information for identification.

Now, let's go back over this slowly. "Anti-communism is anti-Semitism." So spoke the Jewish publication, "Jewish Voice," and "Scratch a professional anti-Communist and you will find an anti-Semite." Thus spoke the "Jewish Life," also a New York Jewish publication.

My friends, what does this tell you? It is very simple. Simply that the smear word "anti-Semite" is the means of destroying any right wing movement. It has always been thus and always will be. Being fully informed is your only protection. Some time ago, I did a program entitled "Anti-Semitism" and if you send for this broadcast, we will include that documentation. In it I endeavor to make it clear that it is not I who interject the Jewish issue but an organization, in this instance, the ADL attacks the conservative movement and I am supposed to be immobilized by fear. I simply won't have it.

It was the eminent authority, Rabbi Stephen Wise, founder of the political, political powerful—excuse me—of the powerful political American Jewish Congress in 1935, who said "some call it Marxism but I call it Judaism." Now, it's a free country. Or, at least, it has been. But if I am going to fight Marxism and some deem that to be an attack upon Judaism, then it is obvious that I will

end up smeared with anti-Semitism. Were there time, I could give you some pretty remarkable for instances, but I simply do not have time right now.

If you will please stay with us, I will be back after 1 minute with our announcer.

(Announcer—not identified) You are listening to a miracle, the miracle of the American way of life. The very fact that Richard B. Cotten is heard on this station is an evidence that there still is some freedom left in the United States. How long this freedom will remain is in real question now. If the current trend continues, Richard B. Cotten and all those who would bring you little known facts regarding the conspiracy and action within our shores will be silenced. You will hear only those things your leaders, Quote—Unquote, want you to hear. The encouraging thing is that you still can control this situation. But the time is late and frankly, Mr. Cotten needs to hear from you in a financial way right now. We do not apologize for this request because your sacrifical gifts are the only means we have of staying on this station. We need a number of very generous investors. But if you can only give very little, please do what you can. The smallest gift, when multiplied by the thousands of listeners to this broadcast, can accomplish great things. The important thing is not to wait. Do it right now. Next week, next month, next year may be too late. Address that investment to: Richard B. Cotten or Conservative Viewpoint, Post Office Box 1976, Bakersfield, Calif.

(Richard Cotten) Now, if you will send for the booklet, "Goldwater Must Be Destroyed," which will expose who's promoting and what's behind the conspiracy to get Goldwater and to discredit the conservatives, you will have a lot of light shed in many dark places. Sixty-two pages of pure dynamite and I believe that you'll agree that treason is the reason.

This is our broadcast No. 220 or part two of "The Smear" and we will include our broadcast "Anti-Semitism." Make no mistake about it. In this land of the free, each man is entitled to his religious convictions, but let's curb the tendency to defame another man's character. Let the record speak for itself. It is certainly interesting.

Program 220, Post Office Box 1976, Bakersfield, Calif. We need your contributions to continue to purchase radio time. Will you make this part of your tithes and offerings.

Until tomorrow, this is Richard Cotten reminding you as always—freedom is not free, free men are not equal and equal men are not free. God bless you.

Presenting:
WHO OR WHAT DOES
THE A.D.L. REPRESENT?

Vol. 3, Nos. 5, 6 & 7
January 6, 7 & 8, 1965

Richard Cotten's
CONSERVATIVE VIEWPOINT
Post Office Box 1976
Bakersfield, California

"Freedom is not free, free men are not equal, and equal men are not free"!!

IN TIMES OF NATIONAL EMERGENCY, SILENCE ISN'T GOLDEN, IT'S YELLOW!

"So because thou art neither cold nor hot, I will spue thee out of my mouth" (Rev. 3:16)

Some little time ago I brought you a program entitled "Anti-Semitism". At a later date I brought a three day program which I entitled "The Smear". Both dealt with what is basically the same problem. The effort on the part of some groups or organizations to discredit the American who endeavors to defend "our way of life" and believes that this is a Christian Constitutional Republic. Now the fight is well out in the open.

A few words are necessary before I get involved in the subject. It has been said, "none but a Jew dare criticize a Jew", I personally don't believe it. But irrespective, what I am about to deal with is an ORGANIZATION, or rather in this instance, TWO ORGANIZATIONS, both of whom claim to speak for the Jewish People. I don't believe they necessarily do. There is a parallel in the work of the NATIONAL COUNCIL OF CHURCHES, a socialistically minded organization if I ever saw one, who masquerade as the VOICE OF AMERICAN PROTESTANTISM. Just as this organization in no wise reflect the opinion of

the fundamental, bible believing, God fearing, patriotic Christian, so too I hope to find, so too do these two organizations I am about to mention do not reflect the opinion of all the Jewish community. Far from it. But a very real problem exists, and we are about to speak on one or more facets of it.

Also before I get well started, let it be said that all of the principal Conservative Organizations in America, are finding themselves under attack by the ANTI DEFAMATION LEAGUE and its agents. It is both "unChristian" and immoral to expect the right wing not to explain its position.

To my knowledge the position of the ADL is now being challenged by something like a bakers dozen of the conservative organizations. I will be bringing you quotes from COUNTERATTACK which is a very valuable publication put out by a group headed by ex-FBI men who plan to see us continue under a "Republican" form of government. Dr. McIntire is carrying on what threatens to become a running battle. The COUNCILOR had taken a mighty swing as has the CHURCH LEAGUE OF AMERICA. The FREEDOM PRESS, THE PAUL REVERE YEOMAN ASSOCIATES, THE CANADIAN INTELLIGENCE SERVICE, JOSEPH P. KAMPE'S HEADLINE PAMPHLETS and many others are realizing this information must be gotten to the public. I say good and more power to them. Mind you, this is not a "religious" issue!! It is the ADL (the anti-defamation league) who would have you think so. Frankly, as I hope to develop, it is a matter of the objectives of the organization. So from this point on, what I have to say will be, as the saying goes, nothing but solid documentation. Wish me well, there is no point in the entire battle for the Republic more in need of clarification.

The immediate reason for this program, which I do in an effort to show that we must resist all efforts toward "world government", centered in a news clipping some two or three weeks ago: I quote, "(headline) JEWISH CONGRESS PLANS TO FIGHT "radical right", then the article, UP Wire Service, dateline Chicago: "The American Jewish Congress, (AJC) has started a nationwide campaign to counter what it calls programs of "smear and intimidation" sponsored by extremist groups. C. Irving Dwork, national secretary of the congress, told the organization's National Governing Council Sunday that right wing activities have increased since election day. Dwork said the American Jewish Congress campaign would directly attempt to discourage contributions to ultrarightist groups from corporations, foundations, and wealthy individuals." Unquote, end of article, now isn't that something. That's really bringing it right out in the open!! A group that purposes to represent a large segment of American Jewry plans to try to cut off the money to "ultra right" groups, by directly approaching corporations, foundations, and wealthy individuals!! Mind you, it isn't anything about communism that they want cut off, just the "ultra rightist" organizations. Well, it should be allowed that the "ultra rightist" make a reply to their "smear and intimidation" accusation.

Let's go back a few weeks, last September was the date for the ANTI DEFAMATION LEAGUE declaring war on the Radical Right and contending that it was a THREAT TO THE UNITED STATES OF AMERICA! This report included such groups as the Christian anti-Communism Crusade, the national Education Program, Facts Forum and the Dan Smoot Report, the Church League of America, and the Conservative Society of America. It described as extreme conservatives the Americans for Constitutional Action, the Young Americans for Freedom and the magazine, the National Review among others. This too is deserving of an answer.

My friends, what these organizations have in common is an all out commitment toward the preservation of the Republic, the United States of America. What they all have in common is a firm resolve to expose SOCIALISM as a threat to our national survival. Now if this contention is correct, how long is America going to stand for an organization which labels patriots as anti-semites and bigots for trying to preserve "our way of life" which is, of course, Freedom under God, States Rights, individual responsibility, and a Republican form of Government!! So now as the saying goes, from the horses mouth no less, let us see if this isn't the heart of the matter.

Probably as kind a starting place as any would be to quote from the writings of the Jewish poet and leader, Israel Zangwill, wherein he was addressing the "Children of the Ghetto" as the volume was called, or the English jewish

106-500—66——14

community back at the turn of the century. Mind you, Zangwill is not only a leader but is also known for his early support of the Zionist movement. (He later separated from them when they insisted upon a return to Jerusalem rather than another area that Zangwill deemed suitable.) Listen closely to the by-play as he, the poet, addresses victims of a "sweater factory" where undoubtedly there were existant sweat shop conditions: "Brethren in exile," said the poet. "The hour has come for laying the sweater low. Singly we are sand-grains, together we are the simoom. Our great teacher, Moses, was the first Socialist. The legislation of the Old Testament—the land laws, the jubilee regulations, the tender care for the poor, the subordination of the rights of property to the interests of the working men—all this is pure Socialism!"

The poet paused for the cheers which came in a mighty volume. Few of those present knew what Socialism was, but all knew the word as a shibboleth of salvation from sweaters. Socialism meant shorter hours and higher wages and was obtainable by marching with banners and brass bands—what need to inquire further?

"In short," pursued the poet, "Socialism is Judaism and Judaism is Socialism, and Karl Marx and Lassalle, the founders of Socialism, were Jews. Judaism does not bother with the next world. It says, Eat, drink and be satisfied and thank the Lord, thy God who brought thee out of Egypt from the land of bondage." But we have nothing to drink, we have nothing to be satisfied with, we are still in the land of bondage." (Cheers.) "My brothers, how can we keep Judaism in a land where there is no Socialism? We must become better Jews, we must bring on Socialism for the period of Socialism on earth and of peace and plenty and brotherly love is what all our prophets and great teachers meant by Messiah-times."

Now there is a great deal more in this very readable little volume but basically I think that tells the story. "My brothers, how can we keep Judaism in a land where there is no Socialism? "We must become better Jews, we must bring on Socialism". My friends, I wonder if the American Jewish Congress, and the ANTI DEFAMATION LEAGUE OF AMERICA would be so kind as to openly allow that their grievance with the "radical right" is that it is blocking any and all efforts by any group or organization, to "bring on socialism?" No matter how thin you slice it, only in this explanation can you find the answer to why these organizations are death of "conservatives" but don't waste any time fighting communism.!!! It was of course the eminent authority, Rabbi Stephen Wise who is quoted as having said, "some call it martism, I call it Judaism."

Let's take a moment and take inventory and see just where we are, we who term ourselves "conservatives" in America. First, last and always, we believe in "Freedom of Speech" in America. We do not believe any organization has a right to advocate the overthrow of the government. And the government is a Constitutional Republic, each of the several states being guaranteed a "Republican Form of Government."

Now religiously speaking, there should be room for all beliefs in America. But the end result should be obvious to the most unthinking persons, if one organization is going to take political action, as in the case of the AMERICAN JEWISH CONGRESS AND THE ANTI DEFAMATION LEAGUE OF AMERICA, and another group refuse to "mix in politics" as does the fundamental Christian church in America. It would be interesting to study the development of that particular suicidal doctrine.

I have been studying an amazing little booklet. It is entitled "I Testify" and the author is Robert Edward Edmondson, now deceased, but in his day a very capable newspaperman. In his day he had quite a run in with the American Jewish Congress and was even held for trial by the then mayor of New York. La Guardia. The mayor resisted all efforts to bring the case to fair trial and when it proved that the advantage would rest with Mr. Edmondson, it was dismissed following a petition by the American Jewish Congress, back in April of 1958 so we now see history somewhat repeating itself. Edmondson made it abundantly clear in all his writings that he was in no wise attacking the Jewish community, certainly did not consider their religious beliefs to be pertinent to the case, but that he did endeavor to expose what he deemed to be an international conspiracy which appeared to have a great many Jewish adherents. And suddenly, as he fought to expose "Socialism, Communism, one worldism," he found his meager resources pitted against the American Jewish Congress and

its limitless "power of the purses". His contention was that under FALSE JEWISH LEADERSHIP, the downfall of the nation was being engineered. His documentation would appear irrefutable, certainly as we see our nation bled white to create the new nation of Israel and the land stolen from the Arabs who had occupied for literally thousands of years, it is difficult to see how our national and internation policies can long endure. Certainly we are not working toward keeping our "sovereignty", but rather toward a "One world", Socialistic, government. Mind you, there is no law in the land against a citizen of the republic desiring that end, there is something inconsistent however with taking public office, swearing to uphold the constitution, and then working to socialize the government. Zionism is a political move, not a religious one. But it was Ben Gurion, premier of Israel who boldly told us, as published in the Look magazine, "within 25 years he looks for the supreme court of all mankind", to be in Israel, with all other governments subservient. He can dream, so can I. of a free America, the land of our forefathers, preserved as a heritage, for my children. America has always welcomed "oppressed minorities" to her shores but not for the purpose of altering our form of government. The entire concept of a separate nationality is alien to the American idea. Needless to say there are a great many Jews who would dearly love to have the ADL, and the AJC, stop trying to protect them. The dual citizenship claimed for the adherents of the pharisaic teachings as laid down in the Talmud, is unquestionably very trying.

May I include two quotes that I always found intriquing: The New York Publication, Jewish Voice, July, August issue, 1941, page 23: I quote, Anti-Communism is anti-semitism. And this jewel, from the Jewish Life, also New York: Scratch a professional anti-communist and you will find an anti-semite. Unquote. May I suggest you bear this in mind as you read of the ADL and the AJC declaring war on the so-called "radical right" which is, after all trying to defend America from communism. You see, my friends, we know that Communism and socialism are one. Last that you remember also the thinking indicated by Israel Zangwill, Socialism is Judaism and Judaism is Socialism, and a bit further, "My brothers, how can we keep Judaism in a land where there is no socialism?" Unquote, well I may not have an answer to that one, but I do believe it behooves each and every citizen of the republic, regardless of racial, ethics, or religious background, to defend the republic against those who would try to subvert it to some form of Godless, Socialistic, One-World government. I can do no less, and stand before God as I understand His purpose in my life, my alegiance to The Requblic demands everything I have. It's a fine Republic, its been more than generous to all "alien minorities". It is to be regretted if the presumed leadership of such a minority declares war on those who fight to preserve our rich heritage.

Tomorrow we will continue to reveal a pattern of control between this concept and the One World organizations, the sooner you write for it the sooner you will have it and before I am through, there should be some fairly revealing quotations. Oh yes, I am not an "anti-semite", and if anyone tells you that I am, tell them their mistaken. But you can tell them this, I am a Christan, Constitutional, Conservative. Maybe they'll be honest enough to answer, well, that's the same thing! Then indeed you could say, "well that's mighty, mighty interesting!!

Until tomorrow, our post office box is Box 1976, Bakersfield, California, program #5, and this is Richard Cotten reminding you as always, freedom is not free, free men are not equal, and equal men are not free plus, it seems fitting, THIS IS A REPUBLIC, NOT A DEMOCRACY, LET'S keep it that way!! God bless you.

January 7 & 8,1965

In starting this series of talks I stressed that it is only after both the Anti Defamation League of Bnai Brith and the American Jewish Congress have publically determined to destroy the so-called "radical right" that it was deemed wise to try to rationalize their objectives. The age-old "smear of "anti-semitism" is supposed to have sufficient power to prevent our retaliation. Thus far I have been as objective as possible, trying to ferret out the explanation as to why these two monstrously powerful organizations that purport to speak for American Jewery, are death on the "Right wing" and soft on communism. Yesterdays program endeavored to shed some light on what appears to be the only logical

conclusion. We quoted the famous jewish poet, Israel Zangwill, who seemingly revealed that he deemed it impossible to "keep Judaism" in a land where there was no "socialism"!! Now personally I believe this is pretty near the "root of the matter". Copies of the broadcast are available and if either the ADL or the AJC wish to challenge the massive evidence indicating that they wish to create "socialism" I will give their rebuttal publication and then proceed to further document what appear to me to be the facts in the case, namely that these organizations see the "right wing" standing in the way of their plans to bring us under a One-world socialisic Government. Mind you, under our present laws this is a legitimate objective if they wish to pursue it. But similarily it must be presumed that I have not only the right but the moral obligation to expose the pitfalls of "socialism" and try to reveal what to me is a diabolic pattern.

Today and tomorrow I intend carefully documenting, from the words of eminent men within our government, the fact that indeed there is such a power bent upon the destruction of our two-party system. Now as I do this let it be known that not less than twelve "conservative organizations" are each, in their own way, trying to educate the American public to the workings of the Anti Defamation League in America. To name a few (who deem it high time for a frontal attack upon this organization) we find Church League of America with Major Bundy; the Twentieth Century Reformation hour with Dr. Carl McIntire, The publication COUNTERATTACK published by some pretty wonderful ex-FBI men, The COUNCILOR edited by Ned Touchstone, THE HERALD OF FREEDOM, edited by Frank Capell, and other competent, Constitutionalists, who are determined to preserve as a Republic, the United States of America. Also as many of you know, it was the infamous smear book entitled Dangers on the Right written for the anti-defamation league, that brought this matter to the entire "right wing's" attention. I had been exposed to the same author, a man who now calls himself Arnold Forster wherein the same anti defamation league had used him to smear patriots back in 1950 in a volume entitled "A MEASURE OF FREEDOM". If the ADL is supposed to be the friend of the jewish community, I can only say, "who needs enemies?" Of course there is a very complex answer.

Now then, listen carefully to the words of Senator William E. Jenner of Indiana, addressing the Senate on February 23, 1954: (oh, how I wish we had some of his kind around right now) I quote:

"We have a well organized political action group in the country, determined to destroy our constitution and establish a one party state. This political action group has its own political support organizations, its own pressure groups, its own vested interest, its foothold within our government, and its own propaganda apparatus." Unquote and now let's get down to the subject. I may have to take the rest of this days broadcast to qualify my "witness" but if so, it'll be worth it, because in my opinion none have done a better job of describing the working of the ADL and the AJC than did founder of the California Senate Fact Finding Committee on Un American Activities, in California, Senator Jack B. Tenney. Oh, he paid the price alright, powerful forces finally defeated him, but he is now engaged in a highly successful law practice in Southern California. While he was in Sacramento, the "Tenney Committee" had the respect of law enforcement throughout the nation.

Now, if I seem ponderous please bear with me for a moment, it is presumably impossible to criticize this organization and continue on the air, I intend proving otherwise but I do want to make very clear, my position.

First item: Both the Anti Defamation League and the American Jewish Congress have publically and taken on the "right wing" which they contend is a threat to the United States of America. This unquestionably deserves an answer.

2nd item: Before someone starts calling me an "anti semite" (a smear term if I ever heard one) let it be said that neither the ADL nor the AJC necessarily speak for all of "Jewery" any more than the National Council of Churches speaks for all of protestantism.

3rd Item: I shall proceed, as the fellow said when asked how a procupine makes love, very, very, carefully. Let it be said that I will bring you the written expression of Senator Jack B. Tenney rather than my own, and that I will first fully qualify him as to his qualifications for expressing such an opinion. Now

that is the American way of doing things, no "smears", no labels, just facts, from the best possible authority.

Senator Tenney wrote several books which an obedient organization has caused to disappear from your library shelves if, indeed, they ever had the courage to purchase them in the first place. Three of these books were reprinted under one cover, called the TENNEY REPORTS ON WORLD ZIONISM. One book therein is entitled "Zion's Fifth Column", another is "Zionist Network" with an introduction by Franklin Hichborn who in turn wrote wonderfully well on how "minorities control the majorities in congress", and the third book, "Zion's Trojan Horse" with an introduction by Col. John Beaty. The latter gentleman has several distinctions. One is that he authored the book, IRON CURTAIN OVER AMERICA and thereby won the everlasting hatred of the ADL, the other being that posthumously the Sovereign State of Texas by official action caused to be read into the record, a very worthy commendation. May I say that no less dignitaries than General Stratemeyer, General Almond, Admiral Crommelin, and General Del Valle recommended his book most highly. In addition, Senator William A. Langer, Chairman of the Judiciary Committee expressed the opinion that, quote, "I think it ought to be compulsory reading in every public school in America." Unquote, referring to the book IRON CURTAIN OVER AMERICA by the author, John Beaty, who is about to bring you his opinion of the writings by Senator Jack B. Tenney that I want to share with you. If this sounds round about, there is a reason. Listen now, to his opinion of Tenney's writings:

"Ten years of arduous work in the California Senate as Chairman of the Committee on Un-American activities has given Senator Tenney a great body of information on vital facts to which newspaper columnists and other political writers, and even academic historians, have no means of access. The reason is obvious. In his strategic position, Senator Tenney not only had opportunities denied to others for uncovering secret data; he even had the power to force the disclosure of much information which would under no circumstances have become known to a writer who was not in a similar position of government authority.

"Other authors have written books which purport to cover the history of the past half century or to deal with the foreign policy of the United States of America and yet, from fear of an alien minority, make no reference whatever to Middle East, Israel, Jews, Judaism, Khazars, or Zionism! These books name names but never the names of such history-making Jews as, for example, the Rothschilds, Chaim Weizman, Samuel Untermeyer, Stephen A. Wise, and Louis D. Brandeis—much less the names of those Jews prominent in more recent times in atomic espionage; in the U.S. executive departments, especially Treasury and State; and above all, in the personal staffs of the last three Presidents of the United States.

"Books that leave out such topics and such names are worse than useless. They are dangerous. They teach the reader to place the blame for the world's perilous condition upon people of his own creed and kind, and not where it belongs—upon scheming alien manipulators. Such books present a picture as much distorted from the truth as would be presented by a history of the U.S. Revolutionary War which made no reference to taxation without representation, the Declaration of Independence, and the Continental Congress; and made no mention of Thomas Jefferson, Benjamin Franklin, John Hancock, or other men prominent at the time in influencing public opinion.

"Senator Tenney writes with a confidence and a zeal which the reader immediately senses and shares. Imbued by the emotion of the author, the reader is swept forward through the mass of details which fill the years between Karl Marx and the present. He is both fascinated and terrified by the climactic story of the growth of two tremendous forces, Communism and Zionism, so closely related in their objectives. The reader sees with the horror which can be induced only by suburb literary writing how the aims of these two forces, Communism and Zionism, are alike hostile to America as a nation and to the Christian civilization of which our nation is the finest flower. The reader shares the authors indignation at the subtle way in which Communism and Zionism have played Christian nations against each other in bloody conflict, and is appalled at the combination of subtle infiltration, brazen bullying, and ever lasting propaganda with which these two alien forces have ridden rough-shod over the world and have demanded and secured in this country rights and privileges which involve the destruction of America and the degradiation of the Christian

West. Jack Tenney has written of the fall of American man, and of American women, too, under the blandishments, the bribes, and the intimidation of alien intruders into the garden spot, America. To read this great book is to arm yourself with knowledge. With your increased knowledge you will feel increased confidence and have a new power to go forth and defend your country, your ideals, and your faith. Signed Colonel John Beaty.

Both the ADL and the AJC have declared war on what they term the "radical right", the "lunitic fringe", etc. Their motives must be brought to America's attention. The best qualified voice I know of, is the voice of Senator Jack B. Tenney of the California Senate Fact Finding Committee on Unamerican activities, a committee which in fact was called the Tenney Committee, for years after it was formed, thanks to his efforts. He is now out of politics, thanks to the "smear" but is a successful trial lawyer in Southern California. I have spent most of this program qualifying him to bring you from his writings, his opinion of the ADL and the AJC. As he will point out, Jewish groups such as the American Council for Judaism who oppose the un-American activities of the Zionists and their agencies, receive scant publicity through the ordinary channels of communication. Let's have that clearly understood, he is going to talk not about a race, or religion, but about certain organizations and their objectives. As I said in prefacing this entire matter, if we can establish that the objective of the ADL and the AJC is world "socialism", then it stands clearly revealed that I have a right to critize them as they attempt to "destroy the radical right", particularily as I do believe the matter resolves itself not around a racial or religious question, but around a question of those who want socialism, and those who want to retain or regain, our Christian, Constitutional Government. Free speach is indicated, the question is will the "power to smear", destroy this fair exchange of ideas. It is not against the law to advocate socialism. It would appear to me to be inconsistent to hold public office wherein one swore allegiance to the flag and the Republic for which it stands, or who swore to defend the constitution.

Not at the same time one is bent upon achieving the results necessary for a one-world socialistic government. In due course this too will be resovled, but not if we allow fear and intimidation to destroy the voice of conservatism.

I bring you Senator Jack B. Tenney's comments on both the ADL and the American Jewish Congress. I assure you, it is impossible to evaluate current happenings without the information furnished in the writings of Jack B. Tenny, the former California Senator.

APPENDIX C

The Record on the Licensee's Exercise of Responsibility

The record establishes the following: (i) Prior to broadcast Mr. Williams had the October 7, 1964, tape auditioned. This broadcast, inter alia, linked Judaism with Marxism on the basis of the quotations from Rabbi Wise, "Jewish Voice" and "Jewish Life"; and, on the authority of the Kamp letter, also referred to ADL's General Counsel Forster as a former member of a Communist spy ring. Despite the patently defamatory nature of the charges, the licensee has given no indication that he investigated or made any affirmative effort to evaluate the charges in that broadcast prior to its presentation.[1]

(ii) That broadcast occasioned the first complaint by ADL on the same day, at which time they requested a copy of the script because of the derogatory remarks about the organization and its general counsel. The licensee still

[1] Even his later inquiries were sketchy, were directed only to Mr. Cotten, and were dropped upon the receipt of responses that were far from satisfactory. Thus when asked about the purported quotation from Rabbi Wise (but only after it had been broadcast twice, and after the Commission's inquiry had begun) Mr. Cotten (1) referred to alleged Communist activities of Rabbi Wise, without documentation; (2) cited the New York Times for a completely different statement; (3) quotes from another rabbi who is mentioned in a publication allegedly issued by Rabbi Wise; and (4) then launched into a discussion of sources indicating that Jews have been active in the Socialist movement. Nowhere does he suggest any source for the alleged quotation from Rabbi Wise, but Mr. Williams did not pursue the matter further—either with Mr. Cotten or with independent authorities. Instead of investigating Mr. Cotten's charges, Mr. Williams hints that he has investigated the ADL and says that it "faired considerably worse than Cotten." Response filed Feb. 7, 1966, pp. 21, 55.

assumed no affirmative responsibility and presented the subsequent broadcasts which repeated and amplified the charges. At a meeting of January 14, 1965, with ADL representatives, after the presentation of these broadcasts, according to the affidavit of one of them (exhibit C to the ADL response of January 13, 1966, pp. 3–7) Mr. Williams said that "he was in no position to judge the accuracy of the many statements broadcast over his radio station and that he could not set himself up as a censor" (p. 3); that "he had no way of judging between Richard Cotten and the ADL" (p. 7); "protested his ignorance and asked for information" (p. 7); and repeatedly used the phrase "who am I to judge who should and who should not be allowed to broadcast?" (p. 3). In his pleadings, the licensee did not dispute that he took the foregoing position.[2]

(iii) Finally, the licensee explains his present position as follows (reply of KTYM filed February 7, 1966, p. 54): KTYM in stating "who am I to judge?" meant it to be understood by any objective person that when a commentator on KTYM spends his full time and talent to prepare a 15-minute broadcast per day (on 25-plus stations) that commentator must be reasonable and practical. In 2 years of broadcasting and of uttering lies and libel, he would have long since been discredited. KTYM in stating "who am I to judge?" meant it understood by any objective person that when a delegation of paid professionals from a private pressure group shows up to counter what the commentator says, and expects that KTYM accept their credentials as against the commentator's—"who am I to judge?" signifies—"if you feel you have a legitimate point in opposition, be KTYM's guest and air your view. Who am I to know that you are right"?

---

[2] See, also, response of Dec. 3, 1965, p. 6, and exhibit 10 to that response, a letter dated Apr. 21, 1965, from Mr. Williams to Mr. Cotten.

The nearest Mr. Williams comes to demonstrating that he exercised his judgment with respect to the presentation of these programs would appear to be reflected in the following statements:

(*a*) "Quite objectively, from this standpoint then (referring to letters favoring Mr. Cotten's viewpoint), KTYM has decided that to remove the program of Mr. Cotten from the air, simply to please the ADL, would be in the need, necessity, and convenience of the ADL only, and this body is but a minuscule among the total public which KTYM serves." (Response of Dec. 3, 1965, p. 12.)

Comment: The issue is not the removal of Mr. Cotten's programs in general, to please the ADL or for any other reason, but whether the public interest was served by presenting programs containing grave charges against all Jews without checking the alleged authorities referred to, and will be served by a continuation of this policy of broadcasting matter of this kind without question.

(*b*) "But KTYM must judge whether the public interest is being served by the 'conservative viewpoint' program from the reaction of the listening audience." (Response of Dec. 3, 1965, p. 15.)

Comment: Any judgment suggested here is not to be that of the licensee, based upon verification of the charges here in issue, but a mere reflection of the response from the station's audience. This is a clear delegation of Mr. Williams' nondelegable duties to his audience.

(*c*) "In each separate case or program, KTYM retains by law the right to accept or reject programs. The exercise of this right, when implemented with great restraint, and under the guidelines set forth by the writer on pp. 24 through 29 of KTYM's reply of Dec. 5, constitutes a basis for 'quasi-censorship,' if the ADL so persists. This is a right tendered to relatively few men. In the exercise of this right, a licensee cannot avoid setting himself up as a judge as to what, in his own conscience and in bald honesty, he permits or rejects. This right is so august a right that it is not exercised lightly by the licensee. Two "different licensees, faced with the same programs, might in all honesty react differently. The 'censorship' which they exercise must be in good conscience and be applied with a velvet glove. In counterdistinction to this censorship, based on a true sensitivity to broad public responsibility, is the hard-core censorship which would be proposed by the ADL. 'Get rid of Cotten or else'—not in so many words (the ADL is too clever for that)—but by a round about method. Such censorship based on the displeasure of a pressure group is truly abhorrent. The writer refuses to engage in this kind of censorship, and has told the ADL so in its first meeting." (Response filed Feb. 7, 1966, pp. 30–31.)

Comment: The essence of a licensee's responsibility is that he should be just as careful—and, indeed, perhaps more careful—about what he puts on the air as he is about what he rejects. Mr. Williams' rationale tips the scales toward making his station a common carrier—though I doubt if he runs it that way generally. Thus he seems to say that, save in the most extreme cases, he should broadcast every program tendered to him. While I am convinced this is an abandonment of his obligations as the public trustee of his frequency, even on his basis I submit that this is an extreme case which required that he make the judgment that the charges in question were reasonably supported by valid authorities before permitting their broadcast. Instead, he persists in accusing the ADL of trying to "get rid of Cotten" because his views are displeasing to them as a "pressure group"—although the ADL has tried to make clear that it is objecting only to programs containing anti-Semitic material, and not to other programs of Mr. Cotten on other topics, though they may disagree with him on these, too. Mr. Williams should exercise his independent judgment instead of defending at all costs his claimed independence to present

seriously damaging charges without making his own judgment that their broadcast would be in the public interest.

None of this can be taken, however, as a statement that Mr. Williams is ready and willing to discharge his responsibility for determining that matter such as this presented on his station is in the public interest. Rather, he repeatedly seeks to shift that responsibility to the public, the Commission, the courts, or even the postal authorities. Nor can it be said that the act of presenting the programs in question reflects the making of the required decision, because he is at such pains to make clear that he may well have broadcast them simply because he is reluctant to censor anyone, or feels that he is not competent to make such decisions.

FCC 66-546

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C. 20554, *June 17, 1966.*

TRANS AMERICA BROADCASTING CORP., *Radio Station KTYM, 6803 West Boulevard, Inglewood, Calif.*

GENTLEMEN: Reference is made to your application for renewal of license for station KTYM, Inglewood, Calif., File No. BR-3611.

In an overall review of KTYM's operation, consideration has been given to a complaint filed on October 25, 1965, by the Pacific Southwest Regional Office of the Anti-Defamation League of B'nai B'rith (ADL); your response to the complaint; ADL's reply to your response; your further response of January 5, 1966; and the numerous exhibits associated with the various filings.

ADL opposes renewal of your license on the grounds that "Richard Cotten's Conservative Viewpoint" programs of October 7, 1964, and May 17, 18, 1965, on KTYM disseminated anti-Semitic material and made personal attacks on the ADL and its officers and staff.

The Cotten broadcast of October 7, 1964, contained what we believe to have been a personal attack on the ADL and its general counsel, Mr. Forster. It was incumbent upon you to have sent them on your own initiative a transcript of the attack with an offer of time to respond. See part E, *Fairness Primer*, 29 F.R. 10415, 10420-10421. It was not enough to offer time only after a complaint had been made.

It appears from the evidence before us that the other Cotten broadcasts do not contain personal attacks upon ADL or its officials. With respect to these broadcasts an offer of adequate time to respond fulfills the legal obligation to afford a reasonable opportunity for the discussion of conflicting viewpoints. It appears that you have made such an offer to the ADL. Your obligation to afford a reasonable opportunity for the discussion of viewpoints that conflict with those of Mr. Cotten is a continuing one. The statements which you have filed with the Commission indicate that you understand this and will provide time for the presentation of such conflicting viewpoints.

We recognize that, as shown by ADL's complaint, such controversial programing as here involved may offend some listeners. But this does not mean that those offended have the right, through the Commission's licensing power, to rule such programing off the airwaves. If this were the case, only the noncontroversial could gain access to the radio microphone or TV camera. No such drastic curtailment can be countenanced under the Constitution, the Communications Act, or the Commission's policy, which has consistently sought to insure "the maintenance of radio and television as a medium of freedom of speech and freedom of expression for the people of the Nation as a whole (*Editorialization Report*, 13 FCC 1246, 1248)." *See In re Pacifica Foundation*, 36 FCC 147, 149.

We have considered the gravity of your failing to fully comply with the fairness doctrine as to the October 7, 1964, broadcast, but since it was an isolated matter have concluded that no further action is warranted.

Upon a finding that the public interest would be served, the Commission this day granted your application for renewal of license for station KTYM.

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

FCC 66–507

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of FIDELITY BROADCASTING CO., INC., MONTICELLO, IND. For Construction Permit	Docket No. 16464 File No. BPH–4931

MEMORANDUM OPINION AND ORDER

(Adopted June 14, 1966)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING; COMMISSIONER COX DISSENTING AND ISSUING A STATEMENT.

1. The Commission has before it for consideration a petition for reconsideration and grant of the application without hearing, filed March 25, 1966, by Fidelity Broadcasting Co., Inc. (Fidelity), and related pleadings.[1] By order, released February 23, 1966 (FCC 66–153), the Commission designated Fidelity's application for hearing on the following issues:

> 1. To determine the extent to which duopoly considerations may preclude future expansion of WFKO–FM and the proposed facilities of Fidelity Broadcasting Co., and, in the light of the evidence adduced in response to this question, whether this proposal represents an efficient use of the channel within the meaning of section 307(b) of the Communications Act of 1934, as amended.
>
> 2. To determine in light of the evidence adduced pursuant to the foregoing issue, whether a grant of the application would serve the public interest, convenience, and necessity.

2. Fidelity, which is the licensee of station WFKO–FM, Kokomo, Ind., has applied for a construction permit for a new FM station in Monticello, Ind., a community approximately 37 miles away. Relying upon our *Report and Order*, FCC 64–445, 2 Pike & Fischer R.R. 2d 1588 (1964), which, in amending the multiple ownership rules, rejected assumed maximum facilities as the basis for determining prohibited overlap, Fidelity asserts that a sufficient showing of possible future expansion has been made to eliminate the need for a hearing. In support of this contention, Fidelity submitted with its petition an engineering report indicating various possibilities for expansion of the existing and proposed facilities without causing an overlap of the 1-mv/m contours of the two stations. In addition, the petition contains allegations relating to the characteristics of the area, other mass communications media located there, and other matters which are claimed by Fidelity to compel the conclusion that its proposal represents an efficient use of the channel.

[1] These pleadings consist of the Broadcast Bureau's opposition, filed Apr. 4, 1966, and Fidelity's reply to the opposition, filed Apr. 11, 1966.

3. In our report and order adopting the revised multiple ownership rules, we stated that "we intend to examine uncontested applications for highly restricted facilities with great care to determine whether duopoly considerations may preclude future expansions" (2 Pike & Fischer, R.R. at 1600). However, a hearing is not required in every case where the operation of commonly owned stations with something less than the maximum permissible power and antenna height would be necessary to avoid prohibited overlap. If the proposal is otherwise in the public interest, it may be granted upon the basis of an application and supporting factual data which establish that no significant limitation upon future expansion will result by reason of duopoly considerations. Consequently, the dispositive question here is whether the fact of common ownership will restrict future expansion to such an extent that a public interest determination cannot be made without an evidentiary hearing.

4. The proposed operation at Monticello (370 w and antenna height of 57 feet) would include within its predicted 1-mv/m contour a population of 6,821 persons in a 75.4-square-mile-area and, according to information on file with the Commission, existing station WFKO–FM at Kokomo (5.3 kw and antenna height of 117 feet) includes 73,943 persons within its predicted 1-mv/m contour which encompasses an area of 643 square miles. According to the engineering study submitted by Fidelity, there are a number of possible combinations of powers and antenna heights whereby the range of both the proposed and the existing stations could be significantly extended without incurring overlap of their 1-mv/m contours. Thus, the subject Monticello proposal represents no bar to the operation of WFKO–FM with maximum class B facilities of 50 kw and 500 feet. Further, the use of maximum class A power and antenna height (3 kw and 300 feet) by the proposed station would nevertheless permit WFKO–FM to improve its facilities to 25 kw and 250 feet without 1-mv/m contour overlap. With both WFKO–FM and the Monticello proposal operating at maximum power but at an antenna height of 250 feet for the former and 150 feet for the latter, the 1-mv/m contours of the stations nevertheless fall short of tangency. Moreover, if an expansion of both stations in this manner (antenna heights of 270 feet for WFKO–FM and 190 feet for the proposal) to the verge of overlap were to be effected, the 2 predicted 1-mv/m contours would include approximately 299,000 persons within a total area of 2,526 square miles. In view of the potential for very substantial expansion of the coverage of the existing and proposed stations without overlap of their 1-mv/m contours, we do not believe that common ownership of the two facilities raises a public interest question which requires a hearing for resolution.

5. The population of Monticello is 4,035 [2] and it is the county seat of White County.[3] The proposed operation will provide Monticello with its first local outlet; this, of course, is an important consideration favoring a grant. Upon reconsideration of this matter in the light of the additional factual data now before us, we conclude that an evi-

[2] This figure is based on 1960 U.S. census records.
[3] White County, Ind., has a population of 19,709.

dentiary hearing is unnecessary and that a grant of Fidelity's application will serve the public interest.

6. *Accordingly, it is ordered*, This 14th day of June, 1966, that the petition for reconsideration filed on March 25, 1966, by Fidelity Broadcasting Co., Inc., *Is granted;* and

7. *It is further ordered*, That the application of Fidelity Broadcasting Co., Inc., for a construction permit for a new FM station at Monticello, Ind., *Is granted*, and this proceeding *Is terminated.*

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

DISSENT OF COMMISSIONER KENNETH A. COX

I dissent. Despite the bare recital to the contrary, there are no additional facts before us that were not considered when we designated this matter for hearing on February 16, 1966. While both facilities could be increased, they cannot without waiver of the rule and creation of prohibited overlap both provide the maximum coverage contemplated by the rule. I think the rule, adopted just 2 years ago, was a sound one. The action last February was in accordance with the rule. Having concluded then that the showing was inadequate to support a waiver, we should reaffirm that position since no additional showing has been made. There are some among my colleagues who say that the Commission should not intervene in program matters, but should concentrate on the technical regulation of broadcasting—yet they continually vote to ignore our most solemnly adopted technical rules.

FCC 66-531

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of RICHARD C. SIMONTON, TR/AS TELEMUSIC CO. For Additional Time To Construct a New FM Broadcast Station at San Bernardino, Calif. (KRCS)	File No. BMPH-8725

MEMORANDUM OPINION AND ORDER

(Adopted June 15, 1966)

BY THE COMMISSION: COMMISSIONER COX ABSENT.

1. The Commission has for consideration a petition for reconsideration (filed April 15, 1966) of its action of March 17, 1966,[1] dismissing the above-captioned application for additional time to construct radio station KRCS, San Bernardino, Calif. The petitioners are Richard C. Simonton, tr/as Telemusic Co. (Simonton), permittee of radio station KRCS, and one Robert Burdette, a prospective assignee of the construction permit. Burdette is president and principal stockholder of Robert Burdette & Associates, Inc., licensee of standard broadcast station KGRB, West Covina, Calif.

2. The outstanding construction permit is a reinstatement of a former permit (BPH-2188) for the same station first granted to Simonton on February 23, 1961. After the grant of a series of extensions, the latter permit expired by its own terms on May 24, 1965. An application to replace the expired permit was filed by Simonton and granted July 21, 1965. In support of that application, it was urged that a new party was prepared to go forward with construction of the station at a different site and that applications for consent to assign the permit and for a new transmitter site were in preparation. The permit was accordingly replaced as BPH-5018 with a completion date of March 21, 1966. During this period of renewed authority there was no indication that a new site was selected, nor was any application filed looking toward assignment of the permit.

3. In this posture of affairs the above-captioned application for still another extension of 6 months was filed on February 24, 1966, again supported by representations that an assignment application was in preparation. It is to our action dismissing this application that the petitioners address their pleading.

4. The petitioners rely on events occurring subsequent to the filing of the above-captioned application as justifying reconsideration of our dismissal thereof. It appears that Burdette was ill for several

[1] By Chief, Broadcast Bureau, under delegated authority (§ 0.281(z) of the rules).

weeks during the period the application was under consideration; that his engineering consultant was likewise incapacitated; and that a new site which had been found proved, upon investigation, unavailable. It is therefore suggested that our action was based upon a misunderstanding of the situation at KRCS. They point out that the letter dismissing the application deals with past delays attributable to Simonton. These are described as past history, and, as such, unrelated not only to the present situation but also to the dismissed application.

5. Although happenings subsequent to the filing of the application were not reported and consequently not considered in connection with the dismissal, it is impossible, in our view, to dissociate the events of the past with the current posture of the station's affairs, or to regard the latest extension request in other than the context of prior requests.

6. During the more than 4 years the original construction permit was in force a total of seven extensions of time to construct were granted to Simonton upon his representation of various circumstances alleged to have prevented completion. Chief among these was a controversy over Simonton's right to occupy the proposed transmitter site, which, after litigation, was abandoned, together with a transmitter house and power line installation already completed. On October 27, 1964, a seventh and last extension of the original permit was granted for the purpose, according to Simonton, of allowing necessary time to select another site and change location of the station, for which changes, appropriate application and petition for rulemaking were in preparation. This extension terminated May 24, 1965.

7. In the course of the rulemaking procedure, however, it developed that Simonton was proposing a sale of station KRCS to the licensee of a standard broadcast station at Garden Grove, Calif., as well as removal of channel 236 to that community. This had not been disclosed when the application for extension of time was filed. The rulemaking petition was denied on April 8, 1965; the construction permit was allowed to expire May 24, 1965. Meanwhile the authorized site had been abandoned. As above set forth, the application to replace the expired permit stated that arrangements for the selection of a new site and assignment of the permit, if replaced, were underway. Neither had been accomplished when we dismissed the above-captioned application on March 17, 1966.

8. In sum, whatever the merits of the site controversy or whatever the validity of the other reasons advanced by Simonton for not completing construction during the 4-year life of the original permit, it is apparent from the record that Simonton abandoned any thought of building a new FM station at San Bernardino, Calif., some 16 months before we dismissed his application, and has sought to maintain his construction permit in a viable state solely for the purpose of assigning it to others.

9. Broadcast construction permits are issued for a period of 8 months, and expire by their own terms unless the station is placed on the air within that period "or within such further period of time as the Commission may allow, unless prevented by causes not under the control of the grantee." Section 319(b), Communications Act

of 1934, as amended. In exercising our discretion under the statute, we require that the applicant show diligence in completing construction. The finding of diligence, in turn, depends upon the facts and circumstances of each case, the underlying consideration being that a permittee should not be allowed to tie up an available channel indefinitely.

10. We conclude, therefore, that the extension of a construction permit for the sole purpose of keeping it alive while protracted negotiations are conducted with prospective assignees or tranferees is contrary to our responsibilities under the act.

Accordingly, and inasmuch as the permittee has not requested the hearing offered in our letter of March 17, 1966, *It is ordered*, That the above petition for reconsideration *Is denied*, and the earlier dismissal of the above-captioned application *Is affirmed*.

It is further ordered, That the call letters KRCS, together with all station records pertaining thereto, *Are hereby deleted*.

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

FCC 66R-234

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
DONALD P. NELSON AND WILBUR E. NELSON, D/B AS NELSON BROADCASTING CO., KINGSTON, N.Y.	Docket No. 15535 File No. BPH-4211
UBIQUITOUS FREQUENCY MODULATION, INC., HYDE PARK, N.Y.	Docket No. 15536 File No. BPH-4312
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted June 20, 1966)

BY THE REVIEW BOARD: BERKEMEYER, SLONE AND KESSLER.

1. On March 30, 1966, the Review Board released a decision (3 FCC 2d 239, 7 R.R. 2d 181) granting the application of Donald P. Nelson and Wilbur E. Nelson, d/b as Nelson Broadcasting Co. (Nelson), for a construction permit for a new FM broadcast station at Kingston, N.Y., and denying the mutually exclusive application of Ubiquitous Frequency Modulation, Inc. (Ubiquitous), for a construction permit for a new FM broadcast station at Hyde Park, N.Y. Ubiquitous now seeks reconsideration and reversal of the Board's decision.[1] Ubiquitous has raised no arguments which persuade us to modify our decision and its petition will be denied.

2. Petitioner's sole ground for requesting reconsideration is the Board's refusal to consider existing 50-uv/m signals in Nelson's proposed white area as constituting "service." Ubiquitous' contentions in this respect were fully treated in paragraph 8 of the Board's decision. The Board held that evidence of 50-uv/m signal service was not contemplated by the designation order herein [2] and that Ubiquitous had failed to request, at any stage of this proceeding, that the issues be modified to permit a showing of 50-uv/m services.

3. Ubiquitous now contends that the Board's ruling "ignores certain historical considerations which render obsolete the Commission decisions cited by the Board." The decisions referenced by Ubiquitous appear at footnote 16 of the Board's decision. Ubiquitous states that subsequent to the issuance of the referenced Commission opinions

[1] Pleadings before the Board for consideration are as follows: petition for reconsideration, filed by Ubiquitous on April 27, 1966; opposition, filed by Nelson on May 6, 1966; opposition, filed by the Broadcast Bureau on May 11, 1966; and reply, filed by Ubiquitous on May 18, 1966.

[2] Issue 1 reads as follows: "To determine the area and population within each of the proposed 1-mv/m contours and the availability of other FM services (at least 1 mv/m) to such areas and populations." Ubiquitous argues that issue (1) requires that "'at least' the 1-mv/m other services shall be shown * * * lest there be a failure of proof and a failure to meet the burden required by the issues." The clear import of issue (1) as contemplating a showing of services providing a signal of 1 mv/m or better is fully discussed in par. 8 of the decision.

(1959 and 1960) the Commission, in 1963, abandoned the protected service contour theory of FM allocation and substituted a tabular system of assignments. *Third Report, Memorandum Opinion and Order*, FCC 63–735, 23 R.R. 1859 (1963). According to Ubiquitous, the purpose of the Commission's change in its FM allocation method was to provide for protection to assigned stations beyond the 1-mv/m contour. The cited *Report* does not support petitioner's thesis: The reasons underlying the Commission's change in the FM assignment system were much more complex, including, inter alia, the inefficiency and lack of precision of the contour system, and the lack of provision in that system for long-range objectives. The *Third Report* reflects an intention to assign stations on the assumption of operation with maximum permissible facilities rather than actual operation characteristics. Contrary to Ubiquitous' contention, the *Third Report* does not extend protection to any specified signal strength contour. Nowhere did the Commission even consider what specific signal strength would constitute adequate service in any particular circumstances, nor did it discuss, or alter, its previous determinations that service beyond the 1-mv/m contour is not a significant factor in the allocation of FM stations. See *Waynesboro Broadcasting Corporation*, FCC 65R–278, 5 R.R. 2d 989. Subsequent orders of the Commission designating FM applications for hearing have affirmed this policy;[3] Ubiquitous' argument that the Board's holding is out of date is, therefore, erroneous.

4. Ubiquitous contends that it could have refused to enter into a stipulation regarding the coverage of the application for channel 232A at Kingston which was granted[4] in the period between the issuance of the initial decision (FCC 65D–13), released April 5, 1965, and the oral argument held before a panel of the Review Board on November 12, 1965. The Board, Ubiquitous asserts, would then have been "bound" to order a further hearing at which it could have offered a showing of 50-uv/m services to the remaining white area and thus preserved its right of appeal from a possible adverse ruling by the examiner. However, Ubiquitous notes, in order to conserve the "time of the Commission's staff," petitioner was not "obstinate" and agreed to the stipulation.

5. Although the Board commends the parties for their cooperation in achieving a stipulation with regard to the coverage of WGHQ–FM, it is clear from paragraphs 6 and 8 of the decision that Ubiquitous was not deprived of any of its rights by virtue of its participation in the stipulation agreement. The parties stated in the stipulation agreement and the Board noted in its decision that if this proceeding had been remanded for further hearing Ubiquitous would have offered an exhibit purporting to depict the existing services of 50 uv/m or better which Nelson's white area received; Nelson and the Bureau would object to the admissibility of such an exhibit; and, depending upon the examiner's ruling, either Ubiquitous or Nelson would except and ap-

[3] On May 6, 1966, the Commission released an order (FCC 66-411) in *Northwestern Indiana Broadcasting Corporation* wherein it directed a comparison of the applicants' coverage proposals "together with the availability of other FM services of at least 1 mv/m in such areas * * *."

[4] The grant was to Skylark Corp. (WGHQ–FM), Kingston, N.Y. This application was granted by memorandum opinion and order, FCC 65R–266, released July 20, 1965.

106–500—66——15

peal to the Review Board. Thus, the Board would have ultimately ruled on the admissibility of the 50-uv/m showing. Such a showing would have been ruled inadmissible for the reasons previously set forth in paragraph 8 of the decision and repeated here in paragraphs 2–3, supra.

Accordingly, it is ordered, This 20th day of June 1966, that the petition for reconsideration, filed by Ubiquitous Frequency Modulation, Inc., on April 27, 1966, *Is denied.*

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

FCC 66-516

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of KENTUCKY CENTRAL TELEVISION, INC., LEXINGTON, KY. WBLG-TV, INC., LEXINGTON, KY. For Construction Permit for New Television Broadcast Station	Docket No. 16700 File No. BPCT-3569 Docket No. 16701 File No. BPCT-3642

MEMORANDUM OPINION AND ORDER

(Adopted June 14, 1966)

BY THE COMMISSION:

1. The Commission has before it for consideration: (*a*) The above-captioned application (BPCT-3569) of Kentucky Central Television, Inc. (Kentucky Central); (*b*) the above-captioned application (BPCT-3642) of WBLG-TV, Inc. (WBLG-TV); (*c*) a petition to deny filed January 14, 1966, by WBLG-TV, Inc., directed against (*a*) above;[1] (*d*) an opposition to petition to deny filed January 27, 1966, by Kentucky Central, directed against (*c*) above; and (*e*) a reply to opposition to petition to deny filed February 11, 1966, by WBLG-TV, Inc., directed against (*d*) above.

2. On May 17, 1965, Kentucky Central filed application BPCT-3569 for a construction permit for a new television broadcast station to operate on channel 62, Lexington, Ky. On October 8, 1965, WBLG-TV, licensee of standard broadcast station WBLG, Lexington, Ky., filed application BPCT-3642 for the same facility. The following communications mass media services are within the predicted grade B contours of the proposed television station. *Television stations:* WKYT-TV, channel 27, Lexington, Ky.; and WLEX-TV, channel 18, Lexington. *Aural broadcast stations:* WBLG, Lexington, Ky.; WBKY, Lexington; WLAP-AM and FM, Lexington, WVLK-AM and FM, Lexington; WCYN, Cynthiana; WHIR, Danville; WSTL, Eminence; WFKY, Frankfort; WAXU, Georgetown; WRVG-FM, Georgetown; WHBN, Harrodsburg; WIRV, Irvine; WLBN, Lebanon; WPHN, Liberty; WMST, Mount Sterling; WRVK, Mount Vernon; WNVL, Nicholasville; WEKY, Richmond; WCND, Shelbyville; WRSL, Stanford; and WWKY, Winchester. *Daily newspapers:* Lexington Herald-Leader; Danville Advocate-Messenger; Frankfort State Journal; Paris Enterprise; Richmond Register; and Winchester Sun.[2]

[1] Although the petition to deny does not meet the filing requirements of sec. 1.580 of the Commission's rules, the Commission, on its own motion, is waiving this section.
[2] "Editor and Publisher International Yearbook," 1965 edition.

3. On the merits, WBLG–TV's sole contention is that in view of the many business interests of Garvice D. Kincaid, chairman of the board of Kentucky Central, and his associates in the area, the Commission should either deny Kentucky Central's application or specify an "economic dominance" issue as to whether a grant of its application would be in the public interest.[3]

4. In support of its request that the Commission either deny or specify an issue on economic dominance, WBLG–TV alleges that Kentucky Central's principals have substantial interests throughout the State of Kentucky engaged in the insurance, banking, and small loan business, all interrelated, with substantial concentration in the area to be served by the proposed television station; that Kentucky Central's principals already control two broadcast facilities in Lexington which devote substantial portions of their broadcast week to promoting the related interests of Kentucky Central; that these interests receive preferential treatment; and that the proposed television station will also be used to promote these interests. This allegedly will have the effect of enabling Kentucky Central to enhance its "* * * extensive and far-flung empire of finance, banking, loans, and insurance companies * * *" in Kentucky to the detriment of its competitors.

5. With respect to the alleged substantial interests of Garvice Kincaid and his associates in the area, it appears from the applicant's pleadings, which have not been rebutted, that Kentucky Central has the following insurance, bank, small loan, broadcast, and miscellaneous interests within its proposed predicted grade B contour.

Insurance: Kentucky Central Life Insurance Co.—354 employees; it also controls 4 insurance agencies which employ 14 persons. *Banks:* Kentucky Central apparently has interests in 12 banks having deposits of $79,700,000 and which employ 216 persons. However, it also appears that there are 92 other banks in the area, which have total deposits of $678,100,000. *Small loan companies:* Kentucky Central appears to control 35 small loan companies in the area which employ 180 people, but there are 66 other small loan companies in the same area. *Broadcast interests:* The principals of Kentucky Central have interests in aural broadcast station WVLK–AM and FM, Lexington, which hires 30 people. As indicated in paragraph 2 above, however, there are 21 other standard broadcast stations serving the same area. *Other business interests:* The pleadings disclose that Kentucky Central and its principals also have interests in 5 miscellaneous fields, employing a total of 201 persons. The largest of these is the Cardinal Corp., which operates the Phoenix Hotel in Lexington which has 180 employees.

6. On the basis of the above, we do not believe it has been shown, nor that it can be shown, that the interests of Kentucky Central and its principals represent such a substantial force in the economic life of Lexington that would require an issue on economic dominance. Although WBLG–TV relies upon "* * * well-established Commis-

[3] The economic dominance question was originally raised by WLEX–TV, Inc., which subsequently withdrew its petition. However, WBLG–TV, Inc., in its petition to deny stated that rather than burden the record with repetition, it would adopt the representations made in pars. 18–40 of WLEX–TV's petition, all of which are based upon matters of which official notice can be taken.

sion precedents such as *Travelers Broadcasting Service Corp.*, 12 R.R. 689 (1956), and *Midland Broadcasting Co.*, 3 R.R. 1961 (1948) * * *" in requesting an economic dominance issue, the facts of those cases were quite different from those present here.

7. In *Midland Broadcasting Company* which involved the "company town" of Midland, Mich., the Commission preferred a newspaper owner over the Dow Manufacturing Co., which the Commission found would "* * * necessarily dominate the life of most of the inhabitants of the community." It is significant to note, however, that in *Midland*, the Dow Co. employed 90 percent of a population of 10,329. Also, that Midland had no broadcast station of its own and only one daytime primary service. Lexington, Ky., has a population of 73,000. Out of this Kentucky Central employs 995 persons. The area in question is also presently served by 2 television stations, 6 newspapers and 23 aural broadcast stations of which only 2, WVLK–AM and FM, are controlled by Garvice Kincaid. In *Travelers*, where the Commission added an issue on economic dominance, Travelers Insurance Co.'s individual assets were the largest of all of the Hartford Insurance Cos., i.e., 28.5 percent, but it was ultimately held that the evidence did not sustain the charge of economic dominance. Even though it is apparent that Kentucky Central is active in many different businesses in Lexington, nothing has been shown that would indicate a dominance, in any of them, to the extent evidenced in the *Midland* and *Travelers* cases.[4]

8. With respect to the time purchased by related business interests on Kincaid's broadcast stations in Lexington (WVLK–AM and FM), it appears that out of a combined total of 295 broadcast hours per week, 56 hours, or 19 percent, are purchased by Kentucky Central and its related interests.[5] Although WBLG–TV has alleged "preferential treatment" nothing has been shown to substantiate this contention. Moreover, Kentucky Central has submitted an affidavit from the general manager of station WVLK–AM and FM which indicates that "* * * the businesses in which Mr. Kincaid has an interest * * * pay the same rates as other advertisers"; that "* * * most of such advertising is placed in less attractive advertising availabilities"; and that "* * * these stations [WVLK–AM and FM] have never refused to carry advertising because a competitive business was involved." Although WBLG–TV alleges that the proposed television station will also be used to promote Mr. Kincaid's interests, Kentucky Central's application indicates that it estimates that five spot announcements per day will be devoted to their insurance business, and that it is aware of no specific plans to carry advertising of its other business interests on the proposed station. Even though WBLG–TV contends that these advertising plans will result in Kentucky Central's affording itself "preferential treatment vis-a-vis its competitors," we have not been shown how this could be accomplished on the basis of the advertising

[4] See also *Hershey Broadcasting Co., Inc.*, FCC 62–222, 22 R.R. 1071. Reconsideration denied, FCC 62–558, 22 R.R. 1072. In *Hershey*, the Commission also added an issue on economic dominance, but this case is also distinguishable. In *Hershey*, the Hershey estate owned and operated the town of Hershey, providing recreation facilities, utilities, and employing 3,605 persons from a total population of 6,815.

[5] BR 1953, granted July 15, 1964. BRH 1244, granted July 20, 1961.

plans now proposed. Moreover, the past record of WVLK–AM and FM does not disclose such a practice. Therefore, we do not believe that an economic dominance issue is warranted and WBLG–TV's petition to deny will be denied. However, this matter can be explored under the standard comparative issue.[6]

9. With respect to WBLG–TV, Inc.'s application, the following considerations are relevant:

(*a*) Its application indicates that $1,107,359 [7] will be needed for the initial construction and first year's operating expenses. To meet the cash requirements, the applicant relies upon the availability of the following: A $500,000 loan from Reeves Broadcasting Corp.; $10,000 in existing capital; $190,000 in stock subscriptions from Reeves Broadcasting and Roy B. White, Jr.; and $500,000 in revenues. The applicant has established the availability of the loan and the $95,000 stock subscription from Reeves Broadcasting. With respect to the remaining $95,000 stock subscription of Roy B. White, Jr., however, since his balance sheet does not fully disclose the nature of his stocks and bonds, i.e., on what exchange they are listed, cash, or market value, etc., we are unable to determine whether or not Mr. White will be able to meet his commitments. Furthermore, although the applicant estimates first year revenues to be $500,000, it has not submitted any evidentiary showing as to their availability. Therefore, the applicant has shown cash available in the amount of $605,000, to meet an estimated requirement of $1,107,359. Accordingly, financial issues are specified.

(*b*) It appears that WBLG–TV, Inc., proposes to locate its main studio outside of the corporate limits of Lexington, and, therefore, it requests a waiver of section 73.613 of the Commission's rules. However, since no justification for waiver has been submitted, an issue is specified to determine whether circumstances exist that warrant a waiver of this section.

10. With respect to both applications, it should be noted that offset designators have not been provided. These will be furnished in a subsequent order by the Commission, and, therefore, a grant of either of these applications will be made subject to the condition that operation of the station will be in accordance with offset designators which will be specified subsequently.

11. In view of the foregoing it appears that no substantial or material questions of fact have been presented by the petitioner, and except as indicated by the issues set forth 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 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

[6] *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 R.R. 2d 1901.

[7] Downpayment to RCA—$192,000; first year's payments to RCA—$186,659; land acquisition—$6,600; building remodeling, etc.—$170,000; miscellaneous expenses—$125,000; and estimated cost of operation—$427,000.

opinion that they must be designated for hearing in a consolidated proceeding on the issues set forth below.

Accordingly, it is ordered, That, pursuant to section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications of Kentucky Central Television, Inc., and WBLG–TV, Inc., *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 WBLG–TV, Inc.'s application:

(*a*) Whether Roy B. White, Jr., has sufficient liquid assets to meet his $95,000 stock commitment.

(*b*) Whether its $500,000 estimate of revenues is reasonable.

(*c*) Whether, in view of the evidence adduced pursuant to (*a*) and (*b*), the applicant is financially qualified.

(*d*) Whether circumstances exist which would warrant a waiver of section 73.613 of the Commission's rules.

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.

It is further ordered, That WBLG–TV, Inc.'s petition to deny *Is hereby denied.*

It is further ordered, That a grant of either of the applications be made subject to the following condition:

That operation of the station be in accordance with offset designators to be specified in a subsequent order.

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.

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(a) of the Commission's rules, give notice of the hearing, either individually or, if feasible, 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.*

FCC 66-535

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of EUGENE TELEVISION, INC. (KVAL-TV), EUGENE, OREG. For Construction Permit	File No. BPCT-3588

MEMORANDUM OPINION AND ORDER

(Adopted June 15, 1966)

BY THE COMMISSION: COMMISSIONER COX ABSENT.

1. The Commission has before it for consideration the above-captioned application of Eugene Television, Inc., licensee of television broadcast station KVAL-TV, channel 13, Eugene, Oreg.; a petition for reconsideration, filed March 31, 1966, by Liberty Television, Inc., licensee of television broadcast station KEZI-TV, channel 9, Eugene, Oreg., requesting reconsideration of the Commission's action of February 23, 1966 (FCC 66-186, 2 FCC 2d 706, 6 R.R. 2d 911), granting without hearing the above-captioned application and denying the petition to deny filed against the application by petitioner herein; and various pleadings filed in connection therewith.[1] The facts of this case are set forth in the above-referenced decision (*Eugene Television, Inc. (KVAL-TV)*, FCC 66-186, 2 FCC 2d 706, 6 R.R. 2d 911), and need not be repeated here.

2. Petitioner alleges that the Commission erred, in its decision granting without hearing the above-captioned application, by using predicted grade B contours (computed in accordance with sec. 73.684 of the Commission's rules) to determine areas and populations which would gain service from the proposed operation of station KVAL-TV, but used terrain-limited contours, as urged by petitioner, to determine the extent of overlap of the grade B contours of applicant's three stations. Petitioner further urges that our recent decision in *Connecticut Radio Foundation, Incorporated*, FCC 66-297, released April 13, 1966, requires that we designate station KVAL-TV's application for hearing or dismiss it because a grant of the application would effectively condemn the two satellite stations to that status indefinitely. Petitioner attacks the concept that stations KPIC and KCBY-TV are, in fact, "satellites" because, in a pleading filed in 1963 by station KPIC requesting reconsideration of the grant of an application for a television broadcast translator station in Roseburg, Oreg., KPIC stated that "* * * [KPIC] can no longer be considered, in any sense, a mere satellite of the Eugene station."

[1] The Commission also has before it for consideration an opposition to the petition for reconsideration, filed Apr. 13, 1966, by Eugene Television, Inc., and a reply thereto, filed Apr. 22, 1966, by petitioner.

3. The *Connecticut Radio Foundation* case, supra, which petitioner cites to support its contention that this application must be designated for hearing or dismissed is inapposite. *Connecticut Radio Foundation* was concerned with whether there was a need for a satellite operation. We pointed out, in our original opinion in the instant matter, that this case does not involve a request for the establishment of a satellite station and there is no question before us as to whether there is a need for a proposed satellite operation. We have before us only an application for changes in the facilities of the parent station. *Connecticut Radio Foundation*, therefore, has no applicability to the matter with which we are here concerned. We reaffirm our holding in this proceeding with respect to the applicability of note 4 to section 73.636 of the Commission's rules to proposals for stations which are primarily satellites.

4. Petitioner's contention that KPIC is not a satellite station because, in a pleading filed in 1963, KPIC stated that it wasn't, is wholly without merit. This contention was before us when we originally considered this matter and our decision was based on our conclusion that, on the facts of this particular case, KPIC and KCBY-TV were primarily satellites. Petitioner asserts nothing new to persuade us that our original conclusion was in error. We, therefore, reaffirm our determination that stations KPIC and KCBY-TV are primarily satellites within the meaning of note 4 to section 73.636 of the rules.[2]

5. The matter of whether there will be overlap of the grade B contours of stations KVAL-TV, KPIC, and KCBY-TV is a complex one which has been before us on several previous occasions. In *Pacific Television, Inc.*, FCC 59-980, 18 R.R. 1041, we adopted an initial decision (FCC 59D-81, 18 R.R. 1035) which granted the application of station KCBY-TV for a construction permit. It was then determined that while there was overlap of the grade B contours of the three stations predicted in accordance with section 73.684 (a) to (e) (then sec. 3.684), "* * * consideration of the practical limits imposed by the intervening terrain restricts these contours sufficiently" so that in fact no overlap exists. Again, when the Commission granted station KVAL-TV's application (BPCT-2781) on January 18, 1961, for changes in the station's authorized facilities, the matter of overlap was considered and it was again determined that, based on data submitted by the applicant, terrain features precluded actual overlap among the three stations. The finding was reiterated in *Eugene Television, Inc.* (KVAL-TV), FCC 62-1000, 24 R.R. 280. In its petition to deny the application now before us, petitioner contended that its engineering showing demonstrated that there would be overlap, but we determined that the disadvantages of overlap were outweighed by the gains. Now we are asked to reconsider this decision.

6. Petitioner states, in its petition for reconsideration, that "* * * the Commission has agreed that increased grade B overlap would result to the extent contended by Liberty * * *." This contention is clearly erroneous. In paragraph 8 of our original opinion, we stated:

[2] The 1965 renewal applications of KPIC (BRCT-392) and KCBY-TV (BRCT-528), granted Jan. 10, 1966, show that KPIC presented 4.7 percent (about 5 hours and 42 minutes out of 122 hours per week) and KCBY-TV presented 3.54 percent (about 4 hours and 19 minutes out of 122 hours per week) locally originated programing.

> Although the matter of whether there will be increased overlap is in dispute, *we will assume, for the purposes of this case*, that there will be increased overlap to the extent contended by the petitioner. (Emphasis supplied.)

We did not accept as valid petitioner's engineering showing nor did we agree with its conclusions. We determined the extent of overlap and the gains by using the prediction method which section 73.684 of our rules states should be used to determine contours. To the extent that the above-quoted language from our original opinion indicated that we had used the petitioner's alternate showing to compute overlap, it was in error. In using the prediction method provided by our rules, we considered an overlap situation which would be greater than could be expected using terrain-limited contours. Thus, we considered the worst possible overlap situation and any distortion with respect to assumed gains was minimized.

7. Our conclusion that the gains justify permitting the overlap was predicated upon our evaluation of the situation based upon use of the prediction method provided by our rules to determine both overlap and gains. Although the quoted language from our original opinion was erroneous, the basis for our conclusion was proper and we, therefore, reaffirm our finding that a grant of the application would serve the public interest, convenience, and necessity.

Accordingly, *It is ordered*, That the petition for reconsideration filed herein by Liberty Television, Inc., *Is denied*.

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

FCC 66R–241

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
LILLIAN LINCOLN BANTA AND DEAN DE VERE BANTA, D/B AS TELEVISION SAN FRANCISCO, SAN FRANCISCO, CALIF.	Docket No. 15780 File No. BPCT–3303
JALL BROADCASTING CO., INC., SAN FRANCISCO, CALIF.	Docket No. 15781 File No. BPCT–3425
For Construction Permits	

ORDER

(Adopted June 22, 1966)

BY THE REVIEW BOARD:

The Review Board having before it for consideration the petition for leave to amend, filed April 28, 1966, by Jall Broadcasting Co., Inc. (Jall).

It appearing, That the proposed amendment is necessary to reflect new broadcast interests recently acquired by Jall's stockholders; and

It further appearing, That the proposed amendment is not opposed by the other parties to this proceeding and would not result in a comparative advantage to Jall;

Accordingly, it is ordered, This 22d day of June 1966, that the petition for leave to amend, filed April 28, 1966, by Jall Broadcasting Co., Inc., *Is granted*, and that its amendment *Is accepted*.

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

FCC 66–548

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of CEASE AND DESIST ORDER TO BE DIRECTED AGAINST MISSION CABLE TV, INC., AND TRANS-VIDEO CORP., OWNER AND OPERATOR, RESPECTIVELY, OF A COMMUNITY ANTENNA TELEVISION SYSTEM AT POWAY, CALIF.	Docket No. 16575

APPEARANCES

Frank U. Fletcher, *Robert L. Heald*, and *James P. Riley* (Fletcher, Heald, Rowell, Kenehan & Hildreth), on behalf of Mission Cable TV, Inc., and Trans-Video Corp.; *Thomas B. Fitzpatrick* and *Anthony J. Sobczak*, on behalf of the Broadcast Bureau, Federal Communications Commission; and *Ernest W. Jennes*, *Charles A. Miller*, and *William Malone* (Covington & Burling), on behalf of Midwest Television, Inc.

DECISION

(Adopted June 21, 1966)

COMMISSIONER LEE FOR THE COMMISSION: COMMISSIONER BARTLEY DISSENTING (see *Buckeye Cablevision, Inc.*, decision FCC 66–449); COMMISSIONER COX CONCURRING AND ISSUING A STATEMENT; COMMISSIONER LOEVINGER NOT PARTICIPATING.

1. This proceeding was initiated by an *Order to Show Cause*, FCC 66–292 (corrected), 3 F.C.C. 2d 296, released April 11, 1966, directing Mission Cable TV, Inc. (Mission), and Trans-Video Corp. (Trans-Video) [1] to show cause why they should not be ordered to cease and desist from further operation of a community antenna television system (CATV) in Poway, Calif., in violation of section 74.1107 of the Commission's rules. The Commission found that expeditious resolution of the matter was essential and it therefore directed that, immediately after closing, the record be certified to the Commission for final decision. The Commission further directed that within 7 calendar days after the date that the record is closed the parties file their proposed findings of fact and conclusions of law.

2. A petition for reconsideration of the order to show cause filed by respondents was denied by the Commission by order, FCC 66–394, released April 28, 1966. Respondents' petition to enlarge issues was denied by the Review Board, FCC 66R–175, released May 5, 1966, and we denied respondents' application for review of the Board's determination by order, FCC 66–434, released May 16, 1966.

[1] In referring to Mission and Trans-Video jointly, the term "respondents" will be used herein.

3. Prehearing conferences were held in this proceeding on April 22, 1966, and on May 9, 1966. At the latter prehearing conference the hearing examiner granted the motion for leave to intervene filed by Midwest Television, Inc., licensee of station KFMB–TV on channel 8 at San Diego, Calif. (KFMB–TV); and he formalized his ruling by an order, FCC 66M–666, released May 10, 1966. The evidentiary hearing was commenced on May 17, 1966, and hearings were held through May 20, 1966, when the record was closed. Pursuant to the mandate contained in the order to show cause, the hearing examiner certified the record to the Commission by order, FCC 66M–720, released May 24, 1966. Proposed findings of fact and conclusions of law were filed on May 27, 1966, by the respondents, by the Broadcast Bureau, and by KFMB–TV. Respondents and KFMB–TV also filed briefs in support of their proposed findings and conclusions.

4. Rules governing the regulation of all community antenna televisions systems (CATV) [2] were adopted by the Commission's second report and order in dockets Nos. 14895, 15233, and 15971, 2 F.C.C. 2d 725, released March 8, 1966; and these rules were published in the Federal Register on March 17, 1966 (31 F.R. 4540). Section 74.1107, which is the basis for the charges in the order to show cause issued in this proceeding, was made effective immediately upon publication. The portions of that section pertinent to this proceeding provide as follows:

> (*a*) No CATV system operating 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. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.
>
> (*b*) A request under paragraph (*a*) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their grade B contours, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within 30 days after such public notice. A reply to such responses or statement may be filed within a 20-day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.
>
> * * * * * * *

[2] Sec. 74.1101(a) defines a CATV system as "any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house."

(*d*) The provisions of paragraphs (*a*) and (*b*) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date; * * *.

5. Poway, Calif., is an unincorporated community located in the west-central part of San Diego County approximately 13 miles inland from the coast. Mission [3] owns and operates a CATV system in the Poway area which, for the sake of convenience, will be referred to herein as the Poway CATV system. This system runs along Poway Road, a highway which extends in an east-west direction, and has several branches which run generally in a north-south direction. The signals of several television stations are received directly off the air at the headend site located to the west of Poway, where there are receiving antennas and associated equipment to amplify and distribute such signals by wire or cable to the CATV system's subscribers.

6. The Poway CATV system was installed pursuant to a nonexclusive franchise for a period of 30 years, awarded to Mission by the board of supervisors of San Diego County on November 7, 1962, effective December 7, 1962. The franchise authorized Mission to construct and operate CATV systems in the unincorporated areas of the county. During 1965 agreements were executed with certain utility companies for the attachment of the CATV cable to their utility poles in the Poway area, and construction of the Poway CATV system was commenced.

7. By February 10, 1966, construction of the trunk and feeder lines [4] was completed and the system was energized.[5] Prewire installations to the homes of subscribers were commenced on February 14, 1966, and 11 homes were connected to the feeder lines on that date. However, no signals from the Poway headend site were delivered to any subscriber until February 26, 1966. As of March 17, 1966, the Poway CATV system had 337 subscribers, and this number was increased to 741 subscribers by May 13, 1966.[6]

8. The CATV system serving Poway has a 12-channel capacity, and its subscribers are provided with the signals of the following television stations:

(*a*) Los Angeles commercial stations KNXT (channel 2), KNBC (channel 4), KTLA (channel 5), KABC–TV (channel 7), KHJ–TV (channel 9), KTTV (channel 11) and KCOP (channel 13); plus noncommercial educational station KCET (channel 28).

(*b*) San Diego commercial stations KFMB–TV (channel 8), KOGO–TV (channel 10); and KAAR–TV (channel 39).

(*c*) Tijuana, Mexico, commercial station XETV (channel 6).

[3] Trans-Video is the majority stockholder of Mission, which is the operating company.

[4] Trunk lines are the main source of distribution of signals, and feeder lines come off the trunk line to distribute signals to particular streets in the system.

[5] A CATV system is energized when the television signals are fed into the amplifiers.

[6] The record establishes that the service by the Poway facility is not confined to "the residents of one or more apartment dwellings under common ownership, control, or management," and no claim is made by respondents that the Poway CATV system is excepted from the definition of a community antenna television system contained in sec. 74.1101(a) of the rules.

The rapid expansion of this cable system serves to confirm our finding in the order to show cause that due and timely execution of our functions imperatively and unavoidably required that the record be certified to the Commission for final decision. See, also, *Buckeye Cablevision, Inc.*, FCC 66–449, released May 27, 1966.

9. Since the commencement of service on February 26, 1966, Mission has provided the signals of all the television stations listed above to its subscribers who pay a charge for this service. The Poway cable system is located approximately 15 miles northeast of the transmitter site of station KFMB–TV in San Diego and is well within the predicted grade A contour of that television station.[7] San Diego is ranked as the 54th television market in the country by the American Research Bureau on the basis of the net weekly circulation for the year 1965.

10. Before a determination may be made whether the signals of any of the aforementioned television stations are being extended beyond their grade B contours in violation of section 74.1107 of the rules, several preliminary issues must be resolved. The first is whether the grade B contours of the television stations in question are to be determined exclusively by means of the prediction method prescribed in section 73.684 of the rules, as the Bureau argues, or whether evidence is admissable to show the actual grade B contour based upon field intensity measurements, as contended by the licensee of KFMB–TV. The hearing examiner ruled that engineering evidence which establishes the actual grade B contour is admissible, and we agree with his ruling. Section 74.1107 prohibits, under certain specified conditions, the extension of a station's signals "beyond the grade B contour of that station" and nothing therein contained restricts the quoted phrase to the predicted grade B contour. We therefore hold that engineering evidence concerning the actual grade B contour of a station, based upon adequate field intensity measurements, is relevant and admissible. (See footnote 13 appended to par. 29 of our memorandum opinion and order in dockets Nos. 14895, 15233, and 15971, FCC 66–456, released May 27, 1966.)

11. Pursuant to the examiner's ruling KFMB–TV sought to introduce into evidence an engineering statement in support of its claim that the carriage of certain Los Angeles television stations by the cable system violated section 74.1107 of the rules. The proffered exhibit indicated that field intensity measurements were taken on 2 successive days at a total of 23 locations in the Poway area. On the basis of the foregoing measurements, KFMB–TV's engineer concluded that the actual field intensities of the signals of Los Angeles stations KTLA, KABC–TV, KHJ–TV, KTTV, and KCOP are below the values required for grade B service. The exhibit was excluded by the examiner and his action was manifestly correct. Within any contour, whether calculated by the prediction method or on the basis of measurements, there may exist pockets of low signal intensity. The fact remains, however, that what section 74.1107 prohibits is the extension of television signals beyond the station's grade B contour. In order to locate the grade B contour of a station, it is necessary to make sufficient measurements along one or more radials, depending on the nature of the terrain, over sufficient distances to establish the fact that the results obtained are not unduly influenced by local conditions. However, the data obtained by KFMB–TV were limited to measure-

[7] KFMB–TV's predicted grade A contour falls at a distance of approximately 36 miles from its transmitter site.

ments at 23 locations within a relatively small area and, at the hearing, KFMB–TV's engineer conceded that the measurements in the proffered exhibit were inadequate to establish the grade B contour of any of the Los Angeles stations. Since the grade B contour of the station is the critical factor to be established, the engineering evidence tendered by KFMB–TV, which does not establish a contour, is irrelevant and inadmissible.[8]

12. A most perplexing problem is posed in this case by the contentions of the Bureau and by KFMB–TV that respondents' Poway CATV system serves more than one geographical area so that the operation of a part of the cable system within the grade B contour of a station does not make permissible the extension of that station's signal to other parts of the system which are beyond the grade B contour. Although each party takes a different approach, the basic views of both the Bureau and KFMB–TV are similar. The Bureau asserts that an unincorporated community is a separate geographical area and that the signals of a television station may not be carried to subscribers within the community if the station's grade B contour falls short of the boundaries of the community. With respect to incorporated communities where the boundaries are legally defined, we have held that for our purposes the CATV system serving each is to be deemed a separate system so that the permissible carriage of a station in one incorporated municipality does not justify carriage of that station's signal beyond its grade B contour into a different autonomous municipality even though both municipalities are served from the same headend. *Telerama, Inc.*, 3 F.C.C. 2d 585, dated April 29, 1966. However, the situation is different with respect to unincorporated communities, since the boundaries thereof are neither clearly delineated [9] nor static. With respect to section 74.1107(a) of the rules and the question of where the grade B contour falls, our concern is whether the television signals can be received in what is, in a real sense, a single, discrete (albeit unincorporated) area, or whether there are two or more separate and different areas. We look to the character of the area in order to make that determination. We deem it both unnecessary and inappropriate to try to specify artificial boundaries for an unincorporated community. If in fact the CATV system serves a single, unincorporated, populated area, a part of which area is within the grade B contour of the station being carried by the CATV system, there is compliance with section 74.1107(a) of the rules.

13. KFMB–TV contends that the area within which the Poway CATV system operates consists of several residential developments, that each development is a separate and distinct geographical area, and that the extension of the signal of a station into a subdivision located beyond the station's grade B contour comes within the interdiction of section 74.1107. In support of this contention KFMB–TV

[8] KFMB–TV attempted to bolster its showing by introducing an exhibit which set forth the opinion of its engineer concerning the location of the grade B contours of the Los Angeles stations. However, the engineer's opinion was predicated upon the inadequate measurements and the exhibit was properly excluded.

[9] We recognized the difficulty of establishing the community status of an unincorporated area because of the absence of clearly defined political boundaries in *Seven Locks Broadcasting Co.*, 37 F.C.C. 83 (1964).

offered to establish the location and perimeters of each housing development served by the Poway cable system and the physical characteristics of the land between these subdivisions. The hearing examiner excluded the evidence, and we agree with his ruling. The mere fact that within the periphery of a populated area there are several housing developments or subdivisions with different names does not serve to show that each subdivision is a separate and distinct geographic area within the contemplation of the rules. The existence of substantial tracts of undeveloped land between subdivisions would be a relevant consideration in determining whether one or more than one geographical areas are involved, but that is not the situation we have here. We note that the east-west axis of the Poway CATV system is less than 3 miles long, that the north-south extensions are even shorter, and that within the confines of the cable system there are several densely populated residential developments with no sharp lines of demarcation between population groupings. At best, KFMB–TV would be able to show only patches of undeveloped land between some subdivisions and such evidence would have no decisional significance. Under the circumstances of this case, we conclude that the exclusion of the proffered evidence did not constitute prejudicial error.

14. On the basis of the evidence of record, we find that the Poway CATV system serves one geographical area. On this record, it is not, we think, realistic to draw what would be an artificial distinction and say that there is a discrete Poway area and another unnamed area, contiguous to but separate and wholly distinct from Poway. In view of our finding, it follows that if any portion of the cable system operates within the grade B contour of any station, the signal of that station may be carried to subscribers throughout the system. *Buckeye Cablevision, Inc.*, FCC 66–449, released May 27, 1966. It is in the light of these considerations that we must determine which, if any, of the signals of the stations carried are being extended beyond that station's grade B contour in violation of the rules.

15. The only grade B contours pertinent for consideration in this proceeding are those of the eight Los Angeles television stations enumerated above (par. 8). The grade B contours [10] of Los Angeles stations KNXT (channel 2), KNBC (channel 4), and KTLA (channel 5) encompass all of respondents' Poway CATV system, and carriage of such signals is clearly permissible. With respect to KHJ–TV (channel 9), the predicted grade B contour falls approximately 105 miles from its transmitter site and embraces approximately three-fourths of the CATV system. The predicted grade B contour of station KCOP (channel 13) includes approximately one-half of the Poway cable system, and those of KTTV (channel 11) and KABC–TV (channel 7) include approximately one-fourth of the said system.[11] Since some portion of the CATV system lies within the grade

[10] The grade B contour of each station has been established in accordance with the prediction method prescribed in sec. 73.684 of the rules. Both the Bureau and KFMB–TV submitted evidence of the predicted grade B contours of the Los Angeles stations and their calculations vary to some extent. However, the variations are so slight as to have no decisional significance.

[11] The approximate distance from transmitter site to predicted grade B contour of each station is as follows: KHJ–TV, 106.8 miles; KCOP–TV, 106 miles; KTTV, 105 miles; and KABC–TV, 105 miles.

106–500—66——16

B contour of each of the aforementioned television stations, no violation of section 74.1107 has been established because of carriage of these stations on the CATV system.

16. Only the carriage of KCET, the Los Angeles educational station on channel 28, remains to be considered. The predicted grade B contour of that station, which is approximately 83.5 miles from its transmitter site, falls short of reaching the Poway CATV system by some 20 miles. At no time prior to the commencement of service by the CATV system on February 26, 1966, did respondents apply for or obtain Commission approval for the extension of that station's signal beyond its grade B contour. However, respondents assert that they are entitled to the benefits of the "grandfather" provisions of section 74.1107(d) and that consequently, such approval was unnecessary. The disposition of this contention requires a discussion of the background facts upon which respondents rely.

17. In addition to the Poway CATV system, respondents own and operate CATV systems which serve the unincorporated communities of Santee and Sweetwater in San Diego County, Calif. Service to subscribers within an unincorporated area of San Diego County first commenced during October 1964. Respondents argue that, since its cable facilities were all constructed pursuant to the same franchise, each is but a unit of the same system and, since service to subscribers within an unincorporated area of San Diego County commenced prior to February 16, 1966, they are entitled to the benefits of the "grandfathering" provisions of section 74.1107(d). The contention is clearly untenable and must be rejected. The franchise authorizing CATV operations is only one of the elements to be considered in determining whether units of a single operation, or separate and distinct operations, are involved. Were we to adopt respondents' view of the effect of a broad franchise, it would mean that the commencement of operation in a single small unincorporated town in a large county would entitle the CATV entrepreneur to initiate new service to all the unincorporated communities in the county, even 30 miles distant from the starting community, without regard to the important public interest considerations embodied in section 74.1107. Poway is more than 15 miles from Santee, the distance to Sweetwater is greater, and the intervening area consists of miles of undeveloped land.[12] Unlike the situation discussed as to Poway in paragraphs 13 and 14, here there is no question but that we are dealing with separate and distinct areas. In view of the foregoing, we conclude that the transmission of television signals to the subscribers of the Poway CATV system constituted an extension of service into a new geographical area, and that respondents are not entitled to the benefits of the "grandfathering" provision of section 74.1107(d).[13]

---

[12] While the above facts in themselves are dispositive of this matter, we note that each of the respondents' CATV systems is served by a separate headend and that there is no physical interconnection between the Poway system and the other facilities operated by respondents.

[13] The application of the new rules to the Poway CATV system comes as no surprise to respondents. In a public notice (mimeo. No. 79927), released Feb. 15, 1966, we announced our intention to make the rules concerning the extension of the signals of a television station beyond its grade B contour applicable to all CATV operations commenced after Feb. 15, 1966; and respondents concede that they were aware of the contents of this notice.

18. Finally, respondents assert that the Commission lacks jurisdiction to adopt the rules and that the said rules are unconstitutional and invalid. Our views concerning our jurisdiction and the validity of the rules have been fully set forth in the second report and order, and we shall rely upon the discussion therein contained.[14]

19. On the basis of all of the foregoing findings of fact, we conclude that the respondents are the owners and operators of a community antenna television system as defined by section 74.1101(a) of the rules; that the Poway CATV system is an operation which is separate and distinct from other cable systems operated by respondents in San Diego County, Calif.; and that the distribution of television signals to the subscribers of the Poway CATV system which commenced on February 26, 1966, constitutes a violation of section 74.1107 of the rules and section 312(b) of the Communications Act of 1934, as amended, in that the signals of station KCET, channel 28, Los Angeles, Calif., are being unlawfully extended beyond the grade B contour of that station.

20. A proceeding of this nature necessarily focuses on a narrow issue—whether respondents, located as they are within the grade A contour of a station in the top 100 television markets, are violating section 74.1107 by extending signals beyond their grade B contours. We recognize that as a result of this narrow focus, the only signal which respondents are being required to remove from their cable system in order to come into compliance with the rules is an educational UHF station. But there are several points to be made in this respect. First, we have already set forth the reasons why we believe it of the utmost importance that there be compliance with the policy and orderly procedure specified in section 74.1107. See second report and order, 2 F.C.C. 2d at 781–784, paragraphs 139–146; memorandum opinion and order in dockets Nos. 14895, 15233, and 15971, FCC 66–456. Here respondents have ignored that procedure and have not sought to obtain the necessary Commission approval. In the circumstances, a cease and desist order is called for.[15] Second, whether the public interest would, in fact, be served by respondents' carriage of the distant educational UHF signal should be determined only upon an appropriate request for waiver, filed by respondents before—not after—they carry this distant signal. It may be, of course, that the public interest would be served by such carriage. However, there are possible countervailing considerations which must be taken into account. Thus, the waiver request must be served upon the local and area ETV interests and school authorities, and they can, if they desire, set forth their views whether the importation of the distant ETV signal would prejudice or have an adverse effect upon the establishment or maintenance of a local ETV service. Second report and

[14] 2 F.C.C. 2d at 729–734 (pars. 10 through 19) and appendix C attached thereto, 2 F.C.C. 2d at 793.

[15] Sec. 502 of the Communications Act provides as follows: "Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this act, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs."

order, 2 F.C.C. 2d at 763, paragraph 95. Further, we have pointed out that in circumstances such as this (i.e., a number of VHF stations which place a grade B signal wholly or partially over the community where the CATV operates, whereas one or two UHF signals, located in the same community as the VHF station, do not yet have such extensive coverage), the public interest may require some appropriate relief as to the carriage of the VHF signals rather than waiver of the rule to permit carriage of the UHF signal without hearing. See footnote 12 appended to paragraph 29, memorandum opinion and order, FCC 66–456; second report, footnote 69, appended to paragraph 151, 2 F.C.C. 2d at 786. Here there has been filed, under section 74.1107, such a so-called "footnote 69" petition, urging that the public interest requires temporary and permanent relief halting the extension of Los Angeles signals into the San Diego area. See petition of Midwest Television, Inc. (KFMB–TV), filed on March 17, 1966. This petition will be considered in a separate proceeding, but, clearly, the question of whether an additional Los Angeles signal should be brought into the San Diego area cannot be answered until there has been a determination of the pending and related questions raised by the aforesaid "footnote 69" petition. We stress that we have reached no conclusion on that question here. We hold only that the question whether the public interest would be served by permitting respondents to carry the distant educational UHF signal must be considered in a separate proceeding upon a proper request for waiver, and that such request, for the reasons stated in our recent *Buckeye Cablevision* decision,[16] FCC 66–455, released May 27, 1966, must also make clear, as a prerequisite to consideration by the Commission, that the respondents are presently complying with the rule to which they are seeking a waiver.

21. We will provide the same timetable for compliance which was used in *Buckeye Cablevision*, FCC 66–449, released May 27, 1966. The respondents must comply with this cease and desist order within 2 days[17] after release, unless they notify the Commission during that 2-day period that they intend to seek judicial review of our order; in that event, respondents are afforded an additional 14-day period in which to file their appeal and seek a stay of this order.

22. *Accordingly, it is ordered*, This 21st day of June 1966, that within 2 days after the release of this decision Mission Cable TV, Inc., and Trans-Video Corp. *Cease and desist* from the operation of their community antenna television system at Poway, Calif., in such a way as to extend the signals of any television broadcast station beyond its

[16] We there stated (par. 8): "* * * In the first place, we would not grant a waiver of sec. 74.1107 while a system was operating in violation of that section. Ordinarily, we would not even consider the merits of a request for waiver until the violation had ceased. To condone such a procedure would undercut the very premise of sec. 74.1107, that the public interest requires Commission consideration of new distant signal operations in major markets before they are commenced, and would encourage other persons to violate the rule while seeking relief before the Commission. Moreover, it would be manifestly unfair to persons who have sought a waiver or evidentiary hearing while deferring distant signal operations in compliance with the rule. Further, there would be an unfair delay in processing such petitions for waiver by those in compliance with the rule. Accordingly, we shall follow a course of promptly considering petitions for waiver by persons who are deferring distant signal operations in compliance with the rule and of not considering requests for waiver by persons operating in violation of sec. 74.1107 until the violation has ceased. Upon such cessation, the request for waiver will be placed on the processing line * * *."

[17] The term "2 days" as used herein excludes Saturdays, Sundays, and holidays, if any.

grade B contour in violation of section 74.1107 of the Commission's rules, and specifically to cease and desist from supplying to its subscribers the signal of station KCET, Los Angeles, Calif.; provided, however, that if respondents notify the Commission during the said 2-day period that they intend to seek judicial review of this order, respondents are afforded an additional 14-day period in which to file an appeal and to seek a stay of the order.

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

CONCURRING STATEMENT OF COMMISSIONER KENNETH A. COX

I concur. However, I think it should be understood that if this cable system were to extend service into new areas not within the community of Poway as it has been described in this record and beyond the grade B contours of some or all of the Los Angeles television stations, we would then have a new question of compliance with section 74.1107. In addition, I am concerned about the invasion of the San Diego market which the rule permits here because of the location of the Los Angeles transmitters at a high elevation on Mount Wilson. It seems to me that the number of stations in Los Angeles and the unusual range of their signals pose serious problems for the maintenance and expansion of local service in San Diego. I am hopeful, therefore, that prompt disposition can be made of the petition of Midwest Television, Inc., filed March 17, 1966.

FCC 66-530

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of CEASE AND DESIST ORDER TO BE DIRECTED AGAINST JACKSON TV CABLE CO., OWNER AND OPERATOR OF A COMMUNITY ANTENNA TELEVISION SYSTEM AT JACKSON, MICH.	Docket No. 16711

ORDER TO SHOW CAUSE

(Adopted June 15, 1966)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING AND ISSUING A STATEMENT IN WHICH COMMISSIONER LOEVINGER JOINS; COMMISSIONER COX ABSENT.

1. The Commission has under consideration the issuance of an order directed against Jackson TV Cable Co. (hereafter Jackson TV), owner and operator of a community antenna television system at Jackson, Mich., to cease and desist from operations in violation of section 74.1107 of the Commission's rules and regulations promulgated under the Communications Act of 1934, as amended. By a letter sent May 5, 1966, the Commission requested information from Jackson TV concerning its operation, and inquired whether Jackson TV would voluntarily cease any violations of the Commission's rules and regulations.

2. From the information before the Commission, the relevant facts appear to be as follows: Jackson TV began carrying the signals of four television broadcast stations beyond their grade B contours after February 15, 1966. On March 13, 1966, service began to subscribers. The following "distant signals" as defined in rule section 74.1101(i) are being provided:

WKBD, channel 50	Detroit, Mich.
WJRT, channel 12	Flint, Mich.
WTOL-TV, channel 11	Toledo, Ohio
WSPD-TV, channel 13	Toledo, Ohio

Although Jackson TV admits that stations WKBD and WJRT are "distant signals," Commission review has revealed that Jackson is also beyond the grade B contours of all the listed stations. Jackson TV is also supplying to its subscribers the signals of television broadcast stations WJBK-TV, channel 2, WWJ-TV, channel 4, and WXYZ-TV, channel 7, in Detroit; station WKZO-TV, channel 3, Kalamazoo; station WJIM-TV, channel 6, Lansing; stations WILX-TV and WMSB, channel 10, Onondaga; station CKLW-TV, channel 9, Windsor, Canada; and station WOOD-TV, channel 8, Grand Rapids. Lansing is ranked by the American Research Bureau as the 47th television

market based on net weekly circulation figures for 1965. Jackson is within the predicted grade A contour of two Lansing stations, WJIM–TV, channel 6, and WILX–TV, channel 10.

3. On March 4, 1966, the Commission adopted rules for the regulation of all CATV systems. The rules are set forth in the Commission's second report and order in dockets Nos. 14895, 15233, and 15971 (FCC 66–220), 2 FCC 2d 725 which was published in the Federal Register on March 17, 1966 (31 F.R. 4540). Section 74.1107 of the rules sets forth certain requirements and procedures for CATV systems operating in the 100 highest ranked television markets as determined by the American Research Bureau net weekly circulation figures for the most recent year, and provides, in substance, insofar as pertinent here, that effective upon publication in the Federal Register (March 17, 1966) no CATV system commencing operation after February 15, 1966, and located within the predicted grade A contour of a television station in one of the 100 largest television markets, shall provide service to subscribers which would extend the signal of any television station beyond its grade B contour, except upon a showing, made in evidentiary hearing and approved by the Commission, that such extension of the signal would be consistent with the public interest. The request for an evidentiary hearing is to be made by the CATV system and shall contain the information specified in the rule.[1]

4. Jackson TV has not sought an evidentiary hearing pursuant to section 14.1107 but is violating the provisions of that section. It denies that the CATV rules which became effective on March 17, 1966, prohibit carriage of distant signals on its system without prior Commission approval, contending that the effective date of the rule is March 17, not February 15, 1966; that the rule is illegally adopted, and that the Commission does not have statutory authority to regulate off-the-air CATV systems.

5. In the second report and order we indicated that we would take section 74.1107 but is violating the provisions of that section. It the rules. We acknowledge "the very great desirability" of avoiding the disruption of CATV service to the public which would result from action applicable to an operating CATV system. Clearly, time is of the essence here. This part of the rules was made effective upon publication so that the Commission could proceed forthwith against any system contravening the rules. The public interest requires that insofar as possible the situation in Jackson be held in status quo. The Commission finds that due and timely execution of its functions in this matter imperatively and unavoidably require that the examiner certify the record, upon its closing, immediately to the Commission for final decision. Expedition also requires that the parties file their

[1] On Feb. 15, 1966, the Commission had issued a public notice (No. 79927) announcing its intention to regulate CATV systems. The Commission announced that it was asserting jurisdiction over all CATV systems, whether or not served by microwave relay, and that persons obtaining State or local franchises to operate CATV systems in the 100 highest ranked television markets, where the system would extend the signals of television broadcast stations beyond their grade B contours, would be required to obtain Commission approval before such CATV service to subscribers could be commenced. It was announced at that time that an evidentiary hearing would be held as to all such requests for Commission approval, subject to the general waiver provisions of the Commission's rules. Notice was given that this aspect of the Commission's regulatory program would be applicable to all CATV operations commenced after Feb. 15, 1966.

proposed findings of fact and conclusions of law within 7 calendar days after the date the record is closed. We note in connection with the imposition of this time schedule that there is only one issue to be resolved, i.e., compliance with the rule.

6. *It is ordered*, This 15th day of June 1966, that pursuant to sections 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), Jackson TV Cable Co. *Is directed to show cause* why it should not be ordered to cease and desist from further operation of a CATV system in Jackson, Mich., which extends the signals of television stations beyond their grade B contours in violation of section 74.1107 of the Commission's rules and regulations.

7. *It is further ordered*, That Jackson TV Cable Co. is directed to appear and to give evidence with respect to the matters cited above at a hearing[2] to be held at Washington, D.C., at a time and before an examiner to be specified by subsequent order, unless the hearing is waived, in which event a written statement may be submitted.

8. *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 7 days after the date the record is closed.

9. *It is further ordered*, That the Secretary of the Commission shall send copies of the order by certified mail—return receipt requested to Jackson TV Cable Co.

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

---

[2] Sec. 1.91(c) of the Commission's rules provides that a respondent in order to avail itself of the opportunity to be heard shall, in person or by its attorney, file with the Commission within 30 days of the receipt of the order to show cause, a written statement stating that it will appear at the hearing and present evidence on the matter specified in the order. If the respondent fails to file an appearance within the time specified, the right to a hearing shall be deemed to have been waived. Where a hearing is waived, a written statement in mitigation or justification may be submitted within 30 days of the receipt of the order to show cause. In the event the right to a hearing is waived, the Review Board shall terminate the hearing proceeding and certify the case to the Commission. Thereupon the matter will be determined by the Commission.

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY IN WHICH COMMISSIONER LEE LOEVINGER JOINS

I dissent. In the absence of congressional action, I agree with the respondent's contention that the Commission does not have jurisdiction over CATV systems and that, consequently, the rules adopted in the second report and order are invalid. Even assuming arguendo that the Commission does have jurisdiction, I believe that section 74.1107 of the rules is invalid because it contravenes section 4(c) of the Administrative Procedure Act, which provides that a substantive rule not be made effective in less than 30 days after required publication "except as otherwise provided by the agency upon good cause found and published with the rule."

Section 74.1107 was made effective immediately upon the required publication. A recitation of "good cause found" was made on the basis of injury to the public from continued implementation of service extending grade B signals.

In my opinion, injury to the public was not supported with any factual indication or showing and was purely unfounded speculation. There appeared to be more indication of benefit, rather than injury, to the public from the extended service in question. Consequently, the recitation of "good cause found" was, I believe, a nullity under section 4(c) of the Administrative Procedure Act, and the immediate effective date of the rule rendered it invalid.

The February 15 cutoff date of section 74.1107(d) appears in practical operation to be a retrospectively applied effective date of the rule itself and, accordingly, a further ground for invalidity of the rule.

Moreover, I believe that section 74.1107 is not valid because adequate notice was not given on the substantive provisions imposed on implementation of service in the top 100 markets. Also, the mandatory hearing requirement seems extremely arbitrary and excessively burdensome on a CATV applicant. A serious question exists as to what kind of possible showing a CATV applicant could make to prevail against the fears expressed by the majority in the second report and order.

A basic fallacy of the CATV rules is the rationale which the Commission used to justify its assertion of jurisdiction in order to effectuate their promulgation. The rationale is on a basis so broad as to appear to encompass any kind of interstate communication and thus go beyond delegable powers of Congress. Congress can, of course, delegate certain of its powers to the Commission, but inherent in such delegation is specification of adequate guidelines. The CATV rulemaking without congressional delegation of power but under jurisdiction asserted by the Commission was, I believe, so lacking in requisite guidelines as to make it unconstitutional.

FCC 66–574

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 25 OF THE COMMISSION'S RULES AND REGULATIONS WITH RESPECT TO THE PROCUREMENT OF APPARATUS, EQUIPMENT, AND SERVICES REQUIRED FOR THE ESTABLISHMENT AND OPERATION OF THE COMMUNICATIONS SATELLITE SYSTEM AND SATELLITE TERMINAL STATIONS	Docket No. 16550

REPORT AND ORDER

(Adopted June 29, 1966)

BY THE COMMISSION:

1. On March 24, 1966, the Commission adopted a notice of proposed rulemaking, requesting comments from interested parties, which would amend subpart B of part 25 of the Commission's rules and regulations by amending section 25.156(e) by adding the following language:

> *Provided further, however*, That the term "party making procurement" shall not include any person or firm engaged in the procurement of property or services required for the establishment or operation of the space segment of a communications satellite system (as said space segment is defined in the Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System opened for signature on 20 August 1964, at Washington) if such person is a resident of, or such firm is organized under the laws of, a foreign jurisdiction and has his or its principal place of business outside the United States.

2. The Commission's notice of proposed rulemaking was issued in response to a petition filed by the Communications Satellite Corp. (Comsat) which requested the proposed amendment. Comsat's position was that as currently written the rules literally "* * * have the effect of imposing United States regulatory requirements upon public and private entities wholly outside the jurisdiction of the United States."

3. Comsat filed a comment requesting adoption for reasons put forth in its petition.

4. The only other comment received was from the Department of State, which urged the adoption of the amendment.

5. Based upon the comments received and an evaluation of all relevant information, the Commission finds the adoption of the proposed amendment would serve the public interest, convenience, and necessity.

6. *It appearing*, That authorization for the adoption and amendment

of the rules is contained in section 201(c)(1) and 201(c)(11) of the Communications Satellite Act of 1962, and section 4(i) of the Communications Act of 1934, as amended.

7. *It is, therefore, ordered*, This 29th day of June 1966, that:

(*a*) Section 25.156(e) of subpart B, part 25, of the Commission's rules and regulations be amended effective August 8, 1966.

(*b*) The proceedings in docket 16550 *Be terminated.*

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

FCC 66–553

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE & TELEGRAPH CO. AND THE ASSOCIATED BELL SYSTEM COMPANIES Charges for Interstate and Foreign Communication Service	Docket No. 16258

MEMORANDUM OPINION AND ORDER

(Adopted June 22, 1966)

BY THE COMMISSION: COMMISSIONERS BARTLEY AND LOEVINGER DISSENTING AND ISSUING STATEMENTS.

1. The GT&E Service Corp. filed a petition on May 4, 1966, requesting reconsideration of the Commission's memorandum opinion and order released April 11, 1966 (3 FCC 2d 307), in which the Commission denied petitions filed by the National Association of Railroad and Utilities Commissioners (NARUC), the Bell System Respondents (Bell), regulatory commissions from 21 States, and GT&E Service Corp., insofar as such petitions requested modification of the previously promulgated hearing procedures [1] so that the jurisdictional cost separations issue would be considered in phase 1 of this proceeding. On May 16, 1966, the Western Union Telegraph Co. filed an answer opposing the petition for reconsideration.

2. Petitioner in the first portion of its pleading essentially reiterates the basic arguments used in NARUC's petition of January 18, 1966, as generally summarized in paragraph 4 of the memorandum opinion and order here questioned, and repeats its own previously expressed concern that "substantial prejudice and irreparable damage will accrue to the telephone companies participating in interstate service offerings if rate reductions are ordered prior to the consideration and determination of the appropriate separations procedures." (P. 4 of petition.)

3. We have carefully reviewed and reconsidered our memorandum opinion and order of April 11, 1966, herein, in the light of the instant petition. In our opinion, the arguments offered by petitioner do not warrant or require any change in our decision that it is neither unfair, improper, nor unlawful for the Commission to consider and determine the issues which are subject to phase 1 of this proceeding by the use of separation procedures now being uniformly applied in both State and Federal jurisdictions. The renewed emphasis by petitioner that any interim rate adjustments that may be ordered in phase 1 may be invalidated by determinations made in phase 2 of the proceeding re-

[1] Memorandum opinion and order of Dec. 22, 1965, FCC 65–1143, 30 F.R. 16222.

quiring changes in current separations procedures is not a new argument requiring reconsideration of our prior holding.

4. Petitioner also urges, as an additional ground for reconsideration, that the ordering of interim adjustments in rates which are charged by petitioner's operating telephone companies to their customers on the basis of existing separations procedures, prior to consideration of petitioner's unresolved objections to the most recent revision of the Separations Manual (the so-called Denver plan), "certainly raises fundamental questions of fairness and propriety." (P. 4 of the petition.) In this connection, the following statement contained in paragraph 2 of our order instituting these proceedings (2 FCC 2d 871, on p. 872), adopted October 27, 1965, gives assurance to petitioner that it will have an opportunity to be heard with respect to its objections to such separations procedures:

> **There is now pending consideration by the Commission of another major revision in the Separations Manual which has been approved by the NARUC for use "on an interim basis," pending conclusion of the proceedings provided for herein and subject to such changes as may be required as a result of such proceedings. Thus, in connection with our determination of revenue requirements of the Bell System applicable to its interstate services, the rates for which are at issue herein, we will consider the propriety of the principles and procedures of the Separations Manual including the most recent revision. This will afford all interested parties an opportunity to present evidence, views, and recommendations concerning these principles and procedures, including the independent segment of the telephone industry which has, in written representations to this Commission, raised certain questions concerning the merits of the recent revision.**

5. Petitioner also questions the relevancy of our reference to *Class Rate Investigation*, 262 ICC 447, upheld in *New York* v. *United States*, 331 U.S. 284 (1947), because that case did not involve the exact issue here, i.e., "the right of the Commission to fix rates without making the appropriate separations required by *Smith* v. *Illinois Bell Telephone Company*, 282 U.S. 133" (p. 5 of petition). We cited that case as authority for our making interim adjustments, where they may be warranted, in view of the challenge made by petitioners of our right to do so. Further, interim rate action ordered by a regulatory agency prior to its resolving rate structure issues was upheld in *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962). Compare also *FPC* v. *Natural Gas Pipeline Co.* (1942), 315 U.S. 575, where the Supreme Court pointed out that "establishment of a rate for a regulated industry often involves two steps of different character, one of which may appropriately precede the other" (p. 584).

6. Petitioner further questions the procedure directed by paragraph 19 of our subject memorandum opinion and order, specifically, as to whether the conferences contemplated "will have some effect in phase 1 of this proceeding." Our order of April 11, 1966, denied petitioners' request in this regard, and we are satisfied that the following statement from the order clearly defines the purpose of the conferences:

> **By means of such conferences, it may well be possible to narrow the issues to be decided, to eliminate or reduce evidentiary presentations on issues as to which there is no serious dispute, and to reduce the number of witnesses required. Furthermore, it is to be hoped that the length of**

time required for presentations and our consideration of the issue of separations may be substantially reduced. (P. 7, memorandum opinion and order.)

The memorandum opinion and order of the Telephone Committee, April 12, 1966 (FCC 66M–571), has provided for a prehearing conference on the matter. The matter is not, however, part of phase 1.

7. Our memorandum opinion and order of April 11, 1966, indicates the Commission will consider any recommendations from the Telephone Committee pursuant to which the separations question "may be advanced in the chronology of this proceeding." Whether this advancement will be sufficient to allow consideration of this question along with phase 1 issues can only be determined when any such recommendations are forthcoming. To allow this consideration as part of phase 1 would require modification of existing orders which we decline to do at this time.

8. *Accordingly*, in view of the above, *It is ordered*, That the petition for reconsideration of May 4, 1966, by the GT&E Service Corp. *Is hereby denied.*

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

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I vote to grant reconsideration and determine interstate and intrastate separation as the threshold issue in this proceeding, for the reasons given in my dissent to the Commission's order of April 11, 1966, denying the referenced petitions.

It is my judgment that this proceeding could be concluded at an overall earlier date if the matter of intrastate and interstate allocations were made a part of phase 1.

I believe that in order for us to make any meaningful examination of A.T. & T. interstate rates we must first determine what makes up the interstate operation, i.e., what is allocated to interstate and what is allocated to intrastate.

DISSENTING OPINION OF COMMISSIONER LEE LOEVINGER

(In re A.T. & T. charges, docket No. 16258, ruling on separations issue)

I dissent from the memorandum opinion and order of the Commission denying the petition of GT&E Service Corp. to consider the issue of cost "separations" (or allocations between interstate and intrastate service) concurrently with consideration of rate levels, on both substantive and procedural grounds.

I concur with the opinion of Commissioner Bartley that cost allocations are such an integral part of rate determination that it is impossible to make any meaningful examination or determination of rates without also considering cost allocations.

Further, even at the risk of reiteration, I wish to record my continuing objection to the procedure being followed in this matter. The petition involved here was "reviewed and reconsidered" in routine administrative fashion by the staff of the Common Carrier Bureau, which then prepared and presented to the Commission the memoran-

dum opinion and order that has now been adopted. The Common Carrier Bureau is participating in the hearings and other formal aspects of the instant proceeding in the same fashion as any other party. Further, the Common Carrier Bureau on February 23, 1966, wrote a letter to A.T. & T. stating its view as to the facts concerning costs and as to a desirable level of rates for oversea services which are in issue herein. It seems to me quite improper thus to mingle the functions of investigator, prosecutor, advocate, ex parte confidential adviser, and adjudicator. Each time that the Common Carrier Bureau leaves the hearing room as a party and enters the conference room to act as a judge in the same matter that it has been litigating it further offends the standards of propriety which I believe, and which the Administrative Conference of the United States has declared, should govern proceedings such as this.

FCC 66-554

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
COMMISSION ORDER, DATED APRIL 6, 1966, REQUIRING COMMON CARRIERS TO FILE TARIFFS WITH COMMISSION FOR LOCAL DISTRIBUTION CHANNELS FURNISHED FOR USE IN CATV SYSTEMS

MEMORANDUM OPINION AND ORDER

(Adopted June 22, 1966)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING AND ISSUING A STATEMENT; COMMISSIONER LOEVINGER NOT PARTICIPATING.

1. On April 6, 1966, the Commission sent letters to the American Telephone & Telegraph Co. (A.T. & T.) and the GT&E Service Corp. (General) directing the operating telephone companies of the Bell System and the General Telephone System to file with this Commission their tariffs for local distribution facilities furnished for use in Community Antenna Television (CATV) systems.

2. In its April 6, 1966, letter, the Commission stated that it had carefully considered the question of jurisdiction in regard to this matter and had concluded that such local distribution facilities are services "incidental to radio communication" within the meaning of section 202(b) of the Communications Act of 1934, as amended, and that tariffs for such services are required to be filed with this Commission under the terms of section 203(a) of the act.

3. The Commission now has before it (*a*) a petition for reconsideration filed by A.T. & T. on May 4, 1966, under section 405 of the act asking the Commission to vacate its April 6, 1966, action, (*b*) a petition for reconsideration filed by General on May 6, 1966, concurring in A.T. & T.'s petition, (*c*) comments in opposition to A.T. & T.'s petition filed May 16, 1966, by the National Community Television Association, Inc. (NCTA), and (*d*) A.T. & T.'s reply to NCTA's comments filed May 26, 1966. Concurrently with the filing of its petition, A.T. & T., under protest, filed with the Commission the tariffs in question.

4. In support of its petition, A.T. & T. alleges that the service in question is a common carrier communications channel service provided within communities in which telephone exchange service is furnished; that television signals selected and furnished by the CATV operator are locally distributed by the telephone company from the CATV operator's antenna site and control house to terminals at the home viewer's premises—all within 1 community located within 1 State; that the service was first offered in 1959 and since then 37 State com-

missions have accepted filed tariffs and assumed jurisdiction over such service and the charges therefor; that the service is presently being provided to CATV operators in 18 communities; that customer orders have been accepted in 56 other communities; that service is under construction in 26 of these 56 other communities; that all of such service is or will be furnished over local facilities wholly inside the State in which the local exchange service community is located; and that no facilities have been constructed or arranged so as to be capable of distributing communications between States.

5. A.T. & T. further alleges that the Bell System companies do not perform any of the functions of selecting, deleting, or producing the CATV program material; that the CATV operator determines what intelligence will be distributed and arranges for any required consents, permissions, or copyright licenses and the telephone company merely distributes the intelligence furnished by the CATV operator to places which the operator designates; that the CATV operator's pickup of programs from the ether does not withdraw such signals from the ether or interfere with similar pickup and reception by any other person; that the operator introduces a number of intervening processes which substantially change the signal before it is furnished to the telephone company for distribution, including such processes as the amplification, modulation, demodulation, filtering, and other conditioning of the signal and, in some instances, changing the frequency of the signal from one channel to another in order to avoid interference or to convert UHF channels to VHF channels. Further, A.T. & T. alleges that the intelligence furnished to the telephone company includes a considerable amount of locally originated closed circuit programing that is not derived even indirectly from the ether, such as time, weather, and news scanners, and occasional events of local public interest.

6. A.T. & T. contends that, as a matter of law, the services in question do not constitute interstate communication service within the Commission's tariff jurisdiction under title II of the act; that such services impose no burden on interstate communications service subject to such jurisdiction; and that the nature of the intelligence furnished by a CATV operator for local distribution over common carrier facilities situated wholly within a single State cannot transmute an intrastate communication service into an interstate communication service within the tariff jurisdiction of the Commission under title II of the act.

7. A.T. & T. further contends as a matter of policy that the action of the Commission is unsound in that it is inconsistent with the Commission's determination that charges for CATV program service are a matter of local concern to be regulated by State and local governmental authorities. The alleged inconsistency is that the charges for the service in question are also matters of local concern which State commissions are fully competent to regulate and over which they presently exercise jurisdiction. Furthermore, A.T. & T. states, there are numerous independent telephone companies, many of which are intrastate carriers not heretofore under the jurisdiction of the Commission under title II of the act, which offer the service in question and such carriers will now come within the Commission's jurisdiction as

to such service under the theory of the Commission's action herein and this will impose additional administrative burdens on both this Commission and such carriers.

8. In developing its legal arguments A.T. & T. first contends that the Supreme Court has twice rejected the reasoning upon which the Commission's action herein is based, citing for this proposition two Court decisions: *Pennsylvania R.R.* v. *Public Utilities Commission of Ohio*, 298 U.S. 170 (1936), and *Pennsylvania R.R.* v. *United States*, 242 F. Supp. 890 (E.D. Pa. 1965), affirmed by the U.S. Supreme Court on January 17, 1966, 382 U.S. 368 and 382 U.S. 372. These cases held that under the express terms of the Interstate Commerce Act the Interstate Commerce Commission, in its economic regulation of the charges of railroads and motor carriers, could not tack private interstate carriage onto intrastate common carriage and thereby gain jurisdiction to regulate the latter. A.T. & T. analogizes that radio broadcasting is interstate private carriage and A.T. & T.'s service in question here is intrastate common carriage and, under the aforementioned cases, the two cannot be unified so as to permit the Commission to regulate the tariffs for such common carriage.

9. We shall treat this argument first. In our letters of April 6, 1966, we specifically referred to section 202(b) of the act as the statutory basis for our action. However, A.T. & T.'s petition fails to allude to or discuss this particular section of the act which reads as follows:

> (b) Charges or services, whenever referred to in this act, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

10. The two decisions cited above by A.T. & T. are clearly inapposite, in that, among other reasons, they are based upon statutory provisions having no similarity to or analogy with the above-quoted section 202(b) of the act. Thus, it seems clear that the U.S. Supreme Court has not at any time rejected the reasoning which underlies our action herein. Our reasoning has been set forth fully in our *Second Report and Order in the Matter of CATV: Amendment of Parts 21, 74, and 91 of Commission's Rules: Dockets Nos. 14895, 15233, and 15971:* 2 F.C.C. 2d 725 (March 4, 1966), at pages 793–794. Moreover, the United States Court of Appeals for the District of Columbia has held that a licensed common carrier microwave service located wholly within the State of Idaho, and delivering signals from four Utah TV stations to a CATV system in Idaho, was used as a link in the flow of uninterrupted signals from Utah to Idaho and thus performs an interstate communication service when it takes part in the transmission of signals from Utah to Idaho. *Idaho Microwave, Inc.* v. *Federal Communications Commission*, 352 F. 2d 729 (October 18, 1965). We consider this case dispositive of the question of the interstate nature of the services before us.

11. A.T. & T. claims that the CATV operator performs certain conditioning and intervening procedures before the TV signals are further transmitted over the service in question. However, no claim is made that there is any significant interruption in the continuous flow of the signals from the TV station to the home viewer or that the

program material transmitted by the TV station is materially different from the program material ultimately received by the home viewer from such station. A.T. & T. also claims that, in addition to the transmission of the aforementioned TV signals by the service in question, there are signals locally originated by the CATV operator that are also transmitted over the same facility. This means only that, as with most of the Bell System's communications facilities, the same facilities may be used jointly for both interstate and intrastate communication service. This fact has no bearing upon the interstate nature of the service in question except perhaps to emphasize the distinction between the two types of service and to strengthen the Commission's conclusion that the further transmission of the TV signals is interstate service.

12. A.T. & T. next argues that Congress, in drafting the Communications Act, rejected the *Shreveport* doctrine [1] that the Commission should have "reserve" economic jurisdiction over intrastate rates found to have an adverse effect upon interstate commerce. Here again, A.T. & T. ignores the express terms of section 202(b) in making this argument. Moreover, the argument begs the question before us by assuming that we are here dealing with intrastate rates. As we have heretofore stated, we think it clear that we are dealing with the regulation of tariffs for interstate communication service.

13. A.T. & T.'s policy argument is that the Commission has heretofore determined that it does not have tariff regulatory jurisdiction over CATV operators as such and that furthermore it would not be desirable for Congress to confer such jurisdiction upon it; that A.T. & T. believes that this is a sound policy position for the Commission to take since the States are better able to regulate such services; that the same policy reasons underlying these determinations should apply with equal force to the common carrier service used by CATV operators to furnish their program service; and that dividing economic regulatory responsibility between the State and Federal Governments will not be conducive to the quick, efficient, and effective handling of CATV service problem.

14. It is true, as argued by A.T. & T., that the Commission has disclaimed tariff regulatory jurisdiction over CATV operators. However, such disclaimer followed from our finding that CATV operators are not engaged as communication common carriers within the contemplation of the Communications Act and that therefore such operators are beyond the reach of section 202(b) of the act. We are unable to make any such disclaimer in the case of telephone companies which furnish channels of communication to CATV operators, for the provision of such service is clearly a common carrier undertaking. Thus, the short answer to A.T. & T.'s policy arguments is that Congress has supplied the controlling policy guidance in section 202(b) of the act, recognizing, as it does, that there is a need for regulatory consideration by the central Federal agency of this type of activity by a common carrier, linked as it is with broadcasting.

15. NCTA, in its comments, maintains that CATV systems are in interstate commerce; that so long as the Commission adheres to its

[1] See *Houston, E. & W.T. Ry. Co.* v. *United States*, 234 U.S. 342, 58 L. ed. 1341, 34 Sup. Ct. Rep. 833.

determination that CATV systems are in interstate commerce it must follow that any common carrier offering of service to CATV operators is in interstate commerce; and that the Commission should reassert its findings that CATV systems are engaged in interstate commerce and that any tariff to furnish CATV service to a CATV system as a common carrier offering should accordingly be filed with the Commission. In addition, NCTA suggests certain action that it believes the Commission should take with respect to the lawfulness of the tariffs now on file with us. We have not considered such suggestions since they are not germane to the petition before us which involves solely the question of whether the tariffs in dispute should be filed with us as we have directed in our orders of April 6, 1966. We conclude that such tariffs are required to be filed with us for the reasons heretofore stated.

Accordingly, it is ordered, That the petitions of A.T. & T. and General for reconsideration of the orders contained in the Commission's letters of April 6, 1966, *Are hereby denied.*

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

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissent. I do not agree with the majority statement that *Idaho Microwave, Inc.* v. *Federal Communications Commission*, 352 F. 2d 729, is "dispositive of the question of the interstate nature of the services before us." That case involved a microwave service and transmission of signals from Utah to Idaho, as distinguished from local telephone exchange service for distribution of reception wholly within a single State, as here.

In my opinion, service for the local channels here involved should be pursuant to intrastate tariffs.

FCC 66-564

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
NEBRASKA RURAL RADIO ASSOCIATION (KRVN), LEXINGTON, NEBR.	Docket No. 15812 File No. BP-15348
TOWN & FARM CO., INC. (KMMJ), GRAND ISLAND, NEBR.	Docket No. 15813 File No. BP-15354
EMERALD BROADCASTING CORP. (KPIR), EUGENE, OREG.	Docket No. 15998 File No. BP-15590
HI-DESERT BROADCASTING CORP. (KDHI), TWENTY-NINE PALMS, CALIF.	Docket No. 16000 File No. BP-16503
CIRCLE L, INC., RENO, NEV.	Docket No. 16110 File No. BP-15413
SOUTHWESTERN BROADCASTING CO. (KORK), LAS VEGAS, NEV.	Docket No. 16111 File No. BP-15441
THE BENAY CORP. (KTEE), IDAHO FALLS, IDAHO	Docket No. 16112 File No. BP-16216
780, INC., LAS VEGAS, NEV.	Docket No. 16113 File No. BP-16273
MEYER (MIKE) GOLD (KLUC), LAS VEGAS, NEV.	Docket No. 16114 File No. BP-16401
ALBERT JOHN WILLIAMS AND JACK M. REEDER, D.B.A. RADIO NEVADA, LAS VEGAS, NEV.	Docket No. 16115 File No. BP-16524
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted June 29, 1966)

BY THE COMMISSION: COMMISSIONER LEE ABSTAINING FROM VOTING.

1. The Commission has before it for consideration that portion of a petition for modification of notice of proposed rulemaking and for interim suspension of consideration of pending applications for class II-A standard broadcast facilities, filed by Columbia Broadcasting System (CBS) on October 29, 1965, which requests: (1) That the hearings and related administrative activities in connection with pending applications for class II-A stations be suspended pending the conclusion of the rulemaking proceeding in docket No. 16222, and (2) that, in the alternative, any construction permits for class II-A stations be conditioned on showings that the proposed directional antennas will afford protection to the cochannel class I-A stations, determined in accordance with section 73.150 of the rules, as this rule may be amended in docket No. 16222.[1]

[1] There are also before the Commission the following timely filed pleadings: Statement in support of interim suspension of hearings filed by WGN, Inc. (now WGN Continental Broadcasting Co. (WGN)), and oppositions to the CBS petition filed by 780, Inc., Circle L, Inc., Emerald Broadcasting Corp., Nebraska Rural Radio Association (KRVN), KWHE Broadcasting Co., Inc., Town & Farm Co., Inc. (KMMJ), and the Broadcast Bureau.

2. The Commission, on June 14, 1966, by memorandum opinion and order (FCC 66–520), denied that portion of the CBS petition which requested that our notice of proposed rulemaking in docket No. 16222, on a proposal looking toward revision of section 73.150 of the standard (AM) broadcast rules to require the calculation of proposed radiation patterns for directional antenna systems by a standardized method, be modified to provide that amendments to the rule adopted in that proceeding shall apply to all pending applications for class II–A standard broadcast applications.

3. The notice of proposed rulemaking in docket No. 16222 explicitly states that, "If adopted, the amended rule would apply to all applications tendered for filing on or after the effective date of the amended rule." In our memorandum opinion and order denying the CBS petition insofar as it relates to docket No. 16222, supra, we set forth the reasons why "limitation of the applicability of our proposal, as proposed in the notice of rulemaking, is appropriate and clearly warranted in the public interest." The same reasons also require the denial of the CBS petition insofar as it requests suspension of consideration of applications for class II–A facilities and the conditioning of construction permits on compliance with any new rules adopted in docket No. 16222.

4. *Accordingly, it is ordered*, This 29th day of June 1966, that the above-described petition of Columbia Broadcasting System *Is denied.*

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

FCC 66–565

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

In re Applications of OTTAWA BROADCASTING CORP. (WJBL); HOLLAND, MICH. For Construction Permit	Docket No. 15180 File No. BP–15189

ORDER

(Adopted June 29, 1966)

BY THE COMMISSION:

At a session of the Federal Communications Commission held at its offices in Washington, D.C., on the 29th day of June 1966;

1. The Commission having under consideration: (*a*) A petition for waiver of sections 1.106 and 1.115 of the Commission's rules to permit consideration of a petition for reconsideration; and (*b*) a petition for reconsideration, filed June 10, 1966, by Ottawa Broadcasting Corp., of an order denying an application for review of the Review Board's decision (FCC 65R–125, released December 3, 1965), filed February 28, 1966, by Ottawa;

2. *It appearing*, That good cause has not been demonstrated for waiving sections 1.106 and 1.115 of the Commission's rules, since the case (*North Central Video, Inc.* (*KWEB*), FCC 66–473, released June 3, 1966) which petitioner relies upon as announcing a change in Commission policy in considering requests for waiver of section 73.28(d)(3) of the rules (the 10-percent rule), is factually distinguishable from the instant one. Among other matters, KWEB would provide a second AM nighttime reception service to substantially more persons than would petitioner's proposal. Moreover, petitioner's population loss would be of a higher order, and the extent of its departure from the provisions of the 10-percent rule would be greater, than was the case with KWEB.

3. *Accordingly, it is ordered*, That the above-referenced petition for waiver of the rules *Is denied*, and the above-referenced petition for reconsideration *Is dismissed.*

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

FCC 66R-248

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.	Docket No. 16573
For Construction Permits	File No. BP-16570

MEMORANDUM OPINION AND ORDER

(Adopted June 23, 1966)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. The Review Board has before it a petition to enlarge issues, filed April 29, 1966, by International Broadcasting Corp. (KWKH), Shreveport, La., a respondent in this proceeding.[1] KWKH requests issues to determine whether there would be an overlap of the applicants' respective 2-mv/m contours [2] with the 25-mv/m contour of station KCCT, Corpus Christi, Tex.,[3] in contravention of section 73.37 of the Commission's rules; and, if so, whether the applications must be denied or dismissed. In an affidavit submitted by its engineer, KWKH contends that a study based on field intensity measurements [4] previously made on station KWBU (now KCTA), Corpus Christi, Tex., indicates that the proposed 2-mv/m contour of H. H. Huntley (Huntley) would overlap the 25-mv/m contour of station KCCT, and that there is a reasonable expectancy that the 2-mv/m contour of Cosmopolitan Enterprises, Inc. (Cosmopolitan), would overlap the 25-mv/m contour of station KCCT. KWKH argues that, since the measurements show that the ground conductivity over the path between Edna and Yoakum, Tex., and Corpus Christi, Tex., is substantially higher than indicated by figure M-3 of the Commission's rules (map of estimated effective ground conductivity in the United States), the study establishes the overlap in the case of Huntley's proposal and demonstrates the likelihood of overlap in the case of Cosmopolitan's proposal. KWKH further argues that Cosmopolitan should be required to take site survey measurements from its proposed site to determine whether or not the overlap would occur, citing *Jeannette Broadcasting Co.*, 29 FCC 44, 19 R.R. 480 (1960), in support of its argument.

[1] Also before the Review Board are: (*a*) Opposition, filed May 23, 1966, by the Broadcast Bureau; (*b*) opposition, filed May 24, 1966, by Cosmopolitan Enterprises, Inc.; (*c*) opposition, filed May 24, 1966, by H. H. Huntley; and (*d*) reply, filed June 6, 1966, by International Broadcasting Corp.

[2] Each applicant is seeking a construction permit for a standard broadcast station to operate on 1130 kc, 10 kw, DA-D, class II.

[3] 1150 kc, 1 kw, DA-D, class III.

[4] Station KCTA is located approximately 12 miles northeast of station KCCT, and the KCTA measurements, on which KWKH relies, are those taken during December 1946 and January 1947, on radials 253.5°, 286.0°, 314.5°, and 11.0°.

2. The oppositions of the applicants and the Broadcast Bureau note that petitioner's engineering statement and the conclusions therein involve ground conductivities determined from field strength measurements made from Corpus Christi toward Yoakum and Edna, in a direction opposite to the pertinent direction, and that the Commission has not recognized the validity of reciprocity of ground conductivity determined by field strength measurements, citing *North Atlanta Broadcasting Co.*, FCC 63R-35, 24 R.R. 939; *Carolina-Piedmont Broadcasters, Inc.*, 5 R.R. 1277, 1281 (1951); and *Mt. Vernon Broadcasting Co.*, 4 R.R. 1471 (1950). Cosmopolitan's consulting radio engineer affirms that if the ground conductivity between Edna and KCCT were as high as 40 mmhos per meter (fig. M-3 indicates 30 mmhos/m), the clearance between the Cosmopolitan 2-mv/m and the KCCT 25-mv/m contours would still be in excess of 15 miles. Cosmopolitan points out that KWKH has applied in the reverse direction the ground conductivity over paths which start near the gulf coast and proceed across or extremely close to large bodies of salty, brackish water, but that there are no paths from Edna southwest toward KCCT. Huntley's engineering affidavit asserts that the measurements submitted by petitioner are not valid because, inter alia, petitioner's measurements were taken years ago, from a different location than that of station KCCT, and none of petitioner's measured radials pass through or near the site proposed by Huntley.

3. The request for enlargement of issues will be denied. The petitioner speculates, on the basis of the measurements indicating that the ground conductivity from Corpus Christi in the general direction of Yoakum and Edna is higher than shown on figure M-3 of the Commission's rules, that the proposed 2-mv/m contours would extend farther toward Corpus Christi than shown by the applicants in their applications. As pointed out by the other parties herein, the validity of reciprocity of ground conductivity determined by field intensity measurements has not been recognized by the Commission; see *Carolina-Piedmont Broadcasters, Inc.*, and *North Atlanta Broadcasting Co.*, supra, and *Air Waves, Inc.* (*WJOC*), 6 R.R. 29, 34, paragraph 12 (1950). The case cited by KWKH in its reply fails to support its request mainly in that the measurement request therein was on the basis that the conductivity in the vicinity of the applicant's proposed operation (Monohans, Tex.) appeared to be higher than that shown by figure M-3. As is demonstrated above, KWKH failed to establish such a basis here. For want of reliable measurements from the Cosmopolitan and Huntley proposed transmitter sites toward station KCCT, KWKH has failed to make a threshold showing justifying enlargement of the issues.

Accordingly, it is ordered, This 23d day of June 1966, that the petition to enlarge issues, filed on April 29, 1966, by International Broadcasting Corp., *Is denied.*

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

FCC 66-586

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C. 20554, June 29, 1966.

MESSRS. ARTHUR W. SCHARFELD AND THEODORE BARON,
Attorneys at Law,
Scharfeld, Bechhoefer & Baron,
1710 H Street NW.,
Washington, D.C. 20006

GENTLEMEN: This is with reference to your letter of March 21, 1966, filed on behalf of the Kansas Association of Radio Broadcasters (KARB), which informed the Commission that KARB receives cash contributions from certain nonprofit organizations such as the National Conference of Christians and Jews, the American Legion, and the Arthritis and Rheumatism Foundation, portions of which contributions are used for the general purposes of the KARB. You state that spot announcements are broadcast by members of KARB on behalf of these and other nonprofit organizations and you ask that the Commission grant a waiver of the sponsorship identification requirements of section 317 of the Communications Act (pursuant to sec. 317(d) of the act) if the Commission should decide that section 317 is applicable to announcements broadcast on behalf of organizations contributing to KARB.

We find that section 317 is applicable. However, in accordance with our decision on a similar request from the *Southern California Broadcasters Association* (24 R.R. 284), we find that the public interest does not require the broadcast of a sponsorship identification announcement under the circumstances set forth in your letter, and we grant your request for waiver of this requirement.

The Commission was concerned about the possibility that some of the nonprofit organizations may be prompted to contribute to KARB by an erroneous belief that they will be discriminated against if they fail to contribute. However, on the basis of the representations made to us, we expect that in such eventuality KARB will take effective action to dispel such misapprehension.

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

106-501—66——2

FCC 66-582

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF WILLIAM E. BLIZZARD, JR., LICENSEE OF RADIO STATION WMNZ, MONTEZUMA, GA., FOR FORFEITURE

MEMORANDUM OPINION AND ORDER

(Adopted June 29, 1966)

BY THE COMMISSION:

1. The Commission has under consideration its notice of apparent liability dated April 6, 1966, addressed to William E. Blizzard, Jr., licensee of radio station WMNZ, Montezuma, Ga.

2. The notice of apparent liability in the amount of $150 was issued because the licensee failed to file annual financial reports (FCC form 324) for the years 1963 and 1964, in willful or repeated violation of section 1.611 of the Commission's rules.

3. The notice of apparent liability was mailed to the licensee on April 6, 1966, by certified mail—return receipt requested. Although the return receipt shows the addressee's receipt of the notice on April 8, 1966, the licensee failed to reply to the notice within the prescribed 30-day period set forth in section 1.621(b) of the Commission's rules. Nor has any other response or filing been made 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 above notice of apparent liability we find that the licensee willfully and repeatedly failed to observe the provisions of section 1.611 of the Commission's rules as above stated. *In the Matter of Paul A. Stewart*, 23 Pike & Fischer R.R. 375; *In the Matter of Fay Neel Eggleston*, 1 FCC 2d 1006.

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*, This 29th day of June 1966, that William E Blizzard, Jr., licensee of radio station WMNZ, Montezuma, Ga., *Forfeit* to the United States the sum of $150 for willful and repeated failure to observe section 1.611 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 and section 1.621 of the Commission's rules, an application for

[1] Sec. 1.621(b) of the Commission's rules states, in pertinent part, as follows: "If the licensee * * * fails to take any action in respect to 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."

mitigation or remission of forfeiture may be filed within 30 days of receipt of this memorandum opinion and order.

6. *It is further ordered*, That the Secretary of the Commission send a copy of the memorandum opinion and order by certified mail—return receipt requested to William E. Blizzard, Jr., licensee of radio station WMNZ, Montezuma, Ga.

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

FCC 66-583

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF MONTANA BROADCASTING CO., LICENSEE OF RADIO STATION KYLT, MISSOULA, MONT., FOR FORFEITURE

MEMORANDUM OPINION AND ORDER

(Adopted June 29, 1966)

BY THE COMMISSION:

1. The Commission has under consideration its notice of apparent liability dated April 6, 1966, addressed to Montana Broadcasting Co., licensee of radio station KYLT, Missoula, Mont.

2. The notice of apparent liability in the amount of $150 was issued because the licensee failed to file annual financial reports (FCC form 324) for the years 1963 and 1964, in willful or repeated violation of section 1.611 of the Commission's rules.

3. The notice of apparent liability was mailed to the licensee on April 6, 1966, by certified mail—return receipt requested. Although the return receipt shows the addressee's receipt of the notice on April 8, 1966, the licensee failed to reply to the notice within the prescribed 30-day period set forth in section 1.621(b) of the Commission's rules. Nor has any other response or filing been made 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 above notice of apparent liability we find that the licensee willfully and repeatedly failed to observe the provisions of section 1.611 of the Commission's rules as above stated. *In the Matter of Paul A. Stewart*, 23 Pike & Fischer R.R. 375; *In the Matter of Fay Neel Eggleston*, 1 FCC 2d 1006.

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*, This 29th day of June 1966, that Montana Broadcasting Co., licensee of radio station KYLT, Missoula, Mont., *Forfeit* to the United States the sum of $150 for willful and repeated failure to observe section 1.611 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 and section 1.621 of the Commission's rules, an application

[1] Sec. 1.621(b) of the Commission's rules states, in pertinent part, as follows: "If the licensee * * * fails to take any action in respect to 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."

for mitigation or remission of forfeiture may be filed within 30 days of receipt of this memorandum opinion and order.

6. *It is further ordered*, That the Secretary of the Commission send a copy of the memorandum opinion and order by certified mail—return receipt requested to Montana Broadcasting Co., licensee of radio station KYLT, Missoula, Mont.

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

FCC 66–584

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF RICHARD M. POMEROY AND BESSIE M. POMEROY, D.B.A. RADIO 940, LICENSEE OF RADIO STATION WJOR, SOUTH HAVEN, MICH., FOR FORFEITURE

MEMORANDUM OPINION AND ORDER

(Adopted June 29, 1966)

BY THE COMMISSION:

1. The Commission has under consideration its notice of apparent liability, dated April 6, 1966, addressed to Richard M. Pomeroy and Bessie M. Pomeroy, d.b.a. Radio 940, licensee of radio station WJOR, South Haven, Mich.

2. The notice of apparent liability in the amount of $150 was issued because the licensee failed to file annual financial reports (FCC form 324) for the years 1963 and 1964, in willful or repeated violation of section 1.611 of the Commission's rules.

3. The notice of apparent liability was mailed to the licensee on April 6, 1966, by certified mail—return receipt requested. Although the return receipt shows the addressee's receipt of the notice on April 8, 1966, the licensee failed to reply to the notice within the prescribed 30-day period set forth in section 1.621(b) of the Commission's rules. Nor has any other response or filing been made 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 above notice of apparent liability we find that the licensee willfully and repeatedly failed to observe the provisions of section 1.611 of the Commission's rules as above stated. *In the Matter of Paul A. Stewart*, 23 Pike & Fischer R.R. 375; *In the Matter of Fay Neel Eggleston*, 1 FCC 2d 1006.

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*, This 29th day of June 1966, that Richard M. Pomeroy and Bessie M. Pomeroy, d.b.a. Radio 940, licensee of radio station WJOR, South Haven, Mich., *Forfeit* to the United States the sum of $150 for willful and repeated failure to observe section 1.611 of the Commission's rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument

[1] Sec. 1.621(b) of the Commission's rules states, in pertinent part, as follows: "If the licensee * * * fails to take any action in respect to 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."

drawn to the order of the Treasurer of the United States. Pursuant to section 504(b) of the Communications Act and section 1.621 of the Commission's rules, an application for mitigation or remission of forfeiture may be filed within 30 days of receipt of this memorandum opinion and order.

6. *It is further ordered*, That the Secretary of the Commission send a copy of the memorandum opinion and order by certified mail—return receipt requested to Richard M. Pomeroy and Bessie M. Pomeroy, d.b.a. Radio 940, licensee of radio station WJOR, South Haven, Mich.

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

FCC 66-585

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF WILLIAM MENDE AND KATHERINE MENDE, LICENSEE OF RADIO STATION KAPR, DOUGLAS, ARIZ., FOR FORFEITURE

MEMORANDUM OPINION AND ORDER

(Adopted June 29, 1966)

BY THE COMMISSION:

1. The Commission has under consideration (1) its notice of apparent liability dated November 10, 1965, addressed to William Mende and Katherine Mende, licensee of radio station KAPR, Douglas, Ariz., and (2) the response to the notice of apparent liability filed November 29, 1965.

2. The notice of apparent liability was issued for willful or repeated failure to observe the terms of the station license and sections 73.59 and 73.93(c) of the Commission's rules. The notice provided that pursuant to sections 503(b)(1) (A) and (B) of the Communications Act of 1934, as amended, the licensee was subject to a forfeiture of $2,000.

3. The material facts leading to issuance of the notice of apparent liability are as follows: On November 24, 1964, and on June 20 and July 25, 1965, station KAPR was monitored and found to be operating with excessive frequency deviation in violation of section 73.59 of the Commission's rules and the terms of the station license.[1] Further, an inspection of the station on March 9, 1965, revealed that in violation of section 73.93(c) of the rules the licensee neither employed one or more operators holding a valid radiotelephone first-class operator license as a full-time member of the station staff, nor, in the alternative, contracted for the services of a first-class operator on a part-time basis.

4. In response to the notice of apparent liability, the licensee stated that a first-class operator had been employed under contract at all times, but alleged that the contract had not been filed with the Commission because the licensee did not realize that such filing was required. The Commission expects each licensee to be familiar with its rules and failure to do so will not excuse a violation thereof.

5. The licensee stated that the frequency deviations resulted from equipment failures and were not due to negligence. The licensee attached a copy of the 1965 equipment performance measurements and

[1] The deviations ranged from 78 to 34.031 cycles. Section 73.59 of the rules provides that the frequency shall be maintained within 20 cycles of the assigned frequency.

copies of periodic checks of frequency from an outside source, all of which indicated that the station was operating properly. A statement by the KAPR first-class radio operator explaining in detail the equipment deficiencies that caused each of the deviations was also forwarded. The licensee requested that the forfeiture be withdrawn and alleged that a $2,000 forfeiture would have a severe adverse effect on the station financially.

6. We have given full consideration to the explanations of the causes of excessive frequency deviation. It appears that each of the violations resulted from equipment failure and that after each notification of failure corrective action was taken. However, in each case the violation continued until after the station was notified of the condition by the Commission. It is believed that such off-frequency operation should have been detected from station instruments immediately and should not have been continued until pointed out by the Commission.[2]

7. We find that the licensee repeatedly violated sections 73.59 and 73.93(c) of the rules and the terms of the station license. However, we believe from the circumstances in this case that a forfeiture of $1,000 rather than $2,000 would be appropriate.

8. In view of the foregoing, *It is ordered*, This 29th day of June 1966, that William Mende and Katherine Mende, licensee of radio station KAPR, Douglas, Ariz., *Forfeit* to the United States the sum of $1,000 for willful and repeated failure to observe the terms of the station license and sections 73.59 and 73.93(c) of Commission 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.

9. *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 William Mende and Katherine Mende, licensee of radio station KAPR, Douglas, Ariz.

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

[2] Further it should be particularly noted in connection with the off-frequency violation of June 20, 1965, that the station was detected operating approximately 32 kc off assigned frequency at 21:55, 22:15, and 22:30 G.m.t. Commission rules (sec. 73.113(a)(3)(iii)) require that frequency be observed and logged each half hour, and it would appear that at least in this instance the violation continued in excess of the time in which it would have been detected if the licensee had complied with the logging rules.

FCC 66-587

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF GREEN MOUNTAIN RADIO, INC., LICENSEE OF RADIO STATION WVTR, WHITE RIVER JUNCTION, VT., FOR FORFEITURE

MEMORANDUM OPINION AND ORDER

(Adopted June 29, 1966)

BY THE COMMISSION:

1. The Commission has under consideration (1) its notice of apparent liability dated February 23, 1966, addressed to Green Mountain Radio, Inc., licensee of radio station WVTR, White River Junction, Vt., and (2) the response to the notice of apparent liability filed on March 21, 1966.

2. The notice of apparent liability was issued for willful or repeated failure to observe sections 73.93(b), 73.56(a), 73.57(a), and 73.47(a) of the Commission's rules. The notice provided that pursuant to section 503(b)(1)(B) of the Communications Act of 1934, as amended, the licensee was subject to a forfeiture of $1,000.

3. The material facts leading to issuance of the notice of apparent liability are as follows: Station WVTR was inspected on June 21, 1965, and cited for 16 violations of the Commission's rules, including operation with unlicensed or improperly licensed operators (sec. 73.93(b)), operation with a defective modulation monitor (sec. 73.56(a)), operation with excessive power (sec. 73.57(a)), and failure to make equipment performance measurements (sec. 73.47(a)). The inspection disclosed that Salvatore W. DiFrancisco operated the station for 10 days in June 1965 without a proper license; that David G. Supple, while unlicensed, operated the station for 10 days in May and June 1965; that Lawrence M. O'Toole (also unlicensed) operated the station on 10 days in May and June,[1] and that Richard Alston, although holding only a restricted permit, operated the station on 10 days in May and June 1965.

4. In its reply to the notice of apparent liability, the licensee did not deny the violations as specifically stated in the notice of apparent liability but requested the Commission to reconsider its apparent liability of $1,000 in light of the progress that has been made in correcting the station's technical deficiencies since the present owner acquired it in 1964. The licensee alleged that a considerable amount of money had been expended to remedy the situation and to improve

[1] Subsequent inspection of the WVTR logs revealed that although Mr. O'Toole still did not hold a Commission operator's license, he apparently was in charge of the transmitting apparatus on Sept. 4, 11, 18, and 25, 1965.

the facilities. A statement by the WVTR chief engineer was attached to the response, describing the technical problems and stating that a part-time first-class radio operator previously employed by the station was at fault for most of the violations. The engineer also expressed the opinion that the licensee had not been lax in correcting the violations following the inspection.

5. We have given full consideration to the explanations contained in this reply and find that the licensee did willfully and repeatedly violate sections 73.93(b), 73.56(a), 73.57(a), and 74.47(a) of the rules. However, we believe from the circumstances in this case that a forfeiture of $500 rather than $1,000 would be appropriate.

6. In view of the foregoing, *It is ordered*, This 29th day of June 1966, that Green Mountain Radio, Inc., licensee of radio station WVTR, White River Junction, Vt., *Forfeit* to the United States the sum of $500 for willful and repeated failure to observe sections 73.93(b), 73.56(a), 73.57(a), and 73.47(a) of the Commission 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.

7. *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 Green Mountain Radio, Inc., licensee of radio station WVTR, White River Junction, Vt.

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

FCC 66R-246

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of THE CORINTH BROADCASTING CO., INC., CORINTH, MISS.	Docket No. 16450 File No. BPH-4714
FRANK F. HINTON AND JAMES D. ANDERSON, D.B.A. THE PROGRESSIVE BROADCASTING CO., CORINTH, MISS.	Docket No. 16451 File No. BPH-5015
For Construction Permits	

ORDER

(Adopted June 23, 1966)

BY THE REVIEW BOARD:

The Review Board has before it a joint petition for approval of agreement, dismissal of the Corinth Broadcasting Co., Inc., application and grant of the Progressive Broadcasting Co. application, filed May 24, 1966, by the Corinth Broadcasting Co., Inc. (Corinth), and the Progressive Broadcasting Co. (Progressive) pursuant to section 1.525 of the Commission's rules and section 311 of the Communications Act; and comments, filed June 9, 1966, by the Broadcast Bureau;

It appearing, That under the instant agreement, Progressive would reimburse Corinth in the amount of $2,000 in partial payment of the legitimate and prudent expenses incurred by Corinth in the preparation, filing, and advocacy of its application; and that affidavits on file substantiate such expenses and show compliance with rule 1.525 in all other respects; and

It further appearing, That the agreement by Progressive not to oppose on economic grounds an additional FM assignment to Corinth, Miss., is not approved. Cf. *WEZY, Inc.*, FCC 65R-27; *The Goodwill Stations, Inc.*, FCC 62-1043, 24 R.R. 373.

It is ordered, This 23d day of June 1966, that the joint petition for approval of agreement, filed May 24, 1966, by the Corinth Broadcasting Co., Inc., and the Progressive Broadcasting Co. *Is granted;* that, except as indicated above, such agreement *Is approved;* that the application of the Corinth Broadcasting Co., Inc. (BPH-4714), *Is dismissed;* and that the application of the Progressive Broadcasting Co. (BPH-5015) for FM channel 232 in Corinth, Miss., *Is granted.*

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

FCC 66R-252

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
HENNEPIN BROADCASTING ASSOCIATES, INC., ST. PAUL, MINN.	Docket No. 16487 File No. BPH-4369
WMIN, INC., ST. PAUL, MINN.	Docket No. 16488
For Construction Permits	File No. BPH-4869

MEMORANDUM OPINION AND ORDER

(Adopted June 28, 1966)

BY THE REVIEW BOARD: BOARD MEMBER SLONE DISSENTING.

1. This proceeding involves the mutually exclusive applications of Hennepin Broadcasting Associates, Inc. (Hennepin), and WMIN, Inc. (WMIN), for a construction permit for a new FM broadcast station to operate on channel 271 in St. Paul, Minn. Hennepin's application, filed on February 25, 1964, originally specified channel 271 in Minneapolis, Minn. However, WMIN requested that channel 271 be allocated to St. Paul and, although Hennepin opposed this request, the Commission amended the FM table of assignments, effective March 12, 1965, to delete channel 271 from Minneapolis, and assign it to St. Paul. *FM Channel Assignments* (*Docket 15513*), 30 F.R. 1851, 4 R.R. 2d 1509 (1965). Thereafter, on March 23, 1965, Hennepin amended its application to increase tower height and power, and to specify St. Paul. WMIN filed its application on March 23, 1965. By order, released March 2, 1966, the subject applications were designated for hearing to determine which of the proposals would better serve the public interest. Presently under consideration is a joint request filed by Hennepin and WMIN seeking approval of an agreement whereby WMIN would reimburse Hennepin for part of the expenses incurred in the prosecution of its application; dismissal of the Hennepin application; and the grant of WMIN's application.[1]

2. In their joint petition and the attached agreement and affidavits, Hennepin and WMIN have supplied all the information required by section 1.525 of the rules, and have shown that the agreement would be in the public interest. They have also fully documented the $5,000 in expenses for which Hennepin is to be reimbursed. However, the affidavits of Hennepin's counsel and engineer indicate that an unspecified portion of the $5,000 was expended in opposing WMIN's request to reassign channel 271 to St. Paul, and in preparing the subsequent amendment in which Hennepin specified St. Paul. The Broadcast

[1] The Review Board has the following pleadings under consideration: (*a*) Joint request for approval of agreement for withdrawal of application of Hennepin Broadcasting Associates, Inc., filed on May 4, 1966, by Hennepin and WMIN; (*b*) Broadcast Bureau's opposition, filed on May 26, 1966; and (*c*) reply, filed on June 10, 1966, by Hennepin.

Bureau opposes approval of the joint agreement, based on its contention that the Board should not allow Hennepin to be reimbursed for these expenses. In support of its contention that the expenses of the amendment are not recoverable, the Bureau cites *Midwest Television, Inc.*, FCC 65R–69, 4 R.R. 2d 652 (1965), wherein the Board disallowed reimbursement for expenses incurred in filing an amendment to specify a new frequency. In support of its contention that the expenses of opposing the rulemaking wherein channel 271 was reassigned from Minneapolis to St. Paul are not recoverable, the Bureau cites *WEPA–TV, Inc.*, FCC 65R–192, 5 R.R. 2d 756, wherein the Board disallowed reimbursement for rulemaking expenses incurred in an attempt to prevent assignment of a particular channel to a community for which an applicant subsequently applied. *Morgan Broadcasting Co.*, FCC 65R–308, 6 R.R. 2d 61, —— FCC 2d ——, wherein the Board allowed rulemaking expenses incurred in the successful defense of retaining a channel for a community for which an applicant already applied is not applicable here, the Bureau argues, because here the rulemaking expenses were incurred in defense of a community not ultimately applied for.

3. With respect to the expenses incurred in the rulemaking where Hennepin unsuccessfully sought to retain channel 271 in Minneapolis, the Board is of the opinion that the *Morgan* case, supra, is controlling, and that these expenses should be allowed. The only difference between the *Morgan* case and this case is that in the *Morgan* case the dismissing applicant was successful in its attempt to retain the disputed channel in its specified community. We do not believe this is an adequate distinction. The significant factor in both cases is that the expenses were incurred in the prosecution of a pending application. In *WEPA–TV, Inc.*, relied upon by the Bureau, the rulemaking took place prior to the preparation of the dismissing application, and therefore could not comport with the requirement contained in section 311(c) of the Communications Act that only expenses incurred by an applicant "in connection with preparing, filing, and advocating the granting of his application" can be recovered.

4. The Board will also allow Hennepin to recover the expenses of amending its application from Minneapolis to St. Paul. This amendment was required as a result of the Commission's rulemaking and was necessary in order for Hennepin to continue to prosecute its application. In the *Midwest Television, Inc.*, case, cited by the Bureau, the Board indicated that it would not allow an applicant to recover the expenses of a proposed amendment to apply for a different allocation in the same city and have the application returned to the processing line. Unlike here, the expense of preparing that amendment was not incurred in advocating the granting of the application, nor was it a part of the application proposed to be withdrawn. Moreover, as pointed out by Hennepin in its reply, in *Sergio Martinez Caraballo*, FCC 65R–246, 5 R.R. 2d 905, the Board specifically allowed an applicant to recover expenses incurred in amendments necessitated by reason of the Commission's revision of the FM broadcast rules and table of assignments.

5. One other matter remains. The agreement between Hennepin and WMIN is dated April 25, 1966, and the subject joint request was

not filed until May 4, 1966. The applicants request a waiver of the 5-day provision contained in section 1.525 of the rules, contending that they have proceeded with diligence and have attempted to thoroughly document their joint request. The request for waiver is granted. Granting of the waiver and approval of the dismissal agreement is in the public interest in that it would expedite the provision of broadcast service to the public.

Accordingly, it is ordered, This 28th day of June 1966, that the joint request for approval of agreement for withdrawal of application of Hennepin Broadcasting Associates, Inc., filed May 4, 1966, by Hennepin Broadcasting Associates, Inc., and WMIN, Inc., *Is granted;* that such agreement, dated April 20, 1966, *Is approved;* that the application of Hennepin Broadcasting Associates, Inc. (BPH–4369), *Is dismissed* with prejudice; that the application of WMIN, Inc. (BPH–4869), for a construction permit for a new FM broadcast station in St. Paul, Minn., *Is granted;* and that this proceeding *Is terminated.*

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

FCC 66-559

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

In re Application of BLACK HAWK BROADCASTING CO. (KWWL-TV), WATERLOO, IOWA For Construction Permit	Docket No. 16722 File No. BPCT-3606

MEMORANDUM OPINION AND ORDER

(Adopted June 22, 1966)

BY THE COMMISSION:

1. The Commission has before it for consideration the above-captioned application of Black Hawk Broadcasting Co. for a construction permit to make changes in the facilities of television broadcast station KWWL-TV, channel 7, Waterloo, Iowa; a petition to deny, filed by WMT-TV, Inc., licensee of television broadcast station WMT-TV, channel 2, Cedar Rapids, Iowa; informal objections, filed pursuant to section 1.587 of the Commission's rules by the Association of Maximum Service Telecasters, Inc. (AMST), and various related pleadings.[1]

2. The applicant is authorized to operate station KWWL-TV with effective radiated visual power of 316 kw and antenna height above average terrain of 1,130 feet from a site approximately 7 miles southwest of Independence, Iowa (approximately 17 miles from Waterloo, Iowa, and 35 miles from Cedar Rapids), using an omnidirectional antenna. The present site is 172 miles from cochannel station KHQA-TV, Hannibal, Mo., a minimum separation of 170 miles being required under our rules.[2] The applicant requests a construction permit to reduce effective radiated visual power to 83.1 kw (average horizontal, 121 kw maximum), increase antenna height above average terrain to 2,075 feet, change transmitter site to a point 10.5 miles southeasterly toward Cedar Rapids, Iowa, about midway between Cedar Rapids and Waterloo (approximately 26 miles from the center of each city), near the present site of the station WMT-TV tower, directionalize the antenna with a null toward station KHQA-TV, and make other changes. Operating as proposed, station KWWL-TV would be 164 miles from station KHQA-TV and there would, therefore, be a mileage shortage of approximately 6 miles. The applicant, by petition filed

[1] The pleadings filed in this proceeding are listed in the Appendix hereto. On Dec. 15, 1965, the applicant filed a motion for leave to file additional pleading (listed as (j) in the appendix) and filed a pleading in connection therewith. This motion will be denied and the associated pleading will be dismissed as having been filed in violation of sec. 1.45 of the Commission's rules. *Springfield Telecasting Co.*, FCC 64-387, released May 4, 1964; FCC 64R-471, 3 R.R. 2d 727. Pleadings filed in connection therewith will be dismissed as moot.

[2] Station KHQA-TV is in zone I; station KWWL-TV is in zone II. Section 73.610(b)(2) of the rules provides that, in such cases, the minimum cochannel mileage separation shall be that of the zone requiring the lower separation. Zone I is the zone having the lower separation.

July 26, 1965, has requested a waiver of section 73.610 of the rules to permit operation at substandard spacing.[3]

3. Applicant contends that its move to a short-spaced site is necessitated by a number of factors beyond its control. It is alleged that, because of terrain features, it is not competitive with the Cedar Rapids stations and in order to be competitive, it must deliver both Waterloo and Cedar Rapids. The applicant alleges that it is unable to increase tower height at its present location because a proposal to increase tower height at its present site was rejected by the Federal Aviation Agency in 1960. The applicant proposes to afford "equivalent protection" to cochannel station KHQA-TV by directionalizing the antenna. The applicant also points out that because it proposes to move close to the station WMT-TV tower, a grant of its proposal would promote the "antenna farm" concept. For these reasons, the applicant contends that a waiver of the separation requirements is warranted.

4. Station KWWL-TV presently provides predicted principal city signals to both Waterloo and Cedar Rapids. Operating as proposed, the signal strength in Cedar Rapids would be increased (but to a level slightly above that provided by station WMT-TV and substantially below that provided by station KCRG-TV, channel 9, Cedar Rapids, Iowa), but signal strength in Waterloo would be decreased. The applicant would, nevertheless, continue to provide a signal strength of at least 88.5 dbu to all of Waterloo.[4] There would be an area containing 156,461 persons who would receive applicant's predicted grade B signal for the first time, but 7,096 persons would lose a predicted grade B signal now being received from station KWWL-TV. Everyone in the loss area would continue to receive at least two other predicted grade B signals. In the gain area, 321 persons would be included within a second predicted grade B contour for the first time and 16,435 persons would be included within a third predicted grade B contour. The remaining 140,000 persons in the gain area already are included within at least 3 predicted grade B contours.

5. 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 basis that it competes for viewers and advertising revenues with the applicant in Waterloo and Cedar Rapids, Iowa, and that a grant of the application would cause petitioner economic injury. We find that the petitioner has standing. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 60 S. Ct. 639, 9 R.R. 2008. AMST does not claim standing as a "party in interest," but rather as an informal objector, and its pleadings will be considered on this basis.

6. Petitioner and the objector dispute the validity of the reasons given by the applicant as requiring it to relocate at a short-spaced site. It is contended that no showing has been made that an increase in tower height at the present site is not possible [5] and that the applicant's con-

[3] Applicant is also the licensee of television broadcast station KMMT, channel 6, Austin, Minn. Overlap of the predicted grade B contours of these commonly owned stations presently exists, but the proposed operation would not increase the existing overlap.

[4] Sec. 73.685(a) of the rules requires a minimum field intensity signal of 77 dbu over the entire principal community.

[5] Petitioner contends that that determination was not a final one and that conditions since 1960 may have changed substantially.

106-501—66——3

clusion that it is not competitive with the Cedar Rapids stations because of terrain factors is unsupported by the facts. It is also alleged that the applicant has not shown that it cannot operate from some other site which would conform to the spacing requirements and still achieve its objective. There is, it is alleged, such an area within which the applicant could locate with a high tower, meet all spacing requirements, not increase existing overlap of the predicted grade B contours of its commonly owned stations, and still achieve its purposes. Petitioner points out that most of the gain area is already well served; there would be a loss area; and there would be a diminution of signal strength in Waterloo. In addition, the petitioner has raised questions concerning the efforts, if any, which the applicant has made to ascertain the programing tastes, needs, and interests of the new area to be served, and the impact which a grant of the application would have on the development of UHF television broadcasting in the new area. These factors, petitioner contends, require dismissal or designation of the application for hearing.

7. The applicant contends that Federal Aviation Agency approval could not be obtained in the alternate area for a tower of the height which would be necessary. The boundaries of the area are in dispute. The applicant, however, does not dispute the existence of an alternate area from which it could operate, if FAA approval were obtained, and still comply with all of our rules. The question which is thus presented is whether consideration of an alternative is warranted under these circumstances.

8. In *WKYR, Inc.* (*WKYR*), FCC 63–893, 1 R.R. 2d 314, affirmed sub nom. *Allegany County Broadcasting Corporation et al.* v. *Federal Communications Commission*, —— U.S. App. D.C. ——, 348 F. 2d 788, 5 R.R. 2d 2067, we said that:

> The Commission's consistent policy has been, however, that an application which is otherwise in the public interest, and meets the requirements of the rules, should be granted without regard to possible superior proposals which might have been advanced.

We then stated, in a footnote, that:

> Where a particular proposal is inherently deficient, consideration of an alternative may be warranted, as in *Beaumont Broadcasting Corp.* v. *Federal Communications Commission*, 91 U.S. App. D.C. 111, 202 F. 2d 306.

Here we have a proposal which is inconsistent with our separation requirements and an alternative has been suggested which, it is alleged, would enable the applicant to achieve its purposes without operating in derogation of our rules. Clearly, the proposal before us is an "inherently deficient" one warranting consideration of alternatives. We are of the view that the applicant has made a sufficient threshold showing in its request for waiver to warrant our designating the application for hearing rather than dismissing it. *United States et al.* v. *Storer Broadcasting Company*, 351 U.S. 192, 76 S. Ct. 763, 13 R.R. 2161.

9. With respect to the applicant's argument that its proposal would promote the "antenna farm" concept, it should be noted that in our notice of proposed rulemaking in docket No. 16030 (FCC 65–458, 1

R.R. 67:1)[6] we emphasized our concern with the integrity of the minimum spacing requirements and stated that if a particular station could not locate in a designated "antenna farm" consistent with the mileage separation requirements, the establishment of that "antenna farm" was not to be interpreted as an indication that the Commission would condone a mileage shortage to enable that station to locate on the "farm." We will, therefore, specify an issue to determine whether circumstances exist which would warrant a waiver of the mileage separation rules.

10. Lee Broadcasting Corp., licensee of television broadcast station KHQA–TV, the cochannel station in Hannibal, Mo., filed a statement on October 11, 1965, containing an agreement between Lee and the applicant in which each undertook to install and maintain precision offset equipment. Lee would not oppose a grant of the application if "equivalent protection" were provided and certain specified conditions were met.[7] Whatever the position of the cochannel station with respect to its willingness to accept "equivalent protection," it is the Commission's responsibility to determine whether such a solution would be in the public interest.

11. Petitioner has also raised a *Suburban* question[8] with respect to the efforts, if any, made by the applicant to ascertain the programing tastes, needs, and interests of the proposed gain area. The applicant responded that it submitted a comprehensive showing, with its 1964 renewal application, of its continuing efforts to ascertain the needs and interests of its coverage area. Although the applicant will provide a predicted grade B signal to Dubuque (population 56,600) and Muscatine, Iowa (population 20,997), for the first time, there is no indication that it has made any effort to ascertain the programing tastes, needs, and interests of these communities. It is well established that where, as here, an applicant proposes to provide service to new areas, the applicant is required to demonstrate that it has made efforts to ascertain the programing tastes, needs, and interests of those areas. Where this has not been done, an issue is warranted. *Wometco Enterprises, Inc.* v. *Federal Communications Commission*, 114 U.S. App. D.C. 261, 314 F. 2d 266, 24 R.R. 2072; *Louisiana Television Broadcasting Corporation* v. *Federal Communications Commission*, —— U.S. App. D.C. ——, 347 F. 2d 808, 5 R.R. 2d 2025. See also *KTBS, Inc.*, FCC 63–359, 25 R.R. 301; *Television Broadcasters, Inc. (KBMT)*, FCC 65–379, 5 R.R. 2d 155.

12. Petitioner also alleges that a grant of the application would have an adverse impact on the development of UHF television broadcasting in the new area proposed to be served. Station KWWL–TV would include Dubuque, Iowa, within its predicted grade B signal for the first time and its predicted grade B contour would fall within 7 or 8 miles of Davenport, Iowa. There are two UHF television broadcast channels allocated to each of these communities, but there are no stations authorized to operate on any of them, although there is an application pending for channel 18 in Davenport. Dubuque,

[6] The Commission has not yet acted on the "antenna farm" proposal.
[7] AMST insists that the specified conditions would be, in any event, inadequate to assure "equivalent protection."
[8] *Patrick Henry et al.* v. *Federal Communications Commission*, 112 U.S. App. D.C. 257, 302 F. 2d 191, 23 R.R. 2016.

Iowa, is included within the predicted grade B contours of the following stations:

KCRG–TV, channel 9, Cedar Rapids, Iowa (ABC).
WMT–TV, channel 2, Cedar Rapids, Iowa (CBS).
WISC–TV, channel 3, Madison, Wis. (CBS).

Davenport, Iowa, is included within the predicted principal city contours of the following stations:

WQAD–TV, channel 8, Moline, Ill. (ABC).
WHBF–TV, channel 4, Rock Island, Ill. (CBS).
WOC–TV, channel 6, Davenport, Iowa (NBC).

13. At the present time, in addition to the stations listed above, whose predicted principal city contours encompass all of Davenport, the predicted grade B contours of stations WMT–TV and KCRG–TV fall within 30 miles of Davenport. We think that it is evident, under these circumstances, that the proposed operation would have little, if any, effect upon the development of UHF television broadcasting in the area. This is not a situation where we need fear that the incursion of a VHF signal for the first time or the introduction of the signals of a network-affiliated VHF station would jeopardize the opportunities for competition among a greater number of stations. Cf. *Selma Television, Incorporated*, FCC 65–216, 5 R.R. 2d 714. Neither is this a situation where the growth and development or continued existence of an operating UHF television station may be imperiled (cf. *KTIV Television Company* (*KTIV*), FCC 64–212, 2 R.R. 2d 95), or where an authorized UHF television station's ability to complete construction and begin operation might be adversely affected (cf. *Central Coast Television* (*KCOY–TV*), FCC 66–48, released January 18, 1966). The foregoing facts persuade us that an issue with respect to UHF impact would not be warranted in this case.

14. The applicant points out the advantages which would accrue to the public interest if the application were granted; e.g., a new grade B service to a substantial number of persons, increased signal strength in Cedar Rapids, promotion of the "antenna farm" concept. There would, however, be certain disadvantages (exclusive of those flowing from operation in derogation of the separation requirements) which we must weigh against the gains to determine whether the public interest would be served by a grant of the application. *Television Corporation of Michigan, Inc.* v. *Federal Communications Commission*, 111 U.S. App. D.C. 101, 294 F. 2d 730, 21 R.R. 2107. For example, there will be a diminution of signal strength in Waterloo and there will be a loss area. Accordingly, we will specify an issue with respect to the gains and losses.

15. Having considered all of the matters raised by the pleadings, we find that, except as indicated by the issues specified below, the applicant is qualified to construct and operate as proposed. The Commission, however, is unable to make the statutory finding that a grant of the application would serve the public interest, convenience, and necessity, and is of the opinion that the application must be designated for hearing on the issues set forth below.

Accordingly, *It is ordered*, That the petition to deny filed herein by WMT-TV, Inc., and the informal objections filed by the Association of Maximum Service Telecasters, Inc., *Are granted* to the extent indicated herein and are otherwise *Denied*.

It is further ordered, That the motion for leave to file additional pleadings, filed by Black Hawk Broadcasting Co., *Is denied*, and the pleading filed pursuant thereto *Is Dismissed* as having been filed in violation of section 1.45 of the Commission's rules. The pleadings filed in connection therewith *Are dismissed* as moot.

It is further ordered, That, pursuant to section 309(e) of the Communications Act of 1934, as amended, the above-captioned application of Black Hawk 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 there is an area within which the applicant could locate its transmitter in conformity with all of the requirements of the Commission's rules and provide service to the public equivalent to that proposed in the application.
2. To determine the areas and populations which may be expected to gain or lose television service or signal strength by the proposed operation of television broadcast station KWWL-TV, and the other television broadcast services available to such areas.
3. To determine the efforts made by the applicant to ascertain the programing tastes, needs, and interests of the area proposed to be served and the manner in which the applicant will meet those tastes, needs, and interests.
4. To determine whether circumstances exist which would warrant a waiver of section 73.610(a) 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 KHQA-TV, Hannibal, Mo., on the basis of the standards set forth in docket No. 13340.
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 WMT-TV, Inc., and, on the Commission's own motion, the Association of Maximum Service Telecasters, Inc., *Are made parties respondent* herein.

It is further ordered, That the burden of proceeding with the introduction of evidence and the burden of proof with respect to issue 1 herein *Is hereby placed* upon the parties respondent.

It is further ordered, That, to avail themselves of the opportunity to be heard, the applicant and the parties 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.

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(a) 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

Pleadings filed herein:

(*a*) Petition for waiver of section 73.610 of Commission's rules and regulations, filed July 26, 1965, by Black Hawk Broadcasting Co.

(*b*) Petition to dismiss, or in the alternative, to deny, filed October 11, 1965, by WMT-TV, Inc.

(*c*) Objections, filed October 11, 1965, by the Association of Maximum Service Telecasters, Inc. (AMST).

(*d*) Statement of Lee Broadcasting Corp., filed October 11, 1965.

(*e*) MST response to statement of Lee Broadcasting Corp., filed November 15, 1965, by AMST.

(*f*) Opposition, filed November 15, 1965, by Black Hawk Broadcasting Co., to (*b*) and (*c*), above.

(*g*) Comments by Black Hawk Broadcasting Co., re MST response, filed November 24, 1965, in connection with (*e*), above.

(*h*) Reply to opposition of Black Hawk Broadcasting Co., filed December 6, 1965, by AMST.

(*i*) WMT-TV reply to opposition of KWWL-TV, filed December 6, 1965.

(*j*) Motion for leave to file additional pleading, filed December 15, 1965, by Black Hawk Broadcasting Co.

(*k*) Opposition to motion for leave to file additional pleading and, in the alternative, response on the merits to Black Hawk's answers, filed December 27, 1965, by WMT-TV, Inc.

(*l*) Reply by Black Hawk Broadcasting Co. to opposition, filed January 6, 1966, to (*k*), above.

(*m*) Response of WMT-TV, filed January 12, 1966, by WMT-TV, to (*l*), above.

FCC 66R-245

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of MARBRO BROADCASTING CO., INC., SAN BERNARDINO, CALIF.	Docket No. 16394 File No. BPCT-3455
SUPAT BROADCASTING CORP., SAN BERNARDINO, CALIF.	Docket No. 16395 File No. BPCT-3499
For Construction Permit for New Television Broadcast Station	

MEMORANDUM OPINION AND ORDER

(Adopted June 23, 1966)

BY THE REVIEW BOARD:

1. Each of the above-captioned applicants seeks a construction permit for a new television broadcast station to operate on channel 18, San Bernardino, Calif. In addition to the standard comparative and other issues, the specified issues encompass an inquiry into the availability of the proposed transmitter site of Supat Broadcasting Corp. (Supat). This issue was added by the Board upon a showing by Marbro Broadcasting Co., Inc. (Marbro), in a petition to enlarge issues, that the controller and vice president of the Sun Co., owner of the site, did not have an understanding with Supat or anyone else respecting the lease of this property.[1] A second petition, filed by Marbro on April 28, 1966, is now before the Review Board for consideration.[2] The instant petition seeks the addition of an issue to determine whether Supat made a willful misrepresentation by proposing a site without having made adequate inquiries as to its availability.

2. In support of its request, Marbro first points out that Supat's application, filed on January 22, 1965, indicates that its transmitter site will be leased. Marbro contends, however, that Supat hearing exhibit 13 indicates that Supat had not even contacted the owner of the site prior to filing its application. Supat exhibit 13 contains a letter and an affidavit from Robert F. Erburu, the secretary of the Sun Co., owner of the site, and vice president and general counsel of the Times Mirror Co., a parent company of the Sun Co. Marbro points out that Erburu, in his letter and affidavit, makes the statements that nothing therein constitutes a commitment to sell or lease the property and that these matters will be discussed after Supat obtains a grant. Marbro also relies upon the affidavit from the vice president

[1] *Marbro Broadcasting Co., Inc.*, FCC 66R-89, released Mar. 10, 1966.

[2] Also before the Review Board are: (*a*) Opposition, filed May 6, 1966, by Supat; (*b*) Broadcast Bureau's comments, filed May 9, 1966; (*c*) errata to Broadcast Bureau's comments, filed May 10, 1966; and (*d*) reply, filed May 16, 1966, by Marbro.

and controller of the Sun Co. (see par. 1, supra). Thus, Marbro contends, it is apparent that Supat had not even contacted the owner of the transmitter site prior to filing its application, and had no reasonable basis to represent in its application that the site could be leased. In support of its request, Marbro cites *Geoffrey A. Lapping*, FCC 62–682, released July 3, 1962. Finally, Marbro alleges that good cause for filing its petition at this time is present because the "principal basis" for requesting the issue is contained in Supat's exhibits, which were received on April 14, 1966. The Broadcast Bureau urges that the affidavits, submitted as an exhibit to the hearing, appear to indicate that the owner of the property was contacted after the application was filed, and, therefore, without further explanation or clarification, addition of the requested issue is warranted.

3. Supat, in its opposition, contends that Marbro is relying in substantial part upon the same affidavit which it previously filed in support of its earlier petition; and that although the Review Board previously added the site availability issue, it did not add a character issue because there was "no substance to the charges." Supat further contends that the affidavits and letter attached to its opposition show that its site is available and was available when the application was filed. Attached to Supat's opposition are the letter and affidavit from exhibit 13, an additional affidavit of Erburu, dated May 4, 1966, and an affidavit of E. Benham, Supat's consulting engineer, dated May 5, 1966. Benham, in his affidavit, states that in August 1964, he contacted a representative of the Times Mirror Co. to determine whether that company owned the proposed site, and in September 1964, after finding out that the property was owned by the Times Mirror Co., he contacted Erburu, who indicated that the property was available and that it could be specified as the site in Supat's application. Erburu, in his May 5 affidavit, affirms that he was contacted by Benham in September or October 1964, that he told Benham that the site was available, and that he gave Benham permission to specify the site in Supat's application. Based on this information, Supat argues that not only should Marbro's present request be denied, but also the site availability issue should be deleted.

4. In its reply, Marbro refers to Benham's testimony at the hearing, and points out that this testimony indicates, among other things, that Benham never attempted to obtain a lease for the site; that Benham knew the site could be sold at any time until an agreement with the owner was reached; that the cost of leasing the property was never discussed; that Benham inserted the word "lease" in the application and did not recall discussing the matter with Supat's president, who signed the application; that Benham did not attempt to investigate the corporate structure of the owner of the site; and that Benham learned that another applicant specified the same site but did not attempt to determine what effect this had on the availability of the site to Supat. Thus, Marbro contends, the record indicates that no discussion has taken place wherein leasing the site was ever meaningfully raised or a promise to lease obtained. To be truthful, Marbro asserts, Supat should have inserted the words "to be leased, if available" in its application.

5. If an applicant specifies a site in its application, and does not contact the owner of that site to inquire as to its availability until after the application is filed, the addition of a character qualifications issue is warranted. See *Geoffrey A. Lapping*, supra. However, the affidavits submitted by Supat with its opposition indicate that, prior to filing its application, Supat's consulting engineer, who was responsible for preparing the technical portions of the application, had a discussion with an officer of the corporation which owned the site, and was informed that the site was available to Supat for lease or sale subject to any offers the owner received prior to Supat's obtaining a construction permit. These facts are not inconsistent with or disputed by any of the allegations contained in the affidavits referred to by Marbro. We need not now determine whether Supat has reasonable assurance that its proposed site will be available.[3] Although Supat's president, as the signer of the application, may have been somewhat lax in failing to determine from his consulting engineer the details of the discussion between the engineer and Erburu, the critical facts from a character standpoint are that the owner of the site had been contacted prior to filing the application, and that Benham had some basis for specifying the site and stating that it would be leased. Under these circumstances, we do not believe a substantial question regarding Supat's good faith has been raised,[4] and Marbro's petition will be denied.

Accordingly, it is ordered, This 23d day of June 1966, that the petition to enlarge issues, filed on April 28, 1966, by Marbro Broadcasting Co., Inc., *Is denied.*

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

---

[3] Supat's request to delete the site availability issue is inappropriately contained in its opposition pleading. See *Midwest Television, Inc.*, FCC 65R-370, 1 FCC 2d 1184. Moreover, the Board has consistently held that it will not delete hearing issues based upon material contained in pleadings where a hearing would have to be held in any event. See, for example, *Theodore Granik*, FCC 65R-450, released Dec. 29, 1965; therefore, this request is denied.

[4] While the words "to be leased" as opposed to "lease" would have made for greater accuracy in the application, we do not believe that Supat's procedure is an indication of an intention to deceive, particularly in view of the fact that Supat did not specify a rental figure.

FCC 66D-24

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re application of UNITED BROADCASTING CO., INC. For Renewal of License of Station WOOK, Washington, D.C.	Docket No. 15795 File No. BR-1104

APPEARANCES

Paul Dobin, Esq., and *Roy F. Perkins, Jr.*, on behalf of United Broadcasting Co., Inc. (WOOK); *Benito Gaguine, Esq.*, on behalf of Bowie Broadcasting Corp.; *Paul Q. Cuddy, Esq.*, on behalf of John Panagos; and *William A. Kehoe, Jr., Edward J. Reilly, Esq.*, and *Irvin S. Elyn, Esq.*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF PRESIDING EXAMINER SOL SCHILDHAUSE

(Effective June 23, 1966, pursuant to sec. 1.276)

FINDINGS OF FACT

Preliminary statement

1. This proceeding inquired into a long series of charges of violations of the Commission's engineering and logging rules and into whether management controls earlier represented to be in effect and apparently found equal to requirements were in fact implemented. The charges are contained in official notices of violation, or citations prepared by station inspectors employed in the Commission's field engineering offices. The issues speak for themselves but appear to have been directed to finding out why WOOK management, if it is effective, did not assure precise compliance with Commission rules and requirements, assuming of course that the violations charged can be said to have been demonstrated. At stake is the application for renewal of license for station WOOK. The order for hearing also contemplates other sanctions; the issuance of an order to cease and desist and the imposition of a money forfeiture.

2. The issues on which the hearing was conducted are:

> 1. To determine whether Richard Eaton has implemented and exercised the controls over the operation of station WOOK as represented in his affidavit of September 27, 1960, to the Commission;
>
> 2. To determine the nature and extent of the violation of Commission rules and regulations committed by WOOK for which official notices of violations have been issued between September 27, 1960, and January 5, 1965, and the licensee's responses to the official notices of violations;
>
> 3. To determine whether station WOOK's operating logs were maintained in a manner designed to deceive or mislead the Commission as to its compliance with the requirements of sections 73.57 and 73.79 of the Commis-

sion's rules and regulations between September 1960 and January 5, 1965;

4. To determine the nature of the control or supervision exercised by Richard Eaton over the operation of station WOOK between September 27, 1960, and January 5, 1965;

5. To determine whether forfeiture in the amount of $10,000 or some lesser sum should be ordered, and whether a cease and desist order should be issued;

6. To determine, in view of the evidence adduced under the foregoing issues, whether a grant of the above-captioned application would serve the public interest, convenience, and necessity.

The hearing was principally held during the period October 20 through November 5, 1965; the record was finally closed on January 10, 1966. Each of the parties filed proposed findings and replied to the other's proposed findings. This process was concluded on March 18, 1966.

3. Useful background would also include the following: Station WOOK is one of a number of broadcast facilities controlled by Richard Eaton of Washington, D.C. The Commission's processes have been turned on Eaton's stations for most of this decade.[1] The order for hearing, in reciting history, relates how a letter to Eaton in September 1960 followed an even earlier investigation into the operation of his stations. This may be said to mark the beginnings of the WOOK proceeding here. The age of the inquiry is relevant to the contemporary problem of proof—the official notices stand unchanged, of course, but the supporting recollection of the inspecting witness was understandably diminished. This in some instances reduced the case against WOOK to a reliance upon argument that proof of violation must be taken to flow inescapably from the general honesty of government purpose and from the admitted integrity of the Commission's inspector.

4. An additional piece of background also deserves mention here Eaton's management affidavit of September 27, 1960, is one of the critical circumstances of the case. It was solicited by the Commission's letter of September 12, 1960, which called attention to the fact that "an inquiry conducted by the Commission" into the operation of several of Eaton's stations had "raised questions as to * * * the public interest," it appearing, the letter went on, that "with the exception of purely monetary or accounting matters" there did not exist between Eaton and his stations "regular liaison whereby your [his functions with respect thereto encompass any active and responsible supervisory participation in the management and operation of the stations," that Eaton took "no active part in program policy, control or supervision, or even demonstrate[d] a concern for or interest in individual station programing, management, or personnel activity, and that "a minimum of effort has been expended in establishing integral controls designed to prevent improper practices * * *." Eaton September 27 letter, in which he denied that he was interested only

[1] WOOK was fixed upon for hearing, with the designation announced along with the other actions on Eaton stations: A $5,000 forfeiture against AM station WBNX in New York City was affirmed and a full-term license renewal granted; 1 year, short-term license renewals were given for AM station WANT in Richmond, Va., AM station WINX in Rockville, Md., WFAN-FM in Washington, D.C., WSID AM-FM in Baltimore, and AM station WJMO in Cleveland Heights, Ohio; regular term license renewal was issued for WCUY-FM in Cleveland Heights, WOOK-TV in Washington, and WMUR-TV in Manchester, N.H.

in the money and accounting problems of his stations, was a detailed account of his broadcast practices and activities and appeared strongly to support these propositions: That the operation of his stations was his only occupation and business activity; that he was present at one of his stations every working day; that he did some of his own on-the-air work; that he maintained almost complete control over all hiring and firing of personnel at all of his stations, and that he personally decided program structure and program policies at each station.

5. In settling the issue on whether Eaton controlled the station as he said he would in his September 27 letter, the Broadcast Bureau ruled out, as apparently did the Commission, any question of the suitability of the WOOK program offerings. The station's programing is therefore concededly acceptable in terms of meeting community needs and requirements. And in its proposed findings, the Bureau has further narrowed the first issue by tying its case to the following excerpts from Eaton's September 27 representations:

> I am the operating head of every station I own or control. I operate without any general assistant to help supervise the operation of my stations; each of my stations operates under a manager and each manager reports directly to me. No decision of any importance is made without my knowledge and approval.
>
> Except when I am away from the Washington area, I visit WOOK or WINX each day and, in fact, I broadcast from these stations each day. I visit all my other stations about once each 5 weeks, except for WSID in Baltimore, which I visit once every week. The visits to my stations are made on a regular basis and I spend sufficient time at each to familiarize myself with the details of operation so that I am able to make decisions with respect to the myriad of special problems which arise at each station. I do not believe in operation of stations by telephone alone and while I am forced to rely on telephones to a very great extent because my stations are spread out over the entire eastern portion of the United States, I make it my business to visit each of the stations on a regular basis, so that I may make on-the-spot decisions and maintain full familiarity with all aspects of the operations of each.
>
> I am able to assert unequivocally that I maintain almost personal control of all hiring and firing of personnel at all of the stations. With only very few exceptions, I interview all personnel before they are hired at any station. In those cases where I do not personally hire, the local manager consults with me in person or by phone with respect to the proposed employment of personnel. Likewise, with very few exceptions, I make the decision when personnel will be discharged. I frequently discharge personnel personally and in all other cases the manager consults with me before personnel are discharged. At all my stations I prescribe the duties of all personnel, hours of employment, and salary. I have always maintained this strict supervision over hiring and firing because I have recognized that the operation of stations depends upon the personnel that is selected to operate the stations.
>
> I maintain almost complete control over all hiring and firing of personnel at all of the stations. With very few exceptions, I interview all personnel before they are hired and where I do not personally hire, the local manager consults with me in person or by telephone with respect to the proposed employment of personnel. Likewise, with very few exceptions I make the decision when personnel will be discharged and frequently I discharge personnel personally. I prescribe the duties of all personnel, their hours of employment, and salary. I maintain strict control of personnel because among other things it makes it possible for me by my personal participation to maintain adequate controls to prevent violation of Commission rules and policies.

6. On March 22, 1961, the Commission renewed the WOOK license but only for the short term ended June 1, 1962 (later corrected to specify July 1, 1962). The rationale for the action is to be found in an earlier opinion and order (FCC 60–1467, released December 14, 1960), which indicated that Eaton was being given a reprieve because of the new procedures he had adopted and would thereafter apply "to insure the type of broadcast station supervision and operations which the Commission expects of its licensees." As a matter of fact, Eaton's response had been misinterpreted. In the process of meeting the charge that his was only a financial concern, Eaton had set out the details of supervision and management activity which the Commission apparently thought an admirable involvement. But Eaton was plainly describing what he held out as his customary and long-established practice, not something which he was promising to institute in order to induce favorable Commission action. In fact, he wrote again to the Commission to make that point. This matter now seems not of critical importance. But myth becomes reality by repetition, and occasional offhand references to that exchange slur what history records—that Eaton successfully met the charge that his was only a financial involvement. There were promises to do better, but not by virtue of "significant changes from past methods of operation." The matter may also have some significance for its place in the tapestry that shows the last grant of renewal for WOOK to have been for a short term only and that now finds the Commission's Broadcast Bureau recommending another renewal for a short period.

Ownership and Management of WOOK

7. Richard Eaton is the sole stockholder of United Broadcasting which is the licensee of station WOOK. The station is operated under Eaton's personal supervision and control. He establishes the policies to be followed, makes all major decisions, and closely supervises all aspects of the station's operations. Eaton is astute, well educated, and very knowledgeable in broadcast matters. He has had substantial experience in newspaper work in Europe and in the States, was a network news commentator during the 1940's, and has been a station owner for about 20 years. Broadcasting is his sole occupation. In addition to WOOK, he has broadcast authorization in Rockville, Md., in Baltimore, in New York City, in Richmond, Va., in Miami, Fla., in Manchester, N.H., in Cleveland Heights, Ohio and in Allen Park (Detroit), Mich.

8. The WOOK studios in northeast Washington also house Eaton's FM station WFAN and his WOOK-TV. Fourteen employees are available to WOOK, but some of these also serve the FM and TV adjuncts. Eaton maintains an office in the studio building, but his principal business office is located at the Shoreham Hotel in northwest Washington.

9. Eaton regularly is present at station WOOK on Monday and Tuesday afternoons, and sometimes on Wednesday, of each week. On his visits to the station he confers with the general manager, with the WOOK program director, with the director of engineering and

from time to time, with other members of the WOOK staff. The main staff conference is generally on Monday with followups on Tuesday and Wednesday. Customarily, Eaton arrives at the station between 3:30 and 4:30 p.m., and the conferences commence upon his arrival. The schedule of weekly visits to WOOK and conferences with the manager and department heads has been in effect, with only slight modification, continuously since 1959. The meetings cover every aspect of the operation of the station, including engineering, programing, sales, and personnel. Eaton personally hires, fires, and promotes all key personnel. The hiring, promoting, and disciplining of almost all employees is subject to his approval. He establishes the pay for all key employees and either establishes or approves the pay of all other employees. He personally outlines duties and responsibilities for key employees. Eaton signs all WOOK checks, including all pay checks.

10. E. Carleton Myers is general manager of stations WOOK, WFAN–FM, and WOOK–TV. He was hired by WOOK in May 1959 as local sales manager, was named general sales manager in 1962. For the next 3 years he acted as assistant general manager, was formally appointed general manager in April 1965. He receives a salary plus an override based upon station revenues. Myers devotes full time to WOOK and has no other business interests. He is in his office on weekdays at 9 a.m. or earlier, and normally leaves between 6 and 9 p.m. at night. On Saturdays and Sundays he is present at WOOK as his schedule demands, rarely failing to be in his office on either Saturday or Sunday of any weekend. As general manager, Myers visits all parts of the WOOK, WFAN–FM, WOOK–TV building on a daily basis and is in regular touch with his engineering and programing people. He monitors the programing of the station in his office and in his automobile. He keeps on top of how the station is running in all departments—programing, technical, and sales.

11. Eaton establishes the station's programing policies. This covers program material, special program scheduling, hiring of on-the-air personnel, and personnel scheduling. The staff conference on Mondays almost invariably includes program director Clifton Holland. The latter reviews with Eaton any developments in station programing and in the programing department. If an announcer is to be hired, Holland will have interviewed the applicants and at the weekly conference will advise Eaton on the applicants and give his recommendations. The choice among the applicants is made by Eaton or with his prior approval. If Holland feels that any changes are needed in the programs or program scheduling, he discusses the matter with Eaton at the weekly conference. The basic programing format of WOOK is under Eaton's direct control and is established by him. There has never been a change in the time slot or basic format of any regularly scheduled program at the station without Eaton's prior approval. No regular program goes on the air at WOOK without Eaton's knowing what it is and approving it. Eaton even approves the hours and basic scheduling of announcers. He also personally handles the 6 p.m. WOOK news and does other air work from time to time.

12. Holland attended Howard University, has been employed by the station for 18 years, and has been program director for some 14 years. He is salaried. His responsibilities include general supervision over all of the station's on-the-air employees, generally combination men. In the technical area of operation, the announcers look to Mr. Gail Griner, director of engineering, for instruction and assistance, but Holland retains ultimate supervision at that level. Holland personally talks with each of the regular WOOK announcers almost every day. He generally arrives at the station at 5:30 a.m. and works until 6–10 p.m., depending upon his workload. On Saturdays, he customarily spends about 6 hours at the station and on Sunday about 8 hours. He personally checks on the performance of the operators, including both programing and technical operation. The basic schedules for announcers are approved by Eaton, but Holland makes shifts as they are required in the announcers' schedules, subject to Eaton's approval, and schedules announcers for appearances outside the station. Within the limits of musical format established by Eaton, Holland selects all musical selections played over WOOK, reviews for quality all commercial tape cartridges produced at the station. He takes an on-the-air turn from 6 to 10 a.m., Monday through Friday.

13. The weekly conferences with Eaton at the station include Gail Griner, director of engineering for United Broadcasting Co. Eaton is not technically trained and looks to Griner for advice and recommendations on technical problems. But Eaton's interests also take him into probing the engineering details of the operation of his stations. Equipment, personnel, expenditures, even the scheduling of engineers, are subjects for discussion between him and Griner. Practically every move of significance, even in this area, is subject to Eaton's prior approval. Every violation notice issued by the Commission's inspectors has been brought to Eaton's personal attention. Griner joined Eaton as technical director in October 1961, and has been continuously employed by United Broadcasting, his job now carrying the title of "director of engineering." He is salaried and sets his own schedule of work. He visits Eaton's Rockville and Baltimore stations frequently, has been to the other Eaton stations a total of 15 to 20 times since joining the company. His office is at WOOK. The WOOK chief engineer reports to Griner, whose duties also include the orienting of every first-class engineer hired or assigned to work at WOOK. Except when he is out of town, Griner confers daily on maintenance and equipment needs with the first-class engineer on duty for WOOK. Griner prepares worksheets and report forms for the equipment maintenance schedules. He conducts the instruction of third-class operators in the performance of the technical aspects of their duties and is involved with overseeing their performance. Griner reports and recommends to Eaton on the condition of equipment and on technical needs, and makes his recommendations for hiring, firing, and promoting technical employees.

14. The month after the designation for hearing of the WOOK renewal application, Eaton hired Hyman Cohen, a retired FCC field engineer, as technical director for his stations. Cohen is an electronics engineer with a degree in 1917 from the Johns Hopkins University.

Beginning in June 1929, he was continuously employed, until his retirement, as an electronics engineer for the Department of Commerce and its successor agencies in radio regulation, the Federal Radio Commission, and the Federal Communications Commission. In May 1945, he became Chief of the Land Inspection Section of the Field Engineering and Monitoring Bureau of the Commission in Washington, where he checked for accuracy and completeness all inspection reports for U.S. land stations, including broadcast facilities. From August 1946, until his retirement in March 1964, he was Engineer-in-Charge of the Commission's Baltimore office. Cohen has personally inspected several thousand broadcast stations in the United States, is familiar with the Commission's rules, and has made numerous determinations under those rules as to whether citations were warranted for their violation.

15. Cohen is alert, intelligent, estimable, and obviously steeped in the Commission's requirements. The coincidence of his hiring and of the designation of the WOOK application for hearing did not go unnoticed. But Bureau counsel's cross-examination of Eaton and Cohen only firmed up the applicant's explanation that Cohen was hired as part of a general long-range improvement program for all the Eaton properties. The Bureau, apart from an irrelevant reference to the possible appearance of Cohen's employment as window dressing, now makes no special point of it.

16. Eaton hired Cohen as a permanent employee, and Cohen expects to continue the employment arrangement indefinitely. His duties are to inspect the Eaton stations for compliance with the Commission's requirements and to determine whether the stations are being operated in accordance with good engineering practice.[2] He reports only to Eaton and submits a written report following each inspection. Cohen is paid a weekly salary plus expenses, and sets his own work schedule. His inspections are unannounced. Although a man in his seventies, Cohen had as of the time of the hearing inspected most of Eaton's stations at least twice. Cohen prepared testimony as to the items in all the violation notices involved in this proceeding and as to the current technical operation of WOOK. He attempted to establish the facts and to determine whether the charges of violations were correct. To do this, he studied over a period of several weeks the official notices since 1960 and the licensee's replies. He reviewed all of the available logs involved, inspected the WOOK transmitter and studio facilities numerous times, and is thoroughly familiar with the technical operation of the station.

17. Gerald Scher, formerly an attorney with the FCC for some 2 years, was employed by United Broadcasting Co. from early 1961 into 1964 in order to provide assistance in the overall supervision of the Eaton stations and in helping bring station operations up to Commission requirements. Scher was hired by Eaton and reported only to

[2] In discrediting Cohen's expertise and his opinion of WOOK as a technically superior station, the Bureau must have overlooked what is publicly recorded beginning at transcript p. 32 in docket 15995 where about a month before his appearance in the WOOK case the same Cohen was offered as a witness by the same Bureau and vouched for as an expert in these matters. See also initial decision of Presiding Examiner Irion in that case, *Kent-Sussex B/Casting*, FCC 66D-22 passim, released April 29, 1966.

106-501—66——4

him. Scher's office was at the Shoreham Hotel initially, later at WOOK. In the course of his employment, he visited all of Eaton's stations. He was responsible for investigating the official notices received by WOOK in 1961 and 1962 and participated in drafting the replies to the Commission. He was also given responsibilities for supervising the WOOK operators to prevent errors in logging and in the operation of the station.

18. Myers, Griner, and John Galloway, the office manager, function with respect to WOOK, WFAN–FM, and WOOK–TV. The first-class engineers at WOOK are responsible for WOOK and WFAN–FM. The television engineers are available as needed, and have been assigned from time to time to WOOK problems. The WOOK announcers hold third-class operator licenses. Full-time operators work 5 days a week for a total of 20–26 hours per week. They are salaried. They do no sales work and have no other duties at the station. First-class engineers work a 40-hour week, do no air work.

19. There are now two engineers at WOOK and WFAN–FM who hold first-class permits. In 1961, however, WOOK had only one engineer with a first-class license. In 1962, that engineer was discharged and his successor was, during the summer of 1964, also discharged. It was during this period that a substantial number of rule violations was charged in the operation of WOOK. By way of introduction to considering the charges, the station's position is that poor performance by its first-class engineer during that period was responsible for the station's difficulties. WOOK considered the operator with the first-class permit to be its chief engineer. The Bureau goes to considerable length to make the point that the first-class operator was not really a chief engineer because he supervised no other engineers, had maintenance and other blue collar functions, and had only employee not management duties. The point is obscure unless the Bureau has this engineering circumstance in mind when in its proposed findings and conclusions it charges Eaton with having distributed meaningless titles without delegating matching functions.

Violations Charged—Inspections During Short-Term License

Inspection of March 8, 1961

20. A March 8, 1961, Commission inspection of WOOK resulted in the issuance of a notice of violation which specified 19 violations covering operating and program log violations; e.g., not dating logs properly, failing to maintain a defense alert system, not signing logs, and not making required entries on the logs. On May 1, 1961, a response to the notice and signed by Eaton was filed on behalf of the station. Eaton indicated that the problems set out in the notice were attributable to employee neglect which was brought on in large measure by activity associated with the construction of new WOOK facilities. Corrective measures, among them the hiring of Gerald Scher, had been taken, it was represented, to avoid future logging violations. The Commission was also told that in March, Eaton had acquired the services of Gail Griner to be employed as chief engineer for Eaton's station WSID in Baltimore, and that in addition to his

WSID duties Griner was expected to provide some supervision over the technical operations of stations WOOK, WFAN-FM, and over Eaton's WINX in Rockville. The Bureau, apparently not making much of the logging and other problems uncovered at this inspection, did not file detailed findings of fact with respect to the particulars of the charges. It may also be observed, however, that the Commission did withhold regular renewal, its March 22, 1961, action shortly after the inspection being for a short term, as indicated in paragraph 6, above. On closer examination, the charges arising out of the March 8 inspection develop as follows.

21. The charge in alleged violation No. 1 was for "failure to maintain an operating log" under then section 3.111(b) of the Commission's rules on these dates: April 24, 1960, November 6, 10, and 27, 1960, December 25, 1960, January 9, 10, 16, 19, 21, 27, and 28, 1961, and February 6, 1961. The charge was really based upon unspecified errors in the logs, not on the absence of logs. The only available log for any of the dates charged met Commission requirements. The charge is deemed not to have been established.

22. No. 2(a) in the notice was for failure to make entries in the operating log of "the time station begins to supply power to the antenna and/or the time it stops." Conjecture would possibly place this charge in context as a citation directed against the station's general practice. But no dates were specified, and the charge is by the terms of pretrial understandings deemed not to have been established.

23. No. 2(b) was for failure to make entries for June 5, November 6, 20, and 27, 1960, and February 6 and March 5, 1961, in the WOOK operating logs under then section 3.111(b)(2) of "the time the program begins and/or ends." WOOK operates on a 24-hour schedule every day except for midnight Sunday to 6 a.m. Monday. All of the dates in question are Sundays or Mondays. The time programing began and ended was shown in the program log as required under then section 3.111(a). The charge of violation arose from the circumstance that the same requirement also was imposed for operating logs under section 3.111(b)(2) of the rules then in effect. The violation is deemed to have been established. But its significance must be weighed in the light of the fact that the rules no longer require the entry on operating logs.

24. Charge No. 3 was for "failure of persons responsible for the operating log to sign the log when going on duty and/or when going off duty" on 3 specified days in November 1960, and on 4 specified days in January 1961. The evidence of violation is vague. The defense relies on the circumstance that on the only specified date for which a log is now available no violation appeared. The charge must be deemed not to have been established.

25. No. 4 was for "failure to enter in the operating log at half-hourly intervals readings of antenna current and frequency deviation" during the hours 1:30 to 5 p.m. on November 4, 1960. There was proof in support of the charge and no countering evidence. The violation is deemed to have been established for the afternoon hours, as indicated above on November 4, 1960.

26. Violation No. 5 was charged for "failure to enter in the program log the name of the sponsor of news programs shown in the log as having been 'announced as sponsored.'" The charge was directed to the 6 p.m. news on 4 days in November 1960 and to the 12:29 a.m. news on November 1, 1960. The log for the latter date does not show a news program for 12:29 a.m. For the other dates, the evidence clearly shows that the 6 p.m. news was unsponsored. This violation is deemed not to have been established.

27. No. 6 charged that the program logs in the period February 8 through March 7, 1961, did not show that each sponsored program was so announced. The licensee previously used a separate column in its program log form to show "announced as sponsored." The citation was based on the absence of such a column and the check marks it would otherwise have contained. The logs do identify the sponsors of the commercial programs and of announcements, and show the time of broadcast, with the entries for each commercial announcement initialed by the announcer. The licensee intended in this way to show that the sponsor was identified. The Commission has not specified a required log form. No violation has been established in this instance.

28. The charge in No. 7 was directed to the fact that program logs described programs as "entertainment" instead of as "music," "drama," "speech," etc. Even inside the Commission there had been some disagreement over this question and over whether the WOOK practice was acceptable. The Bureau has abandoned this charge.

29. Violation No. 8 was charged for failure of the program logs on some days in November 1960 to show that station identification announcements "are actually made as required." More than enough announcements were given, but in some instances were not given at the correct time, i.e., the hour and half-hour. The announcements also were not logged during a "special broadcast—election returns" on November 8, 1960, between 9 p.m. and midnight. This violation is deemed to have been established.

30. No. 9 was for not properly dating operating logs on certain dates in January 1961. There were no days unaccounted for and each log contained the correct day, e.g., Monday, Tuesday, etc. On some of the specified occasions in January, however, the correct day of the week was followed by the wrong date, the error generally running to 1 calendar day. The violation was established.

31. No. 10 was for not having "explained elsewhere in the log," as required, key letters and abbreviations used in the WOOK program logs in February and March 1961. In January 1961 new WOOK log forms were prepared in which the legend, or explanation of symbols, was inadvertently omitted. Thereafter, a separate legend was prepared and distributed to all air personnel for their use. The legend appeared in the January log and on the logs for February 7 and 9 and for March 5, 1961. The violation is established for certain unspecified days during the 2 months in question.

32. Violation No. 11 was charged for "failure to indicate in the operating log the cause and/or duration of each interruption to the carrier wave" on two specified dates. This violation has been established.

33. No. 12 was for not having equipment for receipt of broadcast alerts and all clears under the conelrad system. WOOK did not have such equipment at the time of the inspection. A determination had been made to replace the conelrad equipment prior to completing a move to new studios. The new equipment was on order at the time of inspection, was subsequently delivered and installed. The violation was established, but what was involved in this citation was an hiatus pending replacement of equipment.

34. Violation No. 13 was charged for "failure to enter names of the sponsors of 'public ser.' announcements" on a number of logs in November 1960. The charge, in referring to sponsors of public service announcements, seems improperly framed. It is also not clear, in any event, that such an entry was required under the then governing rule, section 3.111(a) (2). The violation is deemed not established.

35. The charge in No. 14 is to the effect that from the operating log "it would appear" that the WOOK transmitter was operated without a duly authorized operator in attendance on various dates. The inspector raised a question from his review of the logs, and had no knowledge of whether an operator was in fact on duty. The licensee denied in its reply of May 1, 1961, and at hearing that at any of the specified times a licensed operator was not on duty. The program logs show the licensed operators to have been present. The violation as charged is not established.

36. No. 15 is for failing to keep a program log between the hours of 6:05 and 9 a.m. on February 5, 1961. The station was operating during the hours specified. Its explanation is that the missing hours were logged but that the log material for that period was somehow separated and misplaced. All of the evidence on this charge, however, requires a finding that the violation was established.

37. The charge in No. 16 was to the effect that corrections of entries in the program log were not always made properly. No dates were specified, no supporting proof was offered, the charge has been abandoned by the Bureau.

38. The violation charged in No. 17 is directed to 2 days in October 1960 and to 8 days in November 1960, and to occasions on those days when "the persons responsible for the program log" did not "sign the log when going on duty and/or going off duty." This violation was established.

39. No. 18 alleges that the "time programs actually begin and end is often omitted from the program log," and the station's attention was directed to a day in October 1960, and to 6 days in the following month. This violation was established.

40. No. 19 referred to the operating log for July 4, 1960, and noted that "it would appear that log entries are being made in advance and not at half-hourly intervals as required." The log for July 4 was not available. The licensee's May 1, 1961, response to this charge denied

that advance logging was a practice. The available evidence is deemed to have established the violation for the date specified, but this episode cannot be considered as more than an isolated circumstance.

41. Looking back, the inspection of March 8, 1961, was thorough, perhaps even finicky. It was made while WOOK was in the process of transferring operations from its old site at Eighth and Eye Streets NW. to its present location with studios at 5321 First Place NE., and its transmitter and antenna at another location. At the time of the inspection WOOK was broadcasting from its old transmitter site under temporary authority for remote control from its new studios. Eaton had been involved in supervising the construction of the new facilities, and preoccupation with these problems and the dislocation incident to the move to the new facilities contributed to the violations. The notice covering the inspection was to a large extent concerned with entries in the program and operating logs. Soon after the inspection, a management meeting was held with all station operating personnel in which duties and practices were reviewed. Eaton conferred personally at the Commission's offices with the inspecting engineer. To tighten up, a daily check of program and operating logs was instituted at the station. Gerald Scher, who had at the outset of his employment with Eaton in early 1961 been assigned to reviewing programing proposals and existing programing of the Eaton stations, was now given the responsibility for insuring proper performance by the announcer-operators of their technical duties. Working in cooperation with Griner, Scher personally reviewed the program and operating logs every few days. Since it appeared that a number of logging problems resulted from omissions in the preparation of logs and forms, John Galloway was hired as traffic manager in April and given the duties of preparing and maintaining the program logs. The program log form was revised to meet the problems which developed from the inspection. Griner also assisted in the correction of logging problems. He prepared a new WOOK operating log form, personally instructed all operators in the technical operation of the station and in the keeping of the operating log, instituted a daily check of the operating logs by himself and by the first-class engineer, prepared a maintenance program for the WOOK engineer with separate schedules and report forms for daily, weekly, monthly, and quarterly maintenance. Operators were told that entries made in advance would bring dismissal, and were checked during the performance of their duties to insure compliance. They were also notified and corrected whenever the daily checks of the program and operating logs disclosed error. The conelrad receiving equipment was installed prior to the licensee's reply to the official notice.

Inspection of May 25, 1961

42. After the move in early 1961, the station filed its license application to cover the move and the installation of its new transmitter. A routine Commission inspection on May 25 of the new equipment and installation was followed by the issuance of an official notice of violation which charged "noncompliance with section 3.40(a)(8) * * * in that at the time of inspection the control for varying the transmitter

power output was not operating." Section 3.40 was (and is now as 73.40) a rule having to do with design specifications for transmitters. The Commission has for many years followed the practice of approving transmitters by type. The transmitter involved in the inspection was bought new, had been type accepted. The charge was, therefore, improperly framed. At the time of the inspection, however, the control for varying the power output was in fact not operating. The problem was due to slippage in the clutch of the power control unit which was an integral part of the transmitter as delivered by the manufacturer. Although the station cannot under the circumstances be held responsible for any design problem, it is chargeable with any maintenance default. There is, however, no evidence of the duration of the problem before the inspection nor of the licensee's awareness of the difficulty before the inspection. The slippage of the clutch was corrected and the control made fully operative shortly after the matter was called to the station's attention. The Commission's inspecting engineer considered the defect corrected and closed the case on the matter.

Inspection of August 9, 1961

43. This inspection—which takes on added significance because it was made after notification to the licensee of short term renewal, putting the station on trial as it were—resulted in an official notice charging violation of five separate Commission rules. The station was cited for operating during nighttime hours with power in excess of that authorized in its license, for not logging daily observation of its tower lights, for not logging the transmitter operating constants of the last radio stage, for not terminating operation by remote control during periods in which the remote control metering equipment was not operating in a normal manner, and for failing to make entries in the operating logs of the time the programing ended and the time the carrier was turned off. The station's response to the notice was signed by Eaton.

44. Charge No. 1 flowing from the August 9 inspection called attention to the appearance from an examination of operating logs that the station was operated with daytime power of 1,000 w during the nighttime hours 8:30 through 11 p.m. on July 28 and July 29. Available evidence supports the proposition that the station was operated on the 28th at its authorized power, but that the logkeeping was improper. The operator on duty that evening had neglected to enter transmitter readings at required half-hourly intervals and later, fearful of losing his job, quickly filled in the log form with the figures of his last readings taken at 8 p.m. This episode occurred during the first week of operation under the required nighttime power cutback. The operator on duty, on a determination by management to be ordinarily reliable and otherwise suitable, was reprimanded and properly instructed as to new requirements. On the 29th, however, the evidence establishes that power in fact had not been reduced, as required, and from 8:30 until 11 p.m. the station was operated with daytime power of 1,000 w instead of its authorized nighttime power of 250 w. As indicated, the power changeover was a new development in the station's

operation, the Commission having first authorized WOOK to operate with 1 kw by its telegram of July 21 authorizing program tests. It was necessary to explain to all operators the hours of authorized daytime power and the mechanics of switching power. July 29 was a Saturday and the operator on duty was a part-time employee who had not received instruction as to the power change. The evidence supports the finding that the violation was inadvertent but nevertheless avoidable and therefore chargeable to the station.

45. No. 2 was to the effect that the WOOK operating logs for various dates between May 3 and May 15, 1961, did not show a daily visual observation of WOOK tower lights as required. Clearly, the WOOK tower light entries were in fact made. A combined operating log form was used for both WOOK and WFAN–FM, a vertical division of the page separating the FM readings on the left from the WOOK readings on the right. The column for WOOK tower lights on a supply of logs mistakenly labeled the WOOK column "WFAN Tower Lights." But the mistake is obvious because the logs in all other pertinent respects showed that the entries were for the WOOK meters and tower lights. The impact of this default must be deemed to be slight.

46. Violation No. 3 charged that the WOOK operating logs did not, as required, contain operating constants for the last radio stage from 5 p.m. on May 9, 1961, to 10 a.m. on May 10, 1961, and when the standby transmitter was operated on May 26, 1961. The constants were omitted, as charged, on May 9 and 10, and omitted at 1 p.m. on May 26. The violation is deemed to have been established.

47. The charge in No. 4 that WOOK failed to cease operating when its remote control equipment was not operating in a normal manner is directed to the hours of 2 to 10 a.m. on June 14, 1961. The operating log for that date shows no readings of antenna current, plate voltage, and plate current during the specified hours. The remote control meter circuits were not functioning properly. The violation is deemed to have been established.

48. No. 5 notes that entries were not made in the WOOK operating logs on 4 days in April 1961 of the time programing ended and the carrier was turned off. These were Sunday nights at midnight, that being the only time that WOOK went off the air. This violation was established.

49. Reviewing the results of this August 9 inspection, the violations had to do with operating log entries, operation with excessive power on one occasion during nighttime hours, and failing on one occasion to cease operation by remote control, as required. By virtue of its log check procedures instituted after the earlier inspection, station management was aware of the deficiencies before the inspection was made on August 9. With respect to the remote control violation, the operating log from which the Commission's inspecting engineer picked up the default contained the notation that the "remote unit at xmitter was apparently damaged by lightning shortly after midnight." The violation also occurred during the early stages of the station's introduction to remote control operation from its new studios. The part-

time employee who failed to change power on July 29 was reprimanded and was given the kind of instruction which management had earlier neglected to furnish. The operators were again reminded of requirements. WOOK program logs were changed to include a specific instruction on the log at the prescribed time to increase or decrease power, and all WOOK program logs have carried the notation since that time. Eaton directed Scher to be responsible for the operators' making power changes at the correct time, either by visiting or telephoning the WOOK studios. Scher did telephone the studio every evening for 6 weeks to be sure that the power reduction was being properly accomplished. The error in the log forms which resulted in the citation for failure to make tower light entries had been corrected by a new log form some 6 weeks before the inspection. The operator who failed to make "off" entries for program and carrier on the four Sundays in April was replaced. Scher's office was moved from the Shoreham Hotel to a room in the WOOK studios across from the control room and he began a personal daily check of the program and operating logs.

Inspection of January 9, 1962

50. On January 9, 1962, the station was inspected again and an official notice issued. WOOK was still operating under its temporary, short-term extension of license. The inspection disclosed numerous failures to change power at the times specified in the station's authorization, a number of improper log entries, and failures to make required entries on the logs. The station's response was signed by Eaton.

51. The charge of failing properly to change power at sunrise and sunset was directed to the period November 21 to December 13, 1961. During that time, the following was established: On six occasions, the station was late in reducing power at sunset, the delays ranging from 7 minutes to 55 minutes. On 17 days, the station was late in increasing power at sunrise, the delays ranging from as little as 5 minutes to as much on one occasion as 2 hours and 50 minutes.

52. In violation No. 2(a) the station was also cited for failing to maintain an accurate operating log because on the dates involved in the charge of not properly changing power it logged the scheduled time for change, not the actual time. The log entries were improper, as charged, were made by Clifton Holland who is now the station's program director. Because he was otherwise busy, Holland was late in making power changes, then made improper log entries to cover in order to avoid detection by Scher in the latter's review of the logs. No. 2(b) of the notice was for logging two announcements at the wrong time on January 9, 1962. The evidence establishes that one of these was logged as having been aired at 11:29 a.m., 20 minutes later than the time it was actually broadcast. The other spot was logged as having been made at 3:03 p.m., when in fact it was broadcast just before 3 p.m.

53. Citing logs for certain dates in December 1961 and January 1962, the charge in violation No. 3 was to the effect that corrections

to entries in the program and operating logs were not always properly made. The WOOK program logs were pretyped, with the names of programs and announcements and scheduled times entered. In the logs for the specified days there occasionally was a line drawn through a pretyped program or announcement. In some of these cases another program or announcement was written in. Customarily with respect to the crossed-out entry, no time of broadcast was shown in the column provided for such an entry, but there was an entry indicating broadcast time for the program or announcement set out in handwriting. There is no question raised as to whether the log keeping accurately reflected matter broadcast on the specified days. The charge relates only to the matter of the corrections described. The applicable rule, then 3.115 and designated "correction of logs," provided that:

> No log or portion thereof shall be erased, obliterated, or willfully destroyed within the period of retention provided by the rules. Any necessary correction may be made only by the person originating the entry who shall strike out the erroneous portion, initial the correction made, and indicate the date of correction.

Eaton's reply to the official notice labeled the corrections described above as "strike-overs" and indicated an understanding that Commission requirements somehow distinguished between strike-overs and corrections. The explanation noted that station employees

> * * * are aware and have been carefully instructed as to the procedures to follow with respect to making corrections. They were unware, however, that these procedures—lining out, initialing, and dating—applied to strike-overs even where the strike-overs could be read or interpreted without difficulty. They have been instructed, accordingly, and strike-overs will be treated in the same manner as other corrections.

The licensee's position now is that its practice was no violation. It contends that the strike-overs were not corrections, but were original log entries covered by the log keeper's signature at the conclusion of his tour of duty. Each side on this question finds support for its position in the legislative history of the new rules on logging and corrections. See *Report and Order*, 2 FCC 2d 291, 293–294 (1966), where the Commission notes that it has changed the rule to make it clear that the correction requirements apply "not only to logs but to preprinted logs and schedules which eventually become logs, as well." To avoid bogging down over settlement of this minor and not critical question, it is enough to point out that the Commission in that report and at the place cited above also stated its view that the strike-over practice was a violation of the way the Commission had interpreted its earlier rule. So, this must be said to be controlling. But the rule must also be found to have been not unambiguous and the violation must be considered to be something less than a striking default. The Bureau seems to have been of a similar view—its reply to the WOOK proposed findings took issue with the station's interpretation of the rule, but its own findings omitted any data on the violation charged.

54. No. 4 in the official notice covering the January 9, 1962, inspection was concerned with entries for certain meter readings. It was

charged that on December 4, 1961, the operating log did not "show required meter readings between 2:32 and 2:49 a.m. while the auxiliary transmitter was being operated with intermittent carrier for test purposes." The log for that date did, however, contain the following entry signed by Griner at 2:50 a.m.:

> G. Griner—2:30 a.m. Aux. a transmitter on 2:32 a.m. to 2:49 a.m. with intermittent carrier; for test purposes.

The charge must be deemed to have failed. The rule alleged to have been violated applied only to regular station operation. The requirement for auxiliary transmitter testing is only that a record be made of the time and result of the test. It was also alleged in No. 4 that the operating constants for the last radio stage were not entered in the WOOK operating log at certain times on December 9 and 13, 1961. This violation is deemed established. Appraisal of this default must, however, take into account this notation from the logs for the specified dates:

> Ice/rain storm caused low ant. and PA ip readings. Operator did not record meter readings during this period. Instructed to record readings in the future. /s/ G. Griner, 1/4/62.

The WOOK operating logs since that time have contained the following direction:

> ALL meter readings MUST be taken every ½ hour, even though limits have been exceeded. RECORD THE ACTUAL READINGS.

55. No. 5 charges as a violation at the time of the inspection that the remote transmission line current meter was reading 3.4 percent in excess of the meter at the main transmitter. The applicable rule requires that the remote meter read within 2 percent of the meter at the transmitter. The meter had been regularly calibrated, as required. The station's response to the notice recorded that the matter had been corrected, promised to continue weekly checks of the meters. The violation is established, but the irregularity is of the most overparticular variety. The remote meters being read had a minimum scale division of one-tenth ampere. The error of 3.4 percent in the reading of 3.5 amperes amounted to approximately one-tenth ampere. Since the remote reading may read within 2 percent of the meter at the transmitter, the actual error (or 1.4 percent) amounted to less than half of one scale division on the remote meter. The variables in this type of reading are such as to dilute the impact of the charge based upon only one observation.

56. The station was cited in No. 6 because at the time of the inspection the control for varying output power for the main transmitter did not provide sufficient range for raising output power above 235 w for nighttime operation, its licensed nighttime power being 250 w. The violation is deemed to have been established. The power control rheostat had been giving trouble since the installation of the new transmitter some 6 or 7 months earlier. A replacement had been ordered and was installed immediately upon receipt of the official notice.

57. No. 7 was to the effect that there was not available the results of performance measurements for the auxiliary transmitter made during the past year. The requirements for auxiliary transmitters do not appear to have required annual performance measurements. In any event, the WOOK auxiliary transmitter was not authorized until December 1961, when its initial license application was filed. This was less than 1 month before the inspection, and annual measurements would not have been required at that time. The violation was not established. The Bureau did not propose findings on this matter.

58. With respect to No. 8 in the official notice, it was established that for certain periods in December 1961 the station in connection with tower light observations did not record sufficient detail in the operating logs to comply with the requirement that log entries show that the operation of tower lights was checked each day and that at the time of the check they were functioning properly. The entries on the logs for the specified days, recording only that the lights were off, did not meet requirements.

59. Reviewing this inspection—the logging of tower light observations was repaired by relatively simple changes in the log form. The station had discovered this problem on its own and had taken corrective steps before the inspection. The failure of the transmitter's power control rheostat was repaired, as indicated earlier. The violation was established, but only with respect to the defective piece of equipment. The transmitter operating at the maximum of 235 w output power was within the Commission's requirements permitting a power variation of 10 percent under licensed power. Clifton Holland, a long-time employee and otherwise reliable, but who was responsible for the erratic power changing and the improper entries of power changes in November and December of 1961, was put on probation for 90 days, was given new instructions, additional assistance, and more rigorous surveillance by Scher. The latter had discontinued after 6 weeks the regular evening checks by telephone to determine that the power changeover had been properly made. The record shows that Holland had been too busy to give sufficient care to his technical duties. The circumstances of his obvious intelligence, of his knowledgeability about broadcast requirements, and of his long-time employment by Eaton permit the inference that there was somehow communicated to Holland by the WOOK owners and managers an unsuitable evaluation of the priorities for proper station operation. After the official notice, the station purchased and installed an electric control unit to permit power increases and decreases to be accomplished automatically at the prescribed times.

Violations Charged—Inspections After Regular Renewal Application Filed

60. The WOOK short-term license expired during the summer of 1962. To pick up the continuity of license, application to renew for

the regular term was filed in April 1962 and considerably later, in 1965, was designated for hearing in this proceeding.

Inspection of July 8, 1964

61. The station was inspected on July 8, 1964, and two official notices of violation were issued. The second, dated August 12, 1964, charged that the receiver for emergency action notification was not operating at the time of the inspection. In fact, the previous day's check found the emergency broadcast system monitor to be operating normally. It was inoperative at the time of the inspection. Examination by the station's engineer disclosed a shorted filter capacitor and a blown line fuse. The replacement of these components and the return to service were accomplished shortly after the inspection. The applicable rule—73.922—requires the licensee to install and to maintain the necessary equipment. Under the circumstances that the equipment failure was promptly diagnosed and quickly repaired, the violation, if any, was at worst of the most technical kind and of thin consequence.

62. The other notice, dated July 24, 1964, cited 15 numbered paragraphs of violations of Commission requirements. Among other things, the station was charged for not having functioning transmitter interlocks to provide protection to personnel from high voltage circuits, for not having adequate equipment to control the transmitter power from the remote position, for not having had its antenna tower properly painted, for failure to maintain the station's operating power within the prescribed limits of its authorization, and for not having qualified operators on duty. There were also charges of operating and program log violations of omission, duplication, and error, of failure to cease operation when required equipment was not properly functioning, for the failure of the station's employees to take corrective action when the equipment was not operating properly, for not changing operating power as required by the station's license, and for failure to maintain the remote meter within prescribed limits. The station's response to the notice was signed by Griner and ratified by Eaton.

63. Because it was considered that modulation adjustments could more efficiently be made with the transmitter in operation, transmitter interlocks at WOOK were disabled. As a result, the transmitter was not automatically rendered inoperative when the cabinet front door was open. That the interlocks were not in service is charged in paragraph No. 1 of the notice as a violation of section 73.40(b)(3) of the rules which requires only that:

> All plate supply and other high voltage equipment, including transformers, filters, rectifiers, and motor generators, shall be protected so as to prevent injury to operating personnel.

It was the WOOK position that since the cited rule does not specifically require interlocks, its practice under circumstances in which the transmitter is separately located, under lock and key, and with access

to it only by station engineers was a reasonable "protection to operating personnel." In the absence of a more clearly stated requirement or of evidence of established good engineering practice, the violation cannot be said to have been demonstrated. In any event, because the question was raised the interlocks were returned to service after the matter was called to the station's attention.

64. The violation charged in No. 2 was for not being able at the time of inspection to control the transmitter operating power from the remote control position or from the transmitter location. The official notice was framed in terms of rules which have to do with the design and installation of required equipment. The necessary remote control equipment was in fact in place, but at the time of the inspection had failed because of a loose set screw on the shaft of the control rheostat. The inspections of May 25, 1961, and of January 9, 1962, had uncovered similar equipment difficulties. Finally, as a result of this July 1964 inspection, the station purchased and installed a new type of motor control which, it was considered, was a heavy duty device, improved over the old control.

65. The charge in No. 3 went to the proper painting of the WOOK tower. The tower is 275 feet high. The violation is concerned with the fact that three legs of the tower (not the fourth leg nor any cross members) were not painted between the 100- and 125-foot levels from the ground. The 25-foot unpainted interval was not noted after earlier inspections following construction in 1961. The irregularity is established but is not of substantial importance. The upper portion of the tower was fully painted, and on an overall basis more than 90 percent of the entire structure may be said to have been properly painted. Tower repainting since the matter was called to the station's attention has cured this question.

66. No. 4(a) charged violation for failure on a number of days in May and in June 1964 to maintain daytime and nighttime operating power of the station within permissible limits. The citation was based entirely upon examination of the antenna current entries in the operating logs. If the readings of antenna current were correct, WOOK was operated with excessive or at times insufficient powers as charged in the citation. But the logs are required to contain other entries which relate directly to station power, and in evaluating station performance all of these entries must be considered together with the known facts about the station operation. For example, the logs are required to contain the transmitter voltage and amperage which, when multiplied, give the input power of the transmitter. When the output power computed from the antenna current is divided by the transmitter input power, the result is the transmitter efficiency, i.e., the extent to which the transmitter can convert power input into power output. Transmitter efficiency, like antenna resistance, is a fixed value with only slight variations over long periods of time—for WOOK it was 69 percent daytime and 67 percent nighttime. When all the log

entries for any particular time are considered, they must if they are correct produce one of these transmitter efficiencies for nighttime or daytime operation, whichever is applicable. When this determination is made from the antenna currents listed in the WOOK operating logs on the days in question, the indicated efficiencies are incorrect, varying from a high of 113 percent, which is a physical impossibility, to a low of less than 48 percent, which would probably have impaired transmitter tubes because of the excessive heat from inefficient operation. Operation with excessive power was therefore not proven. But the transmitter power taken from antenna current alone was incorrect, and errors in meter readings must therefore be deemed to have been established.

67. The violation charged in No. 4(b) was established. WOOK did operate from midnight to sunrise on March 31, 1964, with daytime power of 1,000 w instead of its authorized nighttime power of 250 w. The irregularity resulted from a defective relay which automatically reverted the transmitter to daytime power. The operator on duty was aware of the failure, should have taken the transmitter off the air, received a separate official notice for the irregularity.

68. In paragraph No. 5 the station was cited for permitting operation from April 19 through July 8, 1964, by an operator who had not qualified for the broadcast endorsement on his third-class operator's permit. The violation is deemed to have been established. The operator had twice taken the test for third-class license, was told after the second test that he had passed, and notified Griner and Holland to that effect. In fact, he had received a license but not with the required broadcast endorsement. He appeared not to have been aware that he had not taken the test required for the endorsement. Immediately after the station learned that the license did not have the endorsement, the operator was suspended until he passed the additional test.

69. No. 6 charged violation of section 73.93 because the operating logs for May 1 and 8, 1964, and for June 17, 1964, do not show an operator on duty between 11:30 p.m. and midnight, and for June 13, 1964, do not show an operator between 6 and 7 p.m. On the last date of June 13, the 7 p.m. entry was inadvertent error—the correct entry, as borne out by the program logs, should have been 6 p.m. The matter of the logs for the first three specified dates relates to the fact that one entry shows an operator signing off at 11:30 p.m., the next signing on at 12 midnight, and no initials for the operator on duty during that half-hour. WOOK is a 24-hour operation, Monday mornings excepted. New log sheets are commenced at midnight. The half-hour gap in time reflected a change at 11:30 p.m. of operators, who also keep the logs at WOOK, and the fact that the new log keeper signed the log sheet for the new day at the time of his first log entries at midnight. There is apparently no Commission requirement, certainly not in the cited section 73.93, that the licensed operator on duty be identified in the operating logs. The only person required to be identified is the

log keeper and that was done. In all cases specified in this charge No. 6 the operating log entries at half-hour intervals were properly made. The program logs show that licensed operators were on duty on all of the occasions specified. The station was operated by licensed operators and the violation charged is deemed not to have been established. But to avoid the raising again of this question, the practice has been instituted of making appropriate entries on the WOOK logs to demonstrate continuity of operation.

70. The evidence with respect to No. 7 establishes that the station did not, as it was required to do, cease operating by remote control between 9:30 and 11:30 p.m. on June 21, 1964, at a time when remote meter readings could not be made because the remote meter circuits were operating improperly. The difficulty had arisen as a result of sluggish operation of the stepping relay in the remote meter circuits.

71. The charges in Nos. 8 and 9 relate to various items of housekeeping in maintaining logs. Among the matters asserted were failure of the WOOK operators on various dates to sign the logs, to show the times of starting or going off duty, and to indicate whether the entries were in standard or daylight saving time and whether for a.m. or p.m. Additionally, the charges covered various omissions of log entries at one of the required 30-minute periods on certain dates and failures on three occasions to log the on and off times for the carrier. The violations, deemed to have been established, were for the most part admitted by the licensee and corrective steps taken.

72. No. 10(a) charges failure to exercise proper diligence in keeping the operating log in that there were two sets of entries in the operating log for May 1, 1964, for the period 6:30 to 10 a.m. This arose from confusion in review of the operating logs which disclosed an apparent lack of entries by the two operators on duty from midnight, April 30, to 10 a.m. on May 1. One of the operators attempted a reconstruction of his log entries covering the period 6 to 10 a.m. In fact, the log entries had been made and were on the log sheet for April 30, were identified as May 1 entries, and were signed. This was discovered and the reconstruction was dropped. The reconstructed entries were not signed and do not, it is now contended, constitute a log. The argument fails. The two sets of entries do not correspond. The reconstructed entries may not have constituted a proper log, but the making available to the Commission's inspector of two varying sets of entries supports the charge of violation of the rule requiring maintenance of an operating log.

73. The evidence on No. 10(b) establishes logging violations: For May 1, 1964, the operating log shows that power was decreased to 250 w at 7:47 p.m., when in fact the half-hourly meter readings indicated that the decrease occurred between 6 and 6:30 p.m. The operating logs for June 7 and for July 2 and 6, 1964, contain similar errors. In all instances except one, the record of transmitter meter readings indicates that the power changes were made at the correct time. In the

one exception, a decrease to night power was involved and the readings establish that the change was made too early.

74. No. 10(c) charges a violation of the log rules in that the log for May 13, 1964, showed transmitter readings at 5 p.m. when the log indicated that the station was "off the air" from 4:40 to 5:25 p.m. as a result of lightning striking a power line. The power returned sporadically during the power failure. The operator made log entries for the transmitter which did operate when the power briefly returned. It was not possible, however, to return to full operation until 5:25 p.m. The explanation was clearly credible and the charge was uselessly pressed at hearing.

75. The charge in No. 11 alleged a failure to indicate in the operating log for March 29, 1964, that the tower lights were observed to be operating properly. In fact, appropriate log entries did show compliance with the Commission's requirement that an observation of tower light operation be made every 24 hours, and this part of the charge fails. The official notice also cites the station for not following required procedures in connection with an entry "tower lights are out" which the notice alleged was "not explained." But the station did explain the entry and its explanation, as follows, satisfies that it may not be faulted for its conduct on this count:

> In brief, the normal check of WOOK tower lights is made in the evening shortly after dark in accordance with the rules. The entry for the night in question indicates that the tower lights were properly functioning. The entry in question is a result of an additional check procedure utilized by station WOOK. This check [is] immediately before dawn so that, in the event there should have ben any failure, the WOOK engineering department will be alert to repair it during the forthcoming day.
>
> In this instance the operator did not get an indication at the remote control panel that the lights were on. However, it was dawn at the time and notification to the FAA would have been pointless.
>
> A check of the equipment concerned during the day did not disclose any malfunction. It is possible that at the time that the operator in question made this final check the lights, which are operated automatically by photoelectric cell, had already gone out due to daylight. It should be noted, in this connection, that on this particular day the operator in question was on duty until 6:30 a.m. which is long past dawn on March 29 of the year.

76. The violation in No. 12 was established in that, as charged, there was a failure of the operator on duty either to correct improper operation as reflected by abnormal meter readings of antenna current and plate voltage beginning at 5:45 a.m. when power was increased or to take the station off the air.

77. No. 13 charged numerous errors in the maintenance logs. The evidence establishes, for example, the following violations: The WOOK maintenance log for May 28, 1964, did not show a failure in the main transmitter, which occurred at approximately 1:40 a.m., and the necessary maintenance work performed on it. The entry for operation of the main transmitter as "O.K." erroneously indicated the time as 1:18 p.m. rather than 2:32 p.m. The WOOK maintenance

106-501—66——5

logs do not show complete inspections on 5 days in each of the weeks of February 9, April 5, April 19, and May 17, 1964. At the time of the Commission's inspection, the maintenance logs did not show the amount of time exclusive of travel devoted to maintenance duties on 5 days of each week. The maintenance logs for April, May, and June, 1964, did not, as required, show whether the auxiliary transmitter was tested at least once each week. These maintenance log violations are in measure explainable by the circumstance that the requirement for the keeping of such logs was relatively new and experience in its application limited. The station had prepared a form of maintenance log to cover requirements. Also, its chief engineer then—or first-class operator—had made the necessary inspections. But the entries with respect to the transmitter were made in his personal notebook and were not placed on the WOOK logs.

78. It is established with respect to No. 14 that WOOK changed power on May 1 through May 12, 1964, at the wrong times. With the exception of May 3, 1964, when the change occurred at 6:15 a.m., the change to daytime power was made at approximately 6:30 a.m. The change to nighttime power was at approximately 7:45 p.m. The authorized times for the power changes in the month of May were 6 a.m. and 8:15 p.m. On July 5, 1964, the change to daytime power was made at 6:29 a.m. and the change to nighttime power at 9:01 p.m.; on July 6, the change to daytime power was made at 6:15 a.m. and the change to nighttime power at 8:44 p.m.; and on July 7, the change to daytime power was made at 6:16 a.m. and the change to nighttime power at 8:55 p.m. The authorized times for these changes in the month of July were 6 a.m. and 8:30 p.m. The station had been cited on other occasions for not properly changing operating power at sunrise and sunset. As earlier promised, there had been installed an automatic timer to make the changes. But it was necessary to reset the automatic timer to account for the monthly changes in daylight hours. The failure to change power properly the early part of May was due to an oversight in changing the clock at the beginning of the month. As a result, the station was using its nighttime power at the beginning and end of daytime. The power changes were, therefore, not made at the authorized times, but no question of excessive power was involved. For the 3 days in July, the transmitter switch at the remote control position was set for manual operation. This resulted in the change of power not being made in the customarily automatic manner. On 2 days there was a delay of approximately 30 minutes and on the third day of about 15 minutes in reducing to nighttime power. There were also delays in increasing to daytime power on the mornings of those 3 days.

79. The violation charged in No. 15 is to the effect that at the time of the Commission's inspection the antenna base current meter read 14 percent higher than the corresponding remote meter, the Commission's requirements being that the remote meter read within 2 percent of the meter at the transmitter. The evidence convinces that no viola-

tion can be said to have been established. The charge results from a misconnection of the remote meter circuits at the time of the inspection under a misunderstanding of instructions during the inspection.

80. The station's asserted position attributes a substantial measure of blame for the performance gaps during this period to the unsatisfactory carrying out of responsibilities by its engineers, and claims on two occasions, in 1962 and in 1964, to have dismissed its chief engineers for dissatisfaction with the manner in which they were operating. There is contradicting testimony that denies that the discharges were for reasons related to competence. Pertinently, however, the severance of employment in each case coincided approximately with the recited disclosures of irregularity in station performance. The Broadcast Bureau repeatedly makes the point that the WOOK chief engineer was really nothing more than the only man at the station with a first-class license. Barring a rule against the practice, it would appear to be harmless to designate as "chief" one who is an "only." The record also supports the judgment that the signs of managerial involvement with supervision were clearly present. As far back as early 1962 Griner had prepared a memo of daily work routine for the engineering department and a daily checkoff list for the use of the chief engineer. In that year, too, Griner addressed a letter to the chief engineers at all of Eaton's standard broadcast stations, including WOOK, alerting them to their responsibilities for insuring that each station was operating in compliance with the rules, listing the sections of the rules with which they were required to be familiar, and supplying an inventory of required spare parts. From time to time as required, Griner personally discussed operating problems with engineering personnel and addressed discrepancy notices to engineers where indicated and as operating errors were spotted. When the WOOK chief engineer involved in the July 8, 1964, inspection was hired in 1962, he was given instruction over a 2-month period by Griner in the nature of the WOOK facilities and in the duties which he would be required to perform. This included explanation of the station's studio, transmitter, and remote control equipment. Additionally, the new engineer was instructed in the daily work routine and checkoff list and other internal controls.

81. The violations uncovered at the July 8, 1964, inspection showed significant defaults in the technical operation of the station and irregularities in the keeping of the operating logs by the operators on duty. It is clear that supervision had failed at some stage. The daily checks of operating logs were obviously not made properly, the automatic power change mechanism was not changed for the new daytime hours effective May 1 and an effective check seems not to have been made during that month, equipment failure suggests gaps in the maintenance program, and maintenance logs were improperly kept. The defense places the blame upon its chief engineer whose services, it has been noted, were terminated soon after the July 8 inspection. The Broadcast Bureau argues, as will be treated later, for a proposition that operational failures stemmed from the shortcomings of owner-

ship and higher levels of management. In any event, following the inspection, Eaton, Griner, and Holland conferred at length on the nature of the violations and on measures to be taken to avoid recurrence. When the official notice was received, Griner and Holland went through it with Eaton explaining how each violation occurred. It was decided in order to avoid errors in the keeping of operating logs to install automatic logging equipment which had recently become available and which would take the function away from the operators by performing it automatically. The new equipment was also designed to prevent improper operation by automatically taking WOOK off the air whenever irregularity in operation occurred. The equipment was ordered on July 28, 1964. It also was decided that WOOK would test its own operators at regular intervals, the tests to cover the specific functions required at WOOK. And at the hearing it developed that these tests had been given three times since August 1964. The supervision of operators and the daily log checks were reinstituted under the personal supervision of Griner. The practice was resumed of giving written notices of violation to be signed by the operator whenever a questionable matter in the operating logs was uncovered. Following receipt of the Commission's official notice, Griner conferred with all of the operators and called their attention to the irregularities. Each operator was required to sign a statement enumerating the violations with which he was involved and accepting responsibility for them. All of the operators were required to sign an "operating procedure for WOOK" covering their engineering duties in the operation of the station; each was provided a copy and a copy was posted in the control room. The maintenance log form was revised to provide an additional entry of the amount of time spent on daily inspection, and separate maintenance logs were prepared for the daily and for the weekly maintenance inspections. The new maintenance log form makes appropriate provision for ammeter calibration entries. In addition, a separate WOOK auxiliary transmitter log form was installed. The power control unit responsible for the violation in No. 2 of the notice was replaced, as earlier indicated. The compensating circuit of the remote meter was moved to the transmitter to prevent a repetition of the matter charged in No. 15. Interlocks on the transmitter were restored, as noted.

Official notice of January 14, 1965

82. WOOK was monitored by the Commission during the period December 30, 1964 to January 3, 1965, and its operating logs also inspected. As charged in the official notice of January 14, 1965, the station on January 1 made the change to daytime power at 7:47 a.m. instead of at the licensed time of 7:30 a.m., and made the change back to nighttime power at 4:46 p.m. instead of its licensed time of 5:15 p.m. For January 3, the change to daytime power was made at 7:15 a.m., not at 7:30 a.m., and the change to nighttime power was made at 5:27 p.m., not at 5:15 p.m. But the station's operating log for January 3 showed the change to nighttime power as having been made at 5:15 p.m., when in fact the change was made, as indicated, at 5:27 p.m.

The operating logs for January 5 and 11, 1965, also showed errors. On the January 5 log the operator erroneously entered daytime antenna current readings at 5:33 and at 6 p.m. For January 11, final plate voltages for 5:30 and 6 p.m. were incorrect because they showed daytime voltages.

83. The improper power changes on January 1 and 3 are attributed to the failure of the station's first-class engineer to change the automatic power change unit to reflect the new daytime hours in January. The operators on duty on those days failed to make the changes manually at the correct time, as they could have. The improper entry in the operating log for January 3 resulted from unawareness by the operator on duty that the unit had not been reset for January and an assumption by him that the automatic power change had occurred at the authorized time of 5:15 p.m. The logging errors for January 5 and 11 have been satisfactorily explained as due to isolated inadvertencies and are not pursued in the Bureau's findings.

84. The station had on its own discovered most of the errors from its daily log check, and its own notices of violation had been issued to the operators on duty. Following receipt of the Commission's notice, the operators responsible for the irregularities signed statements acknowledging their errors. Automatic logging equipment apparently would have eliminated logging error. Although it had been ordered in July 1964, it had not yet been delivered. As is developed below, such equipment is now installed and operating. A first-class engineer, as a matter of station practice, is now present at every power change.

85. The automatic logging equipment was delivered in February 1965, was found not to be suitable, and was returned. Griner then set about designing and building a system. The system, in two units, one at the transmitter and one at the studio, was tested in use for 2 weeks and on May 26, 1965, was placed in regular use. With minor and irrelevant exception, the automatic logger has operated suitably since its installation. A new operating log form was prepared to permit noting of the tower light check and to allow for certification by each operator that the automatic log correctly reflected station operation. Instructions in writing covering the new system were issued to all operators on May 27, 1965, and the operators were instructed in their duties with respect to the automatic logger. The automatic equipment also has a separate alarm circuit which will automatically take WOOK off the air if its operating parameters approach or exceed the limits established under its license and the Commission's rules.

Current Operation of WOOK

86. The automatic logging and control system has come through modifications and trials to operate, as follows.

87. The automatic logging system utilizes two recorders which record by stylus on continuous strips of paper the information normally required in operating logs. One recorder records frequency

deviation continuously. The other records in separate lines transmitter voltage, transmitter amperage, and antenna current, moving from one parameter to the next at intervals of approximately 1 minute, so that the parameters are recorded every few minutes. It also records tower light condition every half-hour. Finally, it separately records a calibrating voltage, the sole purpose of which is to indicate that the remote control lines and recording equipment are operating correctly. The two recorders are mounted on the remote control panel at the WOOK studio where they can be seen by the operator from his operating position. Above the instrument which records the several parameters are colored lights which indicate to the operator which parameter is being recorded at any given time. There are also standard meters which the operator can see and which show the same information as is being recorded. The automatic log charts for each day are dated and signed by the first-class engineer. They are reviewed daily, then attached to the operator's short form log and filed.

88. An automatic alarm system is separate from the recorders and operates independently of them. The alarm covers the two operating parameters for which limits are imposed under the WOOK license and the Commission's rules—frequency and antenna current. The automatic alarm for frequency is set at ±17 cycles, allowing a tolerance from the maximum permissible deviation of ±20 cycles. The antenna current alarm is set to maintain WOOK power within +5 percent and −10 percent of licensed value, the tolerances established in the Commission's rules. If the limits are reached for either frequency or antenna current, a chime sounds and a bright flashing light operates. This also occurs if there is any failure in the remote lines. When this occurs, there is a period of 3 minutes during which a correction may be made. If a correction is not made within that time, the station is automatically taken off the air. This occurs regardless of the condition of the automatic recorders and of the remote lines which feed them, and it also occurs without regard to whether the transmitter is set for automatic power change or for manual operation. Within the 3-minute period the operator can raise or lower the power in order to correct the condition. In the event the frequency deviates and causes the alarm system to operate, the station would go off the air. The transmitter can be placed back on the air after a time delay of 1 minute, but unless the condition has been corrected the alarm cycle would commence immediately and the transmitter would be off the air again in 3 minutes.

89. An automatic power control operates from the alarm circuit covering antenna current, automatically adjusting the antenna current to approximately the licensed value whenever the alarm system is activated by a high or low power condition. The automatic readjustment would be briefly accomplished, the alarm light would cease to flash, and the station would continue to operate with proper power. If for any reason the automatic readjustment of the antenna current should not occur, the station would go off the air automatically in 3 minutes unless the operator were able to readjust the power with the manual power control. The manual control will not override the

automatic system, and if an operator should manually set the wrong power the station would be taken off the air.

90. The remote control panel was redesigned. The off-on switches for the main and auxiliary transmitters were combined in a single switch so that only one or the other can be placed on the air at any time. Power switching failures were in substantial measure attributable to sticking and other troublesome problems with the relays in the WOOK power change system, which was part of the transmitter as delivered from the manufacturer. The power change system has now been redesigned and there is evidence that its operation has been relatively trouble free.

CONCLUSIONS

1. This hearing combed the background of a long series of charges of violation by station WOOK of the Commission's engineering requirements and of the rules with respect to log keeping. The trial uncovered instances of indefiniteness in the rules and revealed some overscrupulousness in the framing of the charges of violation. But despite occasional areas of contradiction in the proof and lingering doubts on some points, it is clearly established that the station's record is packed with evidence of operational irregularity. The issues also call for settlement of the question of whether owner Richard Eaton's management controls, which he earlier represented were in effect and which the Commission found equal to requirements, were in fact implemented. This part of the inquiry, it may be reasonably supposed, impliedly searches for explanation of what went wrong, if in fact Eaton was as involved in his broadcast stations as he had earlier described.

2. The proof easily supports Richard Eaton on whether he has been taken up with management and control to the extent represented in his September 1960 affidavit. He is as well a committed broadcaster as investor. The evidence holds up his participation in his properties as a striking example of the almost complete unity of ownership and operation. In the search for explanation, the case against Eaton never really got around to such conceivabilities as underpaid, overworked people employing substandard equipment under haphazard working conditions. Instead, it is now argued that Eaton exercised too much control, did not sufficiently delegate authority. This proposition, which has at least the merit of originality, must be rejected if only for its hopeless denial of the Commission's classical preference for broadcast licensees who will work at the business, the harder the better. It is also one of the least logical of the possible explanations, none of which it might be observed clearly emerges from the hearing. How much more is it likely that in the establishment and implementation of management goals the attitude was somehow communicated that technical housekeeping carried one of the low priorities. And bearing even on this possibility, the Broadcast Bureau correctly notes that on issue 3 the record demonstrates that although operating logs were at times maintained so as to deceive or mislead, these instances were the fault of employees and not chargeable to the licensee. To sum up, a

record of violations in equipment, engineering performance, and log keeping is established. But it was not proved that management wanted it that way or that it didn't care one way or the other. Under these circumstances, the search for explanation may profitably and importantly yield to an appraisal of what may be expected from here on.

3. At every turn, the record shows evidence of corrective effort after irregularities uncovered at inspection were brought to Eaton's attention. By the process of citation and purification, the station appears to have been dragged into the modern era where equipment and other technical advances have simplified steady attachment to the fulfillment of operational obligations. In the Broadcast Bureau's view of the evidence, the operation of WOOK was "sloppy." The Bureau also appraises the seriousness of the operational irregularities and properly finds in the station's favor the circumstance that, with the possible exception of the failures to maintain authorized power, few if any of the violations had any adverse impact upon the operations of other stations. To meet its repeated power switching and power maintenance problems, the station has now designed and installed switching equipment and warning and other devices to accomplish power changes automatically and to take WOOK off the air when failures occur. And the station has developed, and has in place and in operation, an automatic logging system designed to meet its plaguing problems with log maintenance. The Bureau resists WOOK's claim that it is now a technically superior station. But because it apparently accepted without rebuttal the claim that the new equipment is commendably tailored for the problem and because it urges that the licensee "has made serious effort to insure future compliance with the Commission's rules and regulations" and because its recommendation against the issuance of a cease and desist order is necessarily tied to a judgment that future performance is likely to be correct, the Bureau is caught up with an apparent concurrence in the proposition that the new systems at WOOK are honorably and suitably intended and likely to do the job of meeting requirements. Our regulatory machinery can handle only with unsettling difficulty this kind of chaperoning and watching over. But the circumstance that the Commission now has at least a 6-year investment in a station which has apparently won a place for itself in the community—if the nonspecification of a programing question can fairly be read as a satisfaction with the station's effort in gaging and meeting local needs—undoubtedly persuaded the Bureau quite correctly to pass over nonrenewal of license as a proper sanction.

4. The renewal application filed in 1960 for station WOOK was, as noted in paragraph 6 of the findings, acted upon on March 22, 1961, with the Commission granting a renewal for the short term extending into the middle of 1962. The legislative history of the Commission's rules on short-term renewal identifies the purpose as that of giving a licensee an opportunity to set his house in order during a brief period of time before decision is made on renewal for the regular term. In fact, the proposition is highly logical that the short-term license and the hearing process are alternate routes for determin-

ing whether reform can be achieved. The renewal application filed in 1962 to pick up the continuity of license is in hearing here and will be acted upon at the end of the process. Barring the unexpected, this will at the least not occur much before 1967. Station WOOK will at that time have been operating for perhaps 5 years by virtue of the automatic extension of operating authority which goes with the timely and sufficient filing of an application to renew. At the end of the long trail, it occurs that the only tolerable choices are to take away the license or to renew on a regular basis. The Bureau has rejected nonrenewal and is convinced that Eaton "has made serious effort to insure future compliance." This is quite possibly the point at which esteem for process can be won by quiet liquidation of an unpromising situation. But the Bureau stubbornly persists and urges a 1-year, short-term renewal. Coming on after the earlier short renewal and following what will have been a several-year inquiry in which the licensee has demonstrated rehabilitation and in the face of the Bureau's own conclusion that serious effort has been made to insure compliance, the recommendation for a short-term renewal seems uselessly unforgiving, especially since another inspection during the year that has elapsed since the last might have served as well. The Bureau's position is clearly inappropriate, is rated as a relinquishment of the real contest over renewal of the license and a settling for a $10,000 fine.

5. With the record putting nonrenewal out of legitimate reach and since short-term license or a cease and desist order would register as not very assertive tokens of official displeasure, there remains only the possible imposition of forfeiture of money. Even if, as supposed in this opinion, Eaton and his station WOOK convince that they have now successfully completed the full course, forfeiture is in order—not out of any sense of insisting upon a measure of flesh from this licensee but because there must emerge a bracing message from an inquiry as lengthy, costly, and distracting as this has been over the years. Under the 1-year statutory limitation against imposing forfeiture on stale charges, only the matters uncovered in July 1964 and January 1965 are fair game, and of these only the power change failures are considered to be of uncommon weight. The Broadcast Bureau recommends maximum forfeiture, or $10,000, and relies upon earlier history only to support the charge that the conduct was repeated and willful. But the statutory maximum clearly must be reserved only for the most aggravated of the infractions for which forfeiture is otherwise appropriate. And the Bureau, although put out by the naggingly enduring quality of some of the misconduct, was properly moved to find for the station here in evaluating the overall impact of the operational defects. In that light, the recommendation of a $10,000 discipline seems like a case of overkill, and $7,500 looks to be as much as the notice of apparent liability can support without lending to an appearance of retaliation for conduct long gone by. Not because there is unshakable certainty that $7,500 is more fitting than every lesser sum, but out of a firm conviction that the misconduct was important and that the forfeiture must be substantial to be

effective, the judgment is here reached that a forfeiture of $7,500 is indicated.

Accordingly, *It is ordered*, This 3d day of May 1966, that unless an appeal from this initial decision is taken 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 application of United Broadcasting Co. to renew the license for its station WOOK in Washington, D.C., *Is granted* and that under the terms of section 503(b) of the Communications Act, as amended, the licensee *Forfeit* to the United States the sum of $7,500. The forfeiture is also subject to the provisions of section 504 of the act and of section 1.621 of the Commission's rules and regulations.

FCC 66-573

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 81 AND 83 OF THE COMMISSION'S RULES TO MAKE THE FREQUENCY 2400 KC/S (COAST AND SHIP) EMPLOYING TELEPHONY AVAILABLE FOR PUBLIC SHIP-SHORE USE IN THE BALTIMORE, MD., AREA FOR CONTINUOUS HOURS OF SERVICE	Docket No. 16219 (RM-412)
THE CHESAPEAKE AND POTOMAC TELEPHONE CO. OF MARYLAND, BALTIMORE, MD.	(RM-888)

REPORT AND ORDER

(Adopted June 29, 1966)

BY THE COMMISSION: COMMISSIONER COX CONCURRING AND ISSUING A STATEMENT.

1. A notice of proposed rulemaking in the above-captioned matter was released on October 8, 1965, and was published in the Federal Register on October 14, 1965 (30 F.R. 13079). The dates for filing comments and replies thereto have passed.

2. Comments were filed by Charles R. Butz; George C. Ruehl, Jr.; Robert B. Cockrane; Curtis Bay Towing Co.; the Baker Whiteley Towing Co.; Baltimore Maritime Exchange; the Chesapeake & Potomac Telephone Co. of Maryland; the Diamond State Telephone Co. and the Eastern Yacht Club, Inc. Reply comments were filed by Maryland Port Authority.

3. All parties to the proceeding are in agreement that there is a definite need for an additional 2-Mc/s public correspondence channel in the Baltimore area. Of those participants, all, except the Chesapeake & Potomac Telephone Co. of Maryland and the Diamond State Telephone Co., supported the rulemaking as proposed. Both parties are in opposition to the rulemaking because it would employ the use of simplex operation on the frequency 2400 kc/s.

4. In addition to their opposing comments, the Chesapeake & Potomac Telephone Co. of Maryland filed a petition (RM-888) to amend the rules to make a duplex frequency pair available on a day-only basis for ship-shore operation in the Baltimore, Md., area by pairing the frequency 2400 kc/s (coast) with 2031.5 kc/s (ship). The frequency 2031.5 kc/s is now assigned to ships in the vicinity of Miami, Fla., and can only be used during daylight hours in the Baltimore area. Therefore, the pairing of this frequency as requested by the Chesapeake & Potomac Telephone Co. and the Diamond State Telephone Co. for duplex operation would likewise restrict to day only the use

106-502--66——1

of 2400 kc/s, which is now available for 24-hour use in the Baltimore area.

5. The port of Baltimore is one of the major eastern ports utilized by the maritime industry. This port and the Chesapeake Bay are used by approximately 6,000 oceangoing vessels a year as well as many thousands of smaller craft, both commercial and pleasure. At the present time, the port of Baltimore and the Chesapeake Bay area are being served with only one frequency pair on a 24-hour basis for public ship-shore communications service by class II–B public coast station, call sign WLF, located at Bodkin Point, Md. This frequency pair is shared with public coast stations at Wilmington, Del., and Ocean Gate, N.J. This requires sharing of the available channel time to serve the coastal area off the coast of New Jersey, the Delaware River, the Delaware Bay, the C & D Canal, the upper and middle portions of the Chesapeake Bay, and the Baltimore Harbor. As a result, radiotelephone ship-shore service in the port of Baltimore does not meet current demands.

6. The Commission recognizes the problems encountered when using simplex operation for rendering a public correspondence service in the maritime services. However, it is the responsibility of the Commission when making frequencies available in certain areas to consider the demonstrated needs of the public for adequate and sufficient radio communications and to allocate frequencies that would satisfy those principal needs.

7. Based on the volume of maritime traffic using the facilities of the port of Baltimore and the comments of the parties to this proceeding, it is evident that the present ship-shore radiotelephone service in the area is inadequate, and the establishment of additional service will serve the public interest, convenience, and necessity. Moreover, it is equally evident that the business of the port of Baltimore is a 24-hour-a-day operation and that additional radio services on this basis will be of greater value to the public as well as a more effective utilization of marine frequencies.

8. *Accordingly, it is ordered*, That the petition (RM–888) submitted by the Chesapeake & Potomac Telephone Co. of Maryland *Is hereby denied*. The rules are amended as proposed in accordance with the petition (RM–412) filed by the Maryland Port Authority to make the frequency 2400 kc/s (coast and ship) employing telephony available for public ship-shore use in the Baltimore, Md., area for continuous hours of service.

9. In view of the foregoing, *It is further ordered*, Pursuant to the authority contained in sections 303 (c) and (r) of the Communications Act of 1934, as amended, that effective August 9, 1966, parts 81 and 83 of the Commission's rules *Are amended*.

10. *It is further ordered*, That this proceeding *Is terminated*.

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

CONCURRING STATEMENT OF COMMISSIONER COX

I concur for the reasons stated at the time the notice of proposed rulemaking was issued.

FCC 66-572

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 83 OF THE COMMISSION'S RULES RELATIVE TO SHIP RADIOTELEPHONE TRANSMITTERS HAVING A MAXIMUM POWER INPUT OF 3 WATTS OR LESS TO PERMIT MULTI-CHANNEL OPERATION IN THE 156 TO 174 MC/S BAND WITHOUT REQUIRING THE FREQUENCIES 156.3 MC/S AND 156.8 MC/S	Docket No. 16081 RM-652, RM-744

REPORT AND ORDER

(Adopted June 29, 1966)

BY THE COMMISSION: COMMISSIONER COX DISSENTING AND ISSUING A STATEMENT; COMMISSIONER WADWORTH DISSENTING.

1. A notice of proposed rulemaking in the above-captioned matter was released July 6, 1965, and was published in the Federal Register July 9, 1965 (30 F.R. 8696). The dates for filing comments and replies have passed.

2. The proposed rulemaking was issued in response to a petition filed by Moran Towing & Transportation Co., Inc. It would permit marine utility stations (readily portable ship or coast stations) having a power input of 3 w or less to operate on more than one frequency without being required to operate on 156.3 and 156.8 Mc/s. Such stations are now permitted to operate on only one of the frequencies 156.35, 156.65, 156.9, or 156.95 Mc/s without having a capability to operate on 156.8 and 156.3 Mc/s. The frequencies 156.35, 156.9, and 156.95 Mc/s are among those included in the table, Appendix 18 to the Radio Regulations, with a special provision that in the United States "These frequencies will be used for other functions in the maritime mobile service."

3. The petitioner alleges that more than one VHF channel is required and the Commission has proposed changes in the marine rules to permit multichannel use without the necessity of installing the "calling-working" ship station channels. The operation of the petitioner involves, among other things, 15 low-power portable transmitters operating on 156.35 Mc/s, which are used by docking pilots for communication with Moran's tugs and limited coast stations.

4. In addition to Moran's petition, the Commission has on file a petition filed by American Waterways Operators and requests for waiver of section 83.106(b) of the Commission's rules filed by Marine Exchange, Inc., San Francisco, Calif., and McAllister Brothers, Inc., 17 Battery Place, New York, N.Y. The petition and requests for waiver of the multichannel requirement of the rules are in essence

identical in substance to the Moran petition and the relief sought would be granted by the amendment of the rules as proposed.

5. The issue in this proceeding is whether special purpose low-power transceivers operating in the maritime mobile VHF service should be required to maintain the capability of operation on the safety and calling frequency 156.8 Mc/s and the intership frequency 156.3 Mc/s as is required of ship radio stations. The Commission has ruled in the past that these low-power transceivers would be exempt from the "calling-working" frequency requirements provided only one of the special purpose VHF channels is utilized.

6. Moran Towing & Transportation Co., Inc., points out in their petition that Delaware River pilots, Hudson River pilots, Sandy Hook pilots, and others use 156.65 Mc/s on these compact units for bridge-to-bridge communications to afford safety on the rivers when in a passing situation. By permitting the use of a second frequency on low-power transmitters, they could include a working frequency for communication with their tugs in the docking, undocking, and transporting of ships in the harbor and in addition would install 156.65 Mc/s. They comment, also, that "There ought to be no more objection to the use of a dual frequency transmitter, than to the use of two single frequency transmitters one of which would operate on 156.35 Mc/s and the other on 146.65 Mc/s."

7. We agree. The present rules permit the use of a transmitter that has the single VHF channel 156.35 Mc/s, or a transmitter that has the single channel 156.65 Mc/s. The Commission's rules permit each to be licensed separately. Presumably, therefore, Moran could have two separate low-power single frequency transmitters that would meet this requirement. On the other hand, they are not permitted, under the rules, to combine both frequencies in a single low-powered transmitter operating in the maritime mobile services unless at least two other frequencies (156.3 and 156.8 Mc/s) also are included.

8. Comments were filed by Tug Communications, Inc. (Tug); Shipowners & Merchants Towboat Co., Ltd.; San Pedro Tug Boat Co.; Great Lakes Dredge & Dock Co.; American Pilots Association (APA); Alabama State Docks Dept.; Columbia River Pilots; San Francisco Bar Crescent River Port Pilots Association; Houston Pilots; Savannah Bar Pilots; Kaar Engineering Co. (KAAR); Joint Executive Committee for the Improvement and Development of the Philadelphia Port Area (JEC); American Merchant Marine Institute, Inc. (AMMI); Lake Carriers Association (LCA); Comite International Radio Maritime (CIRM); Northwest Towboat Association; Pacific American Steamship Association (PASA); Columbia Marine Service, Inc.; Hudson River Pilots Association; and, in a late filing, the Netherlands Postal and Telecommunications Service (P&T). Reply comments were filed by American Pilots Association and Puget Sound Pilots.

9. The comments, with the exception of those filed by JEC, AMMI, LCA, CIRM, KAAR, Hudson River Pilots, and the Netherlands P&T, were in support of the Commission's proposal. In addition to the comments filed by the above-mentioned parties, a letter from the River and Harbor Improvement Association, Milwaukee, Wis., which was

addressed to and forwarded by the Commandant of the U.S. Coast Guard, was received in support of the Commission's proposal.

10. The comments filed by CIRM and the Netherlands P&T oppose the proposed rules but their substance is directed primarily toward the legislation which may be proposed by the United States Coast Guard, which would require certain vessels being navigated on inland waters of the United States to be capable of exchanging navigational information on a frequency reserved exclusively for that purpose. We recognize the problems raised but are of the opinion that provision can be made to meet the operational requirements for utility mobile type operations in the maritime mobile service without adversely affecting the outcome of negotiations with respect to exchanging navigational information bridge-to-bridge.

11. The point of the AMMI and JEC comments and others is directed toward the effectiveness of the bridge-to-bridge systems and the degradation of those systems which they feel could ensue from the proposed amendment of the rules. The bridge-to-bridge systems which are now in operation involve a listening watch on the frequency 156.65 Mc/s. JEC emphasizes that the value of the system depends upon continuous monitoring * * *. Any relaxation of such continuous monitoring even for brief periods will degrade the system all out of proportion to the time spent off-channel. It is our opinion, however, that the proposal to use low-power multichannel communication devices for special purposes in the maritime mobile service can be considered without adversely affecting the bridge-to-bridge system since the bridge-to-bridge station aboard the vessel would be separate from the low-power transceivers envisioned in this rule-making. Additionally and perhaps more to the point is the fact that there is no requirement of statute or Commission rule making mandatory a shipboard listening watch on 156.65 Mc/s—or any other VHF frequency for that matter. The argument that availability of any VHF frequency or frequencies other than 156.65 Mc/s to equipment operated from the bridge is detrimental to the maintenance of a continuous listening watch on 156.65 Mc/s is straining a point to say the least. A position to this effect is, of course, in direct conflict with the ITU regulations which require multichannel capability if VHF is to be used at all. Of more concern is the question as to whether the development of limited single or two channel systems utilizing either 156.3 or 156.8 Mc/s is detrimental to development of the comprehensive universal multichannel system envisaged by the ITU regulations. This is treated in connection with the next group of comments.

12. KAAR and LCA oppose the proposal because, in their opinion, it represents a further derogation of the Geneva Radio Regulations (GRR) and is a departure from the "calling-working" frequency concept provided by the GRR and used extensively in the Great Lakes. KAAR states that the calling channel-working channel principle must be maintained in the interest of frequency management and the maximum utilization of the marine VHF to insure universality of contact and traffic handling capacity. The Commission considered this principle initially in providing for single channel bridge-to-bridge communication in August 1959, and again in amending its rules in docket

No. 14375. The Commission recognizes that there are special purpose requirements requiring special consideration in the maritime mobile service, and considers that these can be satisfied within the system without destroying the basic system concept. Low-power transceivers used for docking, piloting, etc., are for the most part self-contained units which include the transmitter, receiver, and antenna. They are not particularly adaptable to taking the place of a regular ship radio station because of the configuration and power; therefore, there is little likelihood of them having any adverse impact on the system.

13. LCA, which confines its comments to the impact of the proposed amendment on the safety of navigation on the Great Lakes, their tributaries and connecting waters, and portions of the St. Lawrence Seaway, requests that the Great Lakes be excluded if the amendment is adopted. LCA cites as precedents for such exclusion the action taken by the Commission in docket No. 14375, which limited the use of 156.65 Mc/s to single frequency navigational communications in all areas other than the Great Lakes, and to the bridge-to-bridge legislation which may be proposed by the Coast Guard in which the Great Lakes area would be excluded. Because of the power of the equipment involved in this rulemaking (3 w or less), it is considered that the use of such equipment will not detract from the efficacy of the multichannel system which uses 156.8 and 156.3 Mc/s and other frequencies as necessary, since the equipment will be used for supplemental purposes. Accordingly, the rules as finalized, permitting use of the 3 w or less equipment without requiring 156.3 and 156.8 Mc/s capability, are applicable to all areas including the Great Lakes.

14. In addition to the foregoing comments, responses urging the adoption of the amendment as proposed were submitted by 10 associations which pilot ships on the Pacific, Gulf, and Atlantic coasts, 6 companies operating tugboats, and Pacific American Steamship Association, an association of 10 oceangoing steamship operators.

15. The responses filed by the pilot groups urging the adoption of the amendment as proposed clearly indicate the need for communication between the bridge of a ship and assisting towboats during docking and undocking maneuvers. Two frequency channels are required. In some instances, Citizens radio is used to meet the need for a second channel. Citizens radio is subject to excessive interference, and when it is used, two separate transceivers are involved, one for the citizens band frequency and another one for VHF marine band bridge-to-bridge communication.

16. Comments filed by towboat companies support the pilots in their need for a second channel, and in addition point out the usefulness of dual channel equipment in towing operations other than docking or undocking ships.

17. After carefully reviewing all comments filed, it is evident to the Commission that the amendment of its rules to permit the use of low-power transceivers without complying with the multichannel requirement would serve a useful purpose.

18. In view of the foregoing, the Commission finds that the public interest, convenience, and necessity will be served by the amendment

ordered herein and, pursuant to the authority contained in section 303 (c), (f), (g), and (r) of the Communications Act of 1934, as amended, accordingly, *It is ordered*, That, effective August 9, 1966, part 83 of the Commission's rules is amended.

19. *It is further ordered*, That this proceeding is hereby terminated.

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

DISSENTING STATEMENT OF COMMISSIONER KENNETH A. COX

I dissent for the reasons given in the statement associated with the notice of proposed rulemaking in this docket. I would have concurred in the rule adopted in section 83.106(f) if it had applied to low-powered portable stations which were used only to communicate with other stations equipped to operate on the internationally agreed channels as specified in paragraphs 988, 989, and 990 of the Geneva, 1959, radio regulations.

FCC 66R–256

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
CENTURY BROADCASTING CO., INC., MEMPHIS, TENN.	Docket No. 16577 File No. BPH–4785
RKO GENERAL, INC., MEMPHIS, TENN.	Docket No. 16578
For Construction Permit	File No. BPH–4788

MEMORANDUM OPINION AND ORDER

(Adopted June 30, 1966)

BY THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Century Broadcasting Co., Inc. (Century), and RKO General, Inc. (RKO), for a construction permit for a new FM broadcast station to operate on channel 290, in Memphis, Tenn. The applications were designated for hearing by order, FCC 66–301, released April 11, 1966. Presently under consideration is a motion to enlarge issues, filed on April 29, 1966, wherein RKO requests the Board to add an issue to determine whether Century is financially qualified to construct and operate its proposed station.[1]

2. In support of its request, RKO first points out that Century's application shows that it will require $35,457 [2] for construction and $10,000 to operate for 1 year (a total of $45,457), and that it has available $12,000 in existing capital, $3,000 profits from an existing station, and $21,450 in deferred equipment payments (a total of $36,450). Thus, RKO concludes, Century's application shows a deficit of $9,007. In addition to the figures in Century's application, RKO urges that there are various other grounds warranting addition of a financial qualifications issue. First, RKO alleges, Century's reliance on $3,000 in profits from its existing operation [3] is misplaced because Century stated in its application that the existing station had been operating at a loss and because the balance sheet (dated October 31, 1964) submitted with Century's application indicates a deficit of $23,936.49. Citing *Ultravision*,[4] RKO also notes that Century cannot rely upon proposed revenues since it did not furnish a basis for its

[1] Also before the Board are (*a*) opposition, filed May 12, 1966, by the Broadcast Bureau; and (*b*) reply, filed May 24, 1966, by RKO.

[2] From the Century application, form 301, section III, this amount should be $35,468. computed as follows:

Transmitter	$20, 412
Antenna system	10, 012
Frequency monitors	2, 044
Other items	3, 000
Total	35, 468

[3] Century is the licensee of standard broadcast station WMQM, Memphis.

[4] *Ultravision Broadcasting Company*, 1 FCC 2d 544, 5 R.R. 2d 343 (1965) and its subsequent clarification, 1 FCC 2d 550, 5 R.R. 2d 349 (1965).

$10,000 estimate of revenue. Furthermore, RKO contends Century's first-year expenses are underestimated by approximately $4,000.[5] Finally, RKO points out that Century's balance sheet lists $200,000 in notes payable under the heading, "Other Liabilities." Since there is no explanation in Century's application, RKO contends that it must be assumed that this represents two loans that were made to Century for its acquisition of standard broadcast station WMQM, Memphis, (BAL–4957). That application indicated that Dalworth Broadcasting Co., Inc., an 80-percent stockholder in Century, agreed to lend Century $155,000,[6] and that an officer and 20-percent stockholder in Century, L. Rodger May, agreed to lend Century $45,000.[7] RKO further urges that "more than 1 year having elapsed since the consummation of these two loan commitments, their amortization now represents a current liability to pay both interest and principal" and concludes that the total amount due for 1 year for both loans is $23,147.52.[8]

3. Century did not file a pleading in response to RKO's petition. However, the Broadcast Bureau, in its opposition, points out that on October 1, 1965, Century filed an amendment to its application which contained a loan commitment for $50,000 from Dalworth.[9] Even assuming that Century's estimated expenses should be increased by $4,000, the Bureau urges that with the $50,000 loan, Century will have adequate funds to construct and operate its proposal.[10]

4. In its reply, RKO reiterates the arguments made in its petition, and points out, for the first time, that an examination of a Dalworth balance sheet, dated February 1966, and filed with Dalworth's assignment application for KCUL–AM–FM, Fort Worth, Tex. (BAL–5757, BALH–895), reveals that Dalworth now holds another promissory note from Century in the amount of $19,997.06.[11] Since there is no indication in the assignment application of the duration or repayment terms of this note, it must be assumed, RKO contends, that this note represents an additional liability of almost $20,000 to be due by the

[5] In support of this contention, RKO submitted an affidavit from D. A. Noel, the general manager of its AM and television stations in Memphis. The affidavit lists a number of specific costs for an FM station which indicate that the minimum first-year expenses will be in excess of $14,000, rather than the $10,000 estimated by Century.

[6] The terms of this note, dated Oct. 22, 1963 (hereinafter referred to as Dalworth note, 1963), are as follows: "The loan will be over a 15-year period at 6 percent interest to be amortized in the following manner: The first-year interest only at 6 percent, beginning the second year for 14 years principal and interest semiannually."

[7] The terms of this note, dated Oct. 22, 1963 (hereinafter referred to as May note), are as follows: "The loan will be over a 5-year period at 6 percent interest to be amortized in the following manner: The first 12 months interest only at 6 percent, then principal and interest over the next 4 years payable monthly."

[8] RKO alleges that the amounts due on these notes will be: $11,733.60 on Dalworth note, 1963, and $11,413.92 on the May note, a total of $23,147.52. Calculations by the Board, based on the payment of interest and principal for 1 year, indicate that approximately $20,371 would be due on the Dalworth note, 1963 ($11,071 principal and $9,300 interest), and approximately $13,950 would be due on the May note ($11,250 principal and $2,700 interest), a total of $34,321.

[9] The letter of commitment indicates that the terms of this loan (hereinafter referred to as Dalworth note, 1965) are as follows: "This is to be a 10-year note at 6 percent interest repayable interest only the first 2 years, and the balance over 8 years principal and interest."

[10] The Bureau's computations, however, do not include any payments of principal and/or interest on the $200,000 in notes mentioned by RKO.

[11] Existence of this note (hereinafter referred to as Dalworth note, 1966) is shown only by the listing of "note receivable—Century Broadcasting $19,997.06" in exhibit 5 of Dalworth's assignment application for KCUL. In light of the facts that RKO's petition was not opposed by Century and that the application in which the existence of this note was revealed was filed only 3 days before RKO's subject petition was filed, the Board will consider this information.

end of the first year. With this additional liability, RKO asserts that Century has not established its financial qualifications, even taking into account the $50,000 loan.

5. In view of Century's failure to refute RKO's allegations concerning Century's estimated costs and standing debts, the Board will, for purposes of determining whether a financial issue is warranted, assume that the debts exist and the costs will be as alleged.[12] Based on RKO's allegations and an examination of Century's application, it appears that Century may require funds in the amount of $106,786.49 in order to construct its proposal and meet first-year expenses, as follows: $57,318.49 payments of principal and interest on notes;[13] $35,468 for construction;[14] and $14,000 for 1 year's operating costs. Century's amended application indicates that it will have available $86,450 as follows: $50,000 loan commitment; $12,000 in existing capital; $3,000 in profit from the existing station;[15] and an equipment credit of $21,450.[16] The above figures indicate that a substantial question exists as to Century's financial qualifications, and therefore the requested issue will be added.

Accordingly, it is ordered, This 30th day of June 1966, that the motion to enlarge issues, filed April 29, 1966, by RKO General, Inc., *Is granted;* and that the issues in this proceeding *Are enlarged* by the addition of the following issues:

(*a*) To determine the basis of Century Broadcasting Co., Inc.'s (1) estimated construction costs and (2) estimated operating expenses for the first year of operation.

(*b*) In the event that Century Broadcasting Co., Inc., will depend upon operating revenues during the first year of operation to meet fixed costs and operating expenses, to determine the basis of its estimated revenues for the first year of operation; and

(*c*) To determine, in light of the evidence adduced, whether Century Broadcasting Co., Inc., is financially qualified to construct and operate its proposed station.

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

---

[12] As stated by the Commission in the *Ultravision* case, supra, "* * * where an applicant is able to demonstrate [its] financial ability * * * without income * * * only because * * * payments * * * [for] fixed charges have * * * been deferred * * * we will scrutinize with care the applicant's itemization of expenses."

[13]

Dalworth note, 1966	$19,997.06	(see note 11, supra)
Dalworth note, 1965 (interest only)	3,000.00	(see note 9, supra)
Dalworth note, 1963	20,371.43	(see note 6, supra)
May note	13,950.00	(see note 7, supra)
Total	57,318.49	

[14] This figure is taken from note 2, supra.

[15] The Board accepts this figure only in computing the amount available in the light most favorable to Century. Since the existing station has been operating at a loss, availability of these funds remains in doubt.

[16] Submitted with Century's application is a letter from RCA indicating that as much as $24,352.07 (75 percent of $32,469.43) may be taken as equipment credit, instead of the $21,450 listed in section III (see par. 2, supra). However, the difference does not affect the result herein.

FCC 66R-259

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
OCEAN COUNTY RADIO BROADCASTING CO., TOMS RIVER, N.J.	Docket No. 15944 File No. BPH-4078
SEASHORE BROADCASTING CORP., TOMS RIVER, N.J.	Docket No. 15945 File No. BPH-4632
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted July 1, 1966)

BY THE REVIEW BOARD:

1. The Review Board has before it a petition to enlarge issues, filed May 26, 1966, by Ocean County Radio Broadcasting Co. (Ocean County).[1]

2. Seashore and Ocean County are competing applicants for a new FM broadcast station in Toms River, N.J. Their comparative hearing was concluded in September 1965 and on February 21, 1966, the examiner released his initial decision (FCC 66D-8) looking toward a grant of Seashore's application. Subsequently, in April 1966, Seashore petitioned the Board for leave to amend its application to show, inter alia, that since March 1966, James Westhall, its proposed full-time general manager and a 16⅔-percent stockholder, has been a public relations director for Northeast Airlines. Because of Westhall's proposed role in Seashore's operation, the apparent importance of his new position, and his acceptance thereof after release of the initial decision, the Board ordered Seashore to submit further clarifying information describing the manner in which Westhall intends to meet his commitment to Seashore.[2]

3. On May 26, 1966, Seashore filed a clarifying statement and an affidavit executed by Westhall stating:

> * * * that it is his intention to leave his present public relations position should Seashore's application be granted in order to assume his role as general manager for Seashore * * *.

On the same day, Ocean County filed the instant petition requesting issues to determine (*a*) the circumstances under which Westhall accepted his position with Northeast Airlines; (*b*) whether he will be able to fulfill his commitment to Seashore; (*c*) whether Seashore possesses the requisite character qualifications to be a licensee of the Commission; and (*d*) whether in light of the foregoing, a grant of

[1] Also before the Board are: (*a*) Opposition to petition to enlarge issues, filed June 8, 1966, by Seashore Broadcasting Corp. (Seashore); (*b*) opposition of Broadcast Bureau, filed June 8, 1966; and (*c*) reply, filed June 21, 1966, by Ocean County.

[2] Memorandum opinion and order, 3 FCC 2d 709 (Rev. Bd. 1966).

Seashore's application will serve the public interest, convenience, and necessity.

4. Ocean County's petition is premised upon its contention that a publicly traded corporation in a complex and specialized field would not hire for only a temporary period a public relations director who has no discernible background in the airlines industry,[3] and its suggestion that Seashore was less than candid in disclosing the circumstances surrounding Westhall's appointment with Northeast. Regarding the latter, it appears to be Ocean County's position that if Westhall had decided he could not fulfill his commitment to Seashore or if there was any "indecision" on his part regarding his ability to do so, Seashore was guilty of misrepresentation by continuing to claim a preference for Westhall's participation in Seashore's operation.[4]

5. Ocean County's petition will be denied. Rule 1.229(c) requires that petitions to enlarge issues shall contain specific allegations of fact supported by affidavits of persons having personal knowledge thereof. Ocean County's petition, which lacks the supporting data, is founded upon assumptions, speculation, and surmise. Westhall has submitted a sworn statement that he intends to fulfill his commitment to Seashore and resign his position with Northeast in the event the application is granted. Ocean County has not advanced any allegations supported by affidavits of persons with knowledge which dispute Westhall's statement. Nor has Ocean County pointed out any inconsistencies, contradictions, or anything else which might indicate that further hearing on this matter would serve any useful purpose. Cf. *Guilford Broadcasting Co.*, 5 R.R. 341 (1949).

Accordingly, it is ordered, This 1st day of July 1966, that the petition to enlarge issues filed May 26, 1966, by Ocean County Radio Broadcasting Co., *Is denied.*

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

---

[3] In support of its contention Ocean County directs our attention to statements made by Northeast's chairman of the board indicating his desire to bring new, aggressive executive ability into the company, and the press release announcing Westhall's appointment wherein Northeast's president was quoted as saying Westhall's experience and background "should mean much to the development of the Northeast story."

[4] Ocean County implies that Seashore had advance knowledge of Westhall's appointment with Northeast since it believes that it is "natural to assume" Westhall did not leave his former position with Seashore's communications counsel without advance notice and that Northeast would not impulsively fill such a position.

FCC 66R–255

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of GORDON SHERMAN, ORLANDO, FLA.	Docket No. 16536 File No. BPCT–3529
OMICRON TELEVISION CORP., ORLANDO, FLA. For Construction Permit for New Television Broadcast Station	Docket No. 16537 File No. BPCT–3596

MEMORANDUM OPINION AND ORDER

(Adopted June 30, 1966)

BY THE REVIEW BOARD: BOARD MEMBERS NELSON AND KESSLER NOT PARTICIPATING.

1. The Review Board has before it a petition to enlarge issues, filed April 11, 1966, by Omicron Television Corp. (Omicron),[1] seeking to add the following issues against Gordon Sherman (Sherman):

> (*a*) To determine whether the $90,000 cash committed by Gordon Sherman is in fact available to him and, even if such funds are found to be available, to determine whether the applicant possesses the financial qualifications to construct, own, and operate the proposed station for a period of 1 year;
> (*b*) To determine whether Gordon Sherman has failed to reveal substantial and decisionally significant information regarding his other broadcast interests and, if so, to what extent such failure reflects upon Sherman's comparative standing.

2. Omicron and Sherman are mutually exclusive applicants for a construction permit for a new UHF television station to operate on channel 35, in Orlando, Fla. The proceeding was designated for hearing by order, FCC 66–264, released March 22, 1966. The designation order noted, among other things, that a bank loan commitment from the Pan American Bank of Miami, Fla., to Sherman was not unconditional;[2] accordingly, an issue was specified inquiring into the availability of this loan.

3. In support of its request to add an issue inquiring as to the availability of the $90,000 cash commitment, Omicron alleges the following: Sherman has claimed that he is willing to finance his proposal in part with $90,000 in cash; yet the availability of this amount is shown by a

[1] Also before the Review Board are (*a*) partial support, filed May 10, 1966, by the Broadcast Bureau; (*b*) opposition, filed May 10, 1966, by Sherman; and (*c*) reply, filed May 25, 1966, by Omicron.

[2] "* * * With respect to the bank loan, the letter from Pan American indicates that the availability of the loan is subject to the condition that '* * * the loan is properly collateralized by a first lien in the physical assets of the new station and that personal guarantees and/or endorsements, supported by detailed current financial statements, are satisfactory to use when and if funds are required.' This is not an unconditional commitment to lend funds."

cursory financial statement only,[3] with the bare allegation that the money is available. Omicron maintains that such a statement does not conform to the requirements contained in the Commission's application form, and "is certainly not consistent with the underlying rationale of full and complete disclosure upon which that requirement is premised." Inquiry into the availability of these funds is especially needed, Omicron asserts, because of the questions concerning the bank loan. Since a condition of the bank loan is that sufficient assets be demonstrated by Sherman, Omicron insists that Sherman must be able to provide security for the bank loan and be able to provide funds for the operation of the station. Omicron alleges that an accurate appraisal of Sherman's financial position is impossible. In addition, Omicron questions whether Sherman has committed all or a part of his cash to other ventures. It cites another assertion by Sherman that he has cash "in excess of $100,000," once again with no supporting data, in an application to acquire the construction permit of WFAC, Mount Dora, Fla. (BAPH–378).[4] With the consummation of the purchase of WFAC, Omicron alleges that "Sherman's 'cash position' has, in all probability, been reduced by some $7,000—the contemplated consideration to the assignor." This, Omicron claims, further impairs Sherman's ability to finance the proposed Orlando television outlet. Moreover, a corporation in which Sherman is a major stockholder, Broadcast Enterprises, Inc., has now acquired station WMMB, Melbourne, Fla. In order to do so, Omicron asserts, Broadcast Enterprises obtained a loan commitment from the Pan American Bank of Miami for up to $170,000 to be extended on a corporate and individual basis. Omicron concludes that "once again, Sherman has taken on a liability which, without more, must be assumed to operate against whatever total assets he may have, including the 'cash on hand' asset which he has so freely asserted and committed." The Bureau supports the addition of an issue inquiring into the availability of the $90,000, based on the lack of detailed information as to Sherman's financial position.

4. In opposition, Sherman attacks the Omicron petition as "gross speculation," asserting that an amendment is before the examiner which shows him to have cash, stocks listed on major exchanges, and life insurance loan value totaling in excess of $145,000, and current and long-term liabilities of less than $55,000.[5] The amendment also states that while Sherman is an endorser of a note made for the purchase of WMMB, Melbourne, and has a contingent commitment to a wholly

[3] Exhibit 1 in the Sherman application stated: "As of Mar. 1, 1965, Mr. Sherman had cash on hand of in excess of $100,000 over and above all current and long-term liabilities. His income after Federal income taxes exceeded $25,000 in each of the past 2 years."

[4] Sherman incorporated by reference sections II, III, and IV of an Orlando, Fla., FM application (BPH–4378) in the application to acquire the Mount Dora construction permit. In pertinent part, Sherman's financial condition was stated as follows: "I, Gordon Sherman, hereby attest that I have cash on hand, and in banks in excess of all liabilities and in excess of $100,000."

[5] The amendment states in pertinent part: "The applicant, Gordon Sherman * * * has cash on hand and in banks; stocks listed on major exchanges computed at current prices; cash surrender value of life insurance; and Government securities; all totaling, after the deduction of all current and long-term liabilities, a sum substantially in excess of $90,000. This sum will be used by the applicant in connection with the construction and operation of the UHF station being applied for * * *. Moreover, this sum is in excess of $90,000 of any current and long-term liabilities incurred in connection with the purchase of radio station WMMB." By order, FCC 66M–728, released May 25, 1966, the examiner accepted the amendment, referring to it, in part, as "a purported statement of financial position of Gordon Sherman."

owned corporation to lend funds for the construction of an FM station to be operated in conjunction with an existing AM station, sufficient cash flows from the respective corporations will obviate the respective contingent liabilities.

5. Sherman's amended application herein indicates that he will require $468,019 in order to construct and operate his proposal for 1 year. To meet this requirement, Sherman relies upon an equipment credit of $135,000, a proposed bank loan, which has already been placed in issue, of $250,000, and cash of $90,000. Thus, it is apparent that the $90,000 is essential to Sherman's financial proposal. To establish the availability of the $90,000, Sherman relies upon the statements contained in the aforementioned amendment. See note 5, supra. However, the Commission has consistently held that a bare assertion of the availability of funds, without a detailed showing of liquid and fixed assets, current and long-term liabilities, and complete showing of net worth, is insufficient to establish that such funds are in fact available. See *Continental Broadcasting Corp.* (*WHOA*), FCC 59–676, 18 R.R. 826; *Publix Television Corp.*, FCC 59–643, 18 R.R. 762; and *Marion Moore*, FCC 64R–523, 3 R.R. 2d 920. Cf. *WLOX Broadcasting Co.* v. *FCC*, 260 F. 2d 712, 17 R.R. 2120 (D.C. Cir. 1958). The requirement for a detailed showing is particularly appropriate in this case where a bank loan is, in part, dependent on the applicant's financial position, and where the applicant has financial commitments to two other stations, and merely alleges that these commitments will not affect his financial position because these stations have sufficient cash flows to meet their needs. Cf. *Nelson Broadcasting Co.*, FCC 64R–505, 4 R.R. 2d 87. Thus, an issue inquiring into the ability of Sherman to meet his $90,000 commitment will be added.

6. Even if Sherman can establish the availability of the $90,000, Omicron requests the Board to broaden the financial issue to encompass a determination of whether Sherman possesses the requisite financial qualifications in other respects. This request is based on Omicron's allegations that Sherman has substantially underestimated his first year's costs. As previously indicated Sherman estimates his first year's costs to be $468,019, consisting of $223,019 for construction and $245,000 for operation. Omicron contends that these costs have been underestimated by at least $21,890, and possibly by as much as $49,750. In support of these allegations, Omicron submits with its petition affidavits of a programing consultant and of the general manager of a UHF television station in Orlando, each of whom alleges various deficiencies in Sherman's estimates.

7. We need not resolve the merits of Omicron's allegations concerning Sherman's costs because, assuming arguendo that Sherman has understated its costs by approximately $50,000, the requested enlargement of the financial issue would still be unwarranted. If Sherman establishes the availability of his bank loan and his $90,000 cash commitment, he will have available $475,000. Adding $50,000 to Sherman's estimate of costs would make for a total requirement of approximately $518,000. Thus, there would be a deficiency of $43,000. Although Sherman placed no reliance on revenues in order to establish its financial qualifications, he estimated his first year's

revenues to be $260,000. Omicron, in its application, estimated its revenues to be $300,000 for the first year of operation; and the Board, in simultaneously disposing of a petition to enlarge issues filed by Sherman against Omicron, has allowed Omicron to rely upon approximately $175,000 in revenues to meet its costs of first year's operation. Our determination in this regard has been based in part on a market analysis of Orlando, which took into account Omicron's rate card. Because Omicron's study was based partly on its rate card and the number of spot announcements Omicron proposes, and because Sherman places no reliance on revenues, we are unwilling to allow Sherman to rely upon revenues to any great extent in the absence of an adequate showing of the bases for his estimate. However, in view of the showing made by Omicron, and the Board's limited acceptance of that showing, it appears equitable to give Sherman credit for up to $43,000 in revenues.[6] We therefore conclude that further enlargement of the financial issue, as requested by Sherman, could serve no useful purpose, and this request will be denied.

8. In support of its request to add an issue concerning Sherman's alleged failure to disclose other broadcast interests, Omicron quotes from section II, paragraph 19, of Sherman's application form, wherein it is stated that Sherman's other broadcast interests are or have been as follows: WHIY, Orlando, Fla.; WROD, Daytona Beach, Fla.; WMAY, Springfield, Ill.; and WMAY-TV, Springfield, Ill. Omicron states that the Sherman application has been amended twice since first being filed, but that no amendment has shown his acquisition of station WFAC, Mount Dora, Fla., or station WMMB, Melbourne, Fla. Omicron alleges that not only do these acquisitions constitute two purchases in the Orlando market, but they also affect Sherman's financial picture. Omicron contends that under section 1.65 of the rules, Sherman was required to report these matters, and his failure to do so justifies the requested issue. The Bureau supports addition of a like issue, but frames it so as not to be "conclusionary in its form."

9. The opposition filed by Sherman points out that the interests acquired could not have been listed in the original application since they were acquired after the application was filed. Furthermore, Sherman contends, since the purchases were shown on other Commission documents and Commission files are cross-indexed, no amendment was required here. Finally, Sherman disputes the contention that the interests bought are in the same area, pointing out that Melbourne is more than 50 miles from Orlando.

10. Sherman's argument that he has notified the Commission of his acquisitions through ownership reports is not persuasive. The Board has specifically held in *Cleveland Broadcasting, Inc.*, 2 FCC 2d 717, 7 R.R. 2d 205 (Rev. Bd. 1966), that the bare filing of ownership reports does not satisfy the requirements of section 1.65 of the rules. Also see *Central Broadcasting Corp.*, FCC 66R-117, 3 FCC 2d 115, reconsideration denied, FCC 66R-170, 3 FCC 2d 577. The acquisition

[6] Although we would utilize Sherman's revenues to this extent, in view of our reliance in this paragraph on Omicron's study, it is our judgment that the extension of the utilization of Sherman's revenues for use as a credit toward the $90,000 cash commitment is not warranted.

of other stations by Sherman is a significant matter which could have an important effect on the outcome of this proceeding, regardless of how far these stations are located from Orlando. Therefore, the issue as framed by the Broadcast Bureau will be added.

Accordingly, it is ordered, This 30th day of June 1966, that the petition to enlarge issues, filed April 11, 1966, by Omicron Television Corp., *Is granted* to the extent indicated herein, and *Denied* in all other respects; and that the issues in this proceeding *Are enlarged* by addition of the following issues:

(*a*) To determine whether the $90,000 cash committed by Gordon Sherman is in fact available to him for the construction and/or operation of the station he proposes herein, and if such funds are found to be unavailable, to determine whether the applicant possesses the financial qualifications to construct, own, and operate the proposed station for a period of 1 year;

(*b*) To determine whether Gordon Sherman failed to perform the responsibilities of continuing accuracy and completeness of information furnished in a pending application as required by section 1.65 of the Commission's rules; and

(*c*) To determine whether the facts adduced pursuant to the foregoing issue (*b*) bear adversely upon the comparative qualifications of Gordon Sherman.

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

FCC 66R–257

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of CITY INDEX CORP., JACKSON, MISS.	Docket No. 16584 File No. BPCT–3530
JOHN M. McLENDON, TR/AS TELE/MAC OF JACKSON, JACKSON, MISS. For Construction Permit for New Television Broadcast Station	Docket No. 16585 File No. BPCT–3647

MEMORANDUM OPINION AND ORDER

(Adopted June 30, 1966)

BY THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of John M. McLendon, tr/as Tele/Mac of Jackson (McLendon), and City Index Corp. (City) for a construction permit for a new UHF television station at Jackson, Miss. The applications were designated for hearing by order, FCC 66–308, released April 20, 1966. Presently before the Review Board is a petition to enlarge issues,[1] filed by McLendon on May 11, 1966, requesting inclusion of the following issue:

> To determine whether American Public Life Insurance Co. is legally qualified to be a stockholder in the City Index Corp. and, in light of the evidence adduced, whether City Index Corp. is legally qualified to own and construct the proposed television station.

2. In support of its request, McLendon points out that City's application shows that American Public Life Insurance Co. (APLIC) is a 73-percent stockholder in City; that the president of City, Richard Rush, is also president and principal stockholder of APLIC; and that Charles C. Rush and Ralph B. Edwards, secretary-treasurer and vice president, respectively, of City, are officers of APLIC. McLendon cites section 5662 of the Mississippi Code, subsection 3, in part, as follows:

> Conflict of Interest. Provided, however, no domestic insurance company shall under this section acquire common stock in any company where the officers or directors of the insurance company, individually or collectively, hold an interest in excess of 10 percent of the company in which the common stock is acquired. For the purpose of this limitation, interest is defined as actual ownership; ownership in the name of a trustee, ownership in the name of a relative within the third degree, ownership in the name of an owned or controlled corporation, business, or ownership in the form of an option.

[1] Also before the Review Board is the Broadcast Bureau's support of petition to enlarge issues, filed on May 24, 1966. City did not file a response to the subject petition.

McLendon further points out that City's application indicates that the Rushes and Edwards own a total of 25.73 percent of City's stock. Since all three men are officers of APLIC, it is urged by McLendon that an issue be added to determine whether City is legally qualified to be a licensee in light of the apparent violation of the law of the State of Mississippi. The Broadcast Bureau recommends that the issue be added.

3. In the absence of any explanation by City, McLendon's uncontroverted allegations raise a substantial question regarding City's legal qualifications. Therefore, the Board will add an issue inquiring into this matter.

Accordingly, it is ordered, This 30th day of June 1966, that the petition to enlarge issues, filed on May 11, 1966, by John M. McLendon, tr/as Tele/Mac of Jackson, *Is granted* and the issues in this proceeding *Are enlarged* by the addition of the following issues:

(*a*) To determine whether American Public Life Insurance Co. is precluded by the laws of the State of Mississippi from investing money and/or purchasing stock in City Index Corp.

(*b*) To determine in light of the evidence adduced under issue (*a*) whether City Index Corp. is qualified to be a licensee of this Commission.

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

FCC 66R-260

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of GORDON SHERMAN, ORLANDO, FLA.	Docket No. 16536 File No. BPCT-3529
OMICRON TELEVISION CORP., ORLANDO, FLA. For Construction Permits	Docket No. 16537 File No. BPCT-3596

MEMORANDUM OPINION AND ORDER

(Adopted June 30, 1966)

BY THE REVIEW BOARD: BOARD MEMBERS NELSON AND KESSLER NOT PARTICIPATING.

1. Before the Review Board is a petition to enlarge issues filed April 11, 1966, by Gordon Sherman (Sherman),[1] seeking to add the following issue against Omicron Television Corp. (Omicron):

> To determine whether Omicron Television Corp. is financially qualified to construct and operate its proposed station.

In the alternative, Sherman seeks to add the following issue:

> To determine whether the funds available to Omicron Television Corp. are sufficient to enable it to construct and operate its proposed station.

2. Omicron and Sherman are mutually exclusive applicants for a construction permit for a new UHF television broadcast station to operate on channel 35, in Orlando, Fla. The proceeding was designated for hearing by order, FCC 66-264, released March 22, 1966. The bases for Sherman's request are specific challenges to (*a*) the ability of two of Omicron's stock subscribers to honor their commitments; (*b*) a bank loan commitment to Omicron; and (*c*) Omicron's estimate of first-year operating expenses.

3. Sherman first alleges that two of Omicron's principals, Albert G. Hartigan and Frank N. Merklein, do not have sufficient liquid assets to purchase $42,500 worth of stock subscribed to by each. In its opposition, Omicron points out that the subscriptions of Hartigan and Merklein are for $4,250 each (rather than $42,500), and alleges that both individuals have shown adequate resources to meet their commitments. In his reply, Sherman concedes the ability of Hartigan to meet his subscription, but again asserts that Merklein has overextended himself in stock commitments, particularly in view of the facts that Omicron's principals are also involved in five other applications (two of which have been granted) and that Merklein's balance sheet does not show sufficient current assets to meet all of his commitments.

[1] Also before the Board are (*a*) partial support, filed May 9, 1966, by the Broadcast Bureau; (*b*) opposition, filed May 10, 1966, by Omicron Television Corp.; and (*c*) reply, filed May 25, 1966, by Sherman.

4. Sherman's allegation that Merklein will be unable to meet his financial obligations to all of his broadcast commitments lacks the specificity required by section 1.229 of the rules. Other than as to the subject application, no showing is made of the total amount Merklein is obligated for, or that his assets are insufficient to meet that amount. Moreover, the Commission has held that it is not necessary to consider whether certain stockholders can meet their commitments in determining an applicant's financial qualifications if sufficient funds are available from other sources. *Greater New Castle Broadcasting Corp.*, 8 R.R. 291 (1952). Here, as will be shown, infra, Omicron need not rely upon Merklein's $4,250 stock subscription in order to finance its proposal. Therefore, addition of the requested issue is not warranted.

5. Sherman next attacks a $300,000 bank loan commitment from the First National Bank at Orlando as not being unconditional in that it requires the personal guarantees of Omicron's stockholders, both jointly and severally, on the note. Sherman claims that the application does not reveal that the stockholders are willing or able to make the guarantee or that the bank was aware of the other obligations of Omicron's principals. The Bureau supports addition of the issue unless it is shown that Omicron's stockholders are willing to guarantee the loan, and that the Orlando bank is aware of the financial obligations of Omicron's principals.

6. In its opposition, Omicron attached a clarifying letter of credit submitted to it by the First National Bank at Orlando. In the letter, the bank states that it does "not require further demonstrations of corporate or individual financial standings or any other facts" and that the $300,000 loan is made in full knowledge of other pending UHF applications. In reference to the necessary guarantees, Hartigan has submitted a letter certifying to the willingness of the stockholders to guarantee the loan. These letters resolve the objections raised by Sherman, and no further inquiry into the availability of the bank loan appears to be warranted.

7. Finally, Sherman contends that the funds available to Omicron will be insufficient to effectuate its proposal. In support of this contention, Sherman points out that Omicron's amendment application shows that Omicron will require $381,000 for construction and $300,000 for its first year's operating costs. Sherman contends that Omicron has only shown the availability of $658,250, as follows: $15,000 in existing capital; $95,000 in stock subscriptions; a $300,000 bank loan; and a $248,250 equipment credit. Thus, Sherman contends Omicron's application itself shows that there is a deficit of $22,750. Moreover, Sherman urges, this deficit should be increased by approximately $25,400 because Omicron allocated only $7,500 for interest payments the first year, whereas if Omicron pays 6 percent interest on its equipment credit and bank loan, its interest payments during the first year would amount to approximately $32,900.

8. Omicron, in its opposition, points out that in making the above analysis, Sherman completely overlooked the fact of Omicron's stated reliance upon its $300,000 estimate of operating revenues. Omicron argues that it has submitted the grounds upon which this estimate

was based and therefore is entitled to rely upon these revenues. Assuming the maximum amount of interest payments,[2] Omicron points out that it would require $585,750 in order to construct and operate its proposal, as follows: $300,000 for first-year operation; $82,750 for downpayment on equipment; $65,000 for equipment payments; $50,000 for other costs; $75,000 for bank loan payments; and $13,000 for additional bank interest payments. To meet this requirement, Omicron states that it has available $713,333, as follows: $113,333 in stock subscriptions and/or existing capital, a $300,000 bank loan, and $300,000 in revenues.

9. Sherman, in his reply, accepts the cost figures furnished by Omicron, but argues that Omicron should not be permitted to rely upon anticipated revenues. Omicron has not, Sherman contends, made the detailed showing as to the probability of achieving such revenues as contemplated by the Commission in the *Ultravision* case,[3] wherein the Commission indicated that an applicant relying upon revenues should be permitted to demonstrate the soundness of its figures by "a convincing evidentiary showing." With regard to Omicron's showing of the bases for its revenue estimate, Sherman states that the "basis for the figure-juggling in Omicron's financial plan * * * and the fractionalizing of the operating VHF stations (sic) revenues and income is nowhere shown to be based on any solid, valid assumption." The Bureau takes the position that Omicron can rely to some extent upon its anticipated revenues.

10. Critical to the determination of Omicron's financial qualifications is the question of whether Omicron can be given credit for anticipated operating revenues. If Omicron can show $176,667 ($585,750, the maximum amount Omicron will require for construction and first-year operation, minus the $413,333 Omicron has available without revenue and the $4,250 stock subscription of Merklein) in revenues, it would have adequate funds to finance its proposal. In a predesignation amendment to its application, Omicron submitted a market analysis of the real and potential television income in the Orlando market, as the basis for its $300,000 estimate of revenues for its first year of operation. In this document, Omicron analyzes Orlando's market size, UHF saturation, the revenues of present stations in Orlando, and spot sales in the present market. For example, Omicron points out that the three existing VHF television stations in Orlando have an average yearly gross income of $1.3 million. Omicron projects that its share will be 7.5 percent of the total revenues or 23 percent of the average VHF station in Orlando. Existing stations in Orlando, Omicron notes, average 575 spot sales per week, whereas Omicron proposes 545 spot sales per week. If Omicron's rate card were set at one-fourth of the lowest rate charged by the three existing Orlando stations, and if Omicron sold only one-half of the number of spots it proposes, it would still receive revenues of over $550,000. These

[2] With its opposition, Omicron submitted a letter from RCA indicating that its first year's interest payment on equipment will be $2,017. This would leave more than $5,400 of the $7,500 originally budgeted for interest to meet the interest payments on the bank loan. Since the maximum interest on the bank loan would be $18,000, Omicron allocated an additional $13,000 for interest.

[3] *Ultravision Broadcasting Co.*, 1 FCC 2d 544, 5 R.R. 2d 343 (1965).

examples will suffice to illustrate the nature of the information contained in Omicron's market analysis.

11. The Board does not believe that every applicant relying upon proposed revenues in its financial proposal must establish at a hearing the soundness of the basis for its estimate. In *Sawnee Broadcasting Company* (*WSNE*), FCC 66–398, 3 FCC 2d 561, the Commission indicated that an estimate of revenues can be relied upon "if that estimate is supported by a realistic showing of revenues of other similar stations, by a *market analysis of available revenues*, or by other objective evidence." (Emphasis added.) Moreover, in *Circle L, Inc.*, FCC 66R–20, released January 14, 1966, the Board denied a request for a financial issue where the applicant was relying on revenues based, in part, on a showing made by that applicant in his opposition pleading.

12. Omicron's bases for its estimate of revenues were before the Commission at the time this proceeding was designated for hearing. No issue regarding this estimate was specified. It is also noteworthy that Sherman estimates his first year's revenues to be $260,000 in the same market, and that Sherman did not factually dispute any portion of Omicron's market study. Also, we are not required to decide whether Omicron's market analysis would be adequate if all or most all of the anticipated revenues would be needed to finance its proposal (par. 10, supra). In view of all the foregoing, we find that Omicron's reliance on approximately $177,000 of its anticipated $300,000 in operating revenues is warranted, and therefore the requested sufficiency of funds issue will not be added.

Accordingly, it is ordered, This 30th day of June 1966, that the petition to enlarge issues, filed April 11, 1966, by Gordon Sherman *is denied.*

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

FCC 66–568

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re MARTIN COUNTY CABLE CO., INC., MARTIN COUNTY AND STUART, FLA. Request for Waiver of Section 74.1107 of the Commission's Rules	CATV 100–2

MEMORANDUM OPINION AND ORDER

(Adopted June 29, 1966)

BY THE COMMISSION: COMMISSIONERS BARTLEY AND LOEVINGER CONCURRING IN THE RESULT; COMMISSIONER COX CONCURRING AND ISSUING A STATEMENT.

1. The Commission has before it for consideration a petition requesting waiver of the evidentiary hearing provisions of section 74.1107 (a) of the rules,[1] filed on March 16, 1966, by Martin County Cable Co., Inc., hereinafter "petitioner."

2. Petitioner has been authorized by resolution of the Board of County Commissioners of Martin County, Fla., dated November 23, 1965, and by resolution No. 817 of the City Commission of Stuart, Fla., dated January 10, 1966, to establish on a nonexclusive basis, community antenna television systems to serve Martin County and Stuart. Martin County and Stuart are located within the grade A contours of the two television stations included in the West Palm Beach, Fla., market which, according to the American Research Bureau television market rankings, is ranked 85th in the Nation. In view of the fact that the CATV systems propose to carry signals of these Miami, Fla., stations beyond the grade B contours of these stations, unless a waiver is granted, an evidentiary hearing would be required.

3. Martin County and Stuart are 37 miles north of West Palm Beach and 17 miles south of Fort Pierce, the only two nearest communities of size with operating or authorized television stations. According to the 1960 U.S. census, Martin County has a population of 16,932 persons,[2] with approximately 6,400 TV homes, and the population of the city of Stuart totals 4,791 persons, with approxi-

[1] Sec. 74.1107 in pertinent part reads as follows: "(a) No CATV system operating within the 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. Commission approval of a request to extend a signal in the foregoing circumstances will be granted when the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made * * *."

[2] The Martin County population consists of 4,001 persons in the Hobe Sound Division, 2,652 persons in the Indian Town Division, and 10,239 persons in the Stuart Division.

mately 1,350 TV homes. Each of the West Palm Beach stations have over 625,000 TV homes within their service areas.[3] There are no television allocations in Martin County.

4. Petitioner claims that there would be an insufficient number of subscribers to support the operation of the proposed CATV systems if it were permitted to carry only the two VHF West Palm Beach signals and the one UHF signal from Fort Pierce.[4] It therefore seeks to furnish their subscribers with the commercial and educational stations from Miami, Fla., the predicted grade B contours of which reach the northern segment of Palm Beach County, but fall short of Martin County. Petitioner will comply with the provisions of section 74.1103 of the rules,[5] with respect to both the West Palm Beach stations and the Fort Pierce station.

5. From the facts presented, the Commission is of the opinion that waiver of the evidentiary hearing requirement of section 74.1107(a) of the rules is warranted in this case. The total Martin County market represents an insignificant percentage of the homes covered by the West Palm Beach stations. These stations' coverage consists primarily of the West Palm Beach area itself and the heavily populated areas to the south of West Palm Beach in the direction of Miami. The areas to the north and west of West Palm Beach are sparsely populated, the largest being St. Lucie County in which Fort Pierce is located.

6. It appears from the foregoing that the operation of CATV systems in the city of Stuart and in Martin County as proposed would have little or no impact upon the development of additional television broadcast stations in the West Palm Beach market area. Furthermore, Martin County is the only separate sparsely populated area within the grade A contours of the West Palm Beach stations, and is, in this sense, unique. All of the other populated areas within the grade A contours of the West Palm Beach stations are within Palm Beach County or in heavily populated Broward County to the south. Accordingly, we find that the operations proposed by the petitioners would be consistent with the public interest, and specifically the healthy maintenance of television broadcast service in the West Palm Beach market area.[6]

7. *Accordingly, it is ordered.* This 29th day of June 1966, that the petition for waiver of hearing filed by Martin County Cable Co., Inc., on March 16, 1966, *Is granted;* the hearing provision of section 74.1107 of the Commission's rules *Is waived;* and Martin County Cable Co., Inc., is authorized to carry the signals of the Miami stations on its Stuart and Martin County CATV systems subject to the provisions of section 74.1103 of the Commission's rules.

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

---

[3] WPTV's net weekly circulation for March 1965 was 222,200; WEAT-TV's net weekly circulation for March 1965 was 158,900.

[4] Station WTVX, channel 34, the UHF station assigned to Fort Pierce, has a predicted grade B contour over Stuart and part of Martin County.

[5] Sec. 74.1103 of the rules details the requirements relating to the distribution of television signals by CATV systems; those stations which the CATV systems are required to carry; special requirements to be followed in the event of noncarriage; the manner of carriage; the extent of program exclusivity, and exceptions thereto.

[6] We note that no oppositions have been filed against this proposal.

CONCURRING STATEMENT OF COMMISSIONER KENNETH A. COX

I don't greatly object to the grant of a waiver here because it seems unlikely that petitioner's CATV operations will be large enough seriously to affect the stations in West Palm Beach and Fort Pierce and because it does not appear that there will be other CATV systems within these stations' service areas which could make the same showing petitioner has advanced.

However, I cannot accept many of the assertions made by petitioner and do not think it should be assumed that they constitute an adequate basis for waiver of the hearing requirement of section 74.1107(a) of the rules. I think petitioner makes contradictory statements. On the one hand, it claims that Martin County is a classic CATV market because it has poor television reception, and that as a result its people must erect high receiving antennas with an average annual cost of maintenance approaching the annual charges of many CATV systems.[1] This suggests that off-the-air service is so poor that people in the area would subscribe to petitioner's cable service simply to get a decent signal from the nearest stations. But elsewhere petitioner claims there would be insufficient subscriber support for a Martin County cable system delivering only the three local stations—though among them they carry programs of all three networks—and that, as a consequence, petitioner needs to carry the Miami signals in order to have a viable operation. Either cable service is needed, or not—I don't think petitioner can have it both ways.

Further, in order to support a claim that it will assist the Fort Pierce UHF station, petitioner makes some rather loose statements about UHF set saturation and related matters. It says it is "told" there are very few sets in the county with UHF converters. While conversions may be few, presumably a good many sets have been purchased since the all-channel law went into effect.

Petitioner tries to disassociate itself from the West Palm Beach market, or, alternatively, to question whether the Commission really intended to apply its rules to markets this small. However, Martin County is clearly in the West Palm Beach market—indeed, until recently it received its only television service from there—and the Commission made its rules applicable to all of the top 100 markets, and did not adopt different policies for those toward the end of the list.

In short, I think most of the claims made by petitioner rest on bare assertion rather than factual showing. The decisive thing is that it does not appear that other systems can establish a basis for waiver in the area served by the West Palm Beach and Fort Pierce stations, and the impact of petitioner's system will be small. This is the basis for the waiver granted, and I therefore concur.

[1] These are bare conclusionary assertions. It seems to me that one seeking to avoid a hearing should submit more specific factual data.

FCC 66–569

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re COLDWATER CABLEVISION INC., COLDWATER, MICH. Request for Waiver of Section 74.1107 of the Commission's Rules	CATV 100–17

MEMORANDUM OPINION AND ORDER

(Adopted June 29, 1966)

BY THE COMMISSION: COMMISSIONERS BARTLEY AND LOEVINGER CONCURRING IN THE RESULT; COMMISSIONER COX CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT.

1. The Commission has before it for consideration a petition requesting waiver of the evidentiary hearing provisions of section 74.1107(a) of the rules,[1] filed on April 26, 1966,[2] by Coldwater Cablevision, Inc., hereinafter "petitioner."

2. An operating permit, passed in the form of an ordinance by the Coldwater City Council on June 28, 1965, authorized petitioner to establish a community antenna television system in Coldwater, Mich. Petitioner has commenced construction and expects the system to be completed by the latter part of June 1966. Coldwater is located within the grade A contour of television station WILX–TV, channel 10, Lansing (Onondaga), Mich., which is ranked the 47th market in the Nation according to American Research Bureau television market rankings, and is within the grade B contours of stations WKZO–TV, channel 3, Kalamazoo, Mich., WOOD–TV, channel 8, Grand Rapids, and WJIM–TV, channel 6, Lansing, Mich. In view of the fact that the CATV system also proposes to carry signals of seven stations beyond their grade B contours, unless a waiver is granted, an evidentiary hearing would be required.[3]

3. Coldwater, Mich., is a city of 8,880 persons (1960 U.S. census), located in the south-central portion of the State of Michigan,

[1] Sec. 74.1107 in pertinent part reads as follows: "(a) No CATV system operating within the 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. Commission approval of a request to extend a signal in the foregoing circumstances will be granted when the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made."

[2] Public notice B, Apr. 28, 1966, report No. 6, 83416.

[3] Petitioner proposes to carry, in addition to the grade A and grade B signals, the signals of WXYZ–TV (channel 7, ABC) and WKBD–TV (channel 50, independent), Detroit; WSPD–TV (channel 13, ABC) and WDHO–TV (channel 24, independent), Toledo; WPTH–TV (channel 21, ABC), Fort Wayne; WSBT–TV (channel 22, CBS), South Bend; and CKLW–TV, Windsor, Ontario, Canada.

approximately 12 miles north of the Michigan-Indiana State line, and 59 miles south of Lansing, Mich.[4] It is not a part of any standard metropolitan area, nor is it a portion of an urbanized area of any larger city. Coldwater, on the basis of the census population, is calculated to have 2,535 total households and 2,460 TV homes.

4. At present Coldwater is within the grade A contours of only one station, WILX/WMSB, the shared-time station on Lansing (Onondaga), shared by Michigan State University, and WILX–TV, an NBC network affiliate. However, as pointed out by petitioner, because of the share-time arrangement only 85 percent of the NBC–TV schedule is available for viewing in prime time. Grade B services are received representing the CBS–TV and NBC–TV networks, but neither an ABC–TV affiliated station nor an independent station places a grade B signal over Coldwater. Nor is there a grade B or better UHF service available. Petitioner contends, therefore, that it will provide for the first time a choice of all three major television networks, plus the choice of independent and sports programing carried by stations viewed in major centers, and this of necessity entails the extending of such signals beyond their grade B contours. Because of the limited population, petitioner alleges that Coldwater does not appear to have the economic potential to support a local TV station.

5. Petitioner claims that the established pattern of commercial television stations has been to move away from Coldwater and that as a result service to the Coldwater community has deteriorated. It points out that a CATV system is needed to assure this city a minimum level and choice of services. Petitioner alleges further that because the community is removed from the larger markets it does not enjoy multiple local service available in markets of significant size. It urges, additionally, that because of the differing factual situations in Lansing and Coldwater (Lansing receives two city grade signals and one grade A signal, representing the three major networks), the presence of petitioner in a Lansing hearing on CATV would not be meaningful; that such a hearing would place an unreasonable financial burden on petitioner, which, incidentally, has progressed to the point of offering service, and impose a needless wait on the underserved city of Coldwater.

6. From the facts presented, we are persuaded that waiver of the evidentiary hearing requirement of section 74.1107(a) of the rules is warranted in this case. We note initially, that over the years the trend of television service has been away from Coldwater and toward the larger cities. There are no unassigned VHF channels open in the general area and no UHF channels are assigned to Coldwater. Channels 23 and *69 have been assigned, but not applied for, to East Lansing, and channels 47 and 53 have been assigned to Lansing, but no applications for those channels have been filed. Coldwater is considered to be in the Lansing market, under our rules, because it is within the grade A contour of station WILX/WMSB. However, in view

[4] The nearest larger city to Coldwater is Battle Creek, Mich., which is 25 miles to the northwest. Other cities surrounding Coldwater include Jackson, Mich.—36 miles to the northeast; Kalamazoo, Mich.—38 miles to the northwest; South Bend, Ind.—65 miles to the southwest; Fort Wayne, Ind.—60 miles to the south; Toledo, Ohio—78 miles to the east; Detroit, Mich.—100 miles to the northeast; Lansing, Mich.—59 miles to the northeast; and Grand Rapids, Mich.—78 miles to the northwest.

of the fact that Coldwater is some 59 miles from Lansing, on the very edge of the grade A, and in view of the size of Coldwater (2,460 TV homes) as compared to the total net weekly circulation of the largest station in the market (403,700), we think it reasonable to conclude that the proposed CATV system in Coldwater would have little or no impact on the development of UHF stations in Lansing or East Lansing.

7. Nor do we think that the proposed Coldwater CATV system will have any significant impact on any other UHF channels in the area. Battle Creek, the closest community of size, has been assigned UHF channel 41 for which there is a pending application (BPCT-3654). Examination of the application, however, indicates that the predicted grade B contour of the proposed station will miss the center of Coldwater by upward of 4 miles. Channel 18 has been assigned to Jackson and there is an application pending (BPCT-3708), but its predicted grade B contour would not encompass Coldwater. There is no application pending for channel *58 in Ann Arbor, which is even farther removed from Coldwater than is Jackson. Thus, it does not appear that these channels, when activated, would rely upon communities the size and distance of Coldwater for significant audiences or revenues.[5]

8. Equally compelling in our decision to waive the evidentiary hearing in this case is the fact that the proposed CATV operation will bring the first ABC and independent television services to the residents of Coldwater. As we observed in the second report and order (31 F.R. 4540, 4562), CATV can make an important contribution to the public interest and the demand for television services (1) in areas too small in population or too remote in distance to support a local station and (2) by meeting the public's demand for good reception of multiple program choices, particularly the three full network services. Where these goals can be achieved, as here, with little risk to the establishment or healthy maintenance of UHF stations in the area, we can find no useful purpose to be served by holding an evidentiary hearing. In view of the above, we find that the operations proposed by petitioner would be consistent with the public interest, and specifically the establishment and healthy maintenance of television service in the area.[6]

Accordingly, it is ordered, This 29th day of June 1966, that the petition of Coldwater Cablevision Inc. for waiver of the Commission's rules, filed on April 26, 1966, *Is granted;* the evidentiary hearing provision of section 74.1107 of the Commission's rules *Is waived;* and Coldwater Cablevision Inc. *Is authorized* to commence operation as proposed, subject to the provisions of section 74.1103 of the Commission's rules.

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

---

[5] We have noted also the comparative size and population of the counties in which the above communities are located: Ingham County (Lansing), 211,296 population, 61,300 TV homes; Calhamn County (Battle Creek), 138,858 population, 42,600 TV homes; Jackson County (Jackson), 131,994 population, 38,900 TV homes; Washtenaw County (Ann Arbor), 172,440 population, 48,800 TV homes; Branch County (Coldwater), 34,903 population, 9,600 TV homes.

[6] We note that no oppositions have been filed against this proposal.

FCC 66–570

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re CHENOR COMMUNICATIONS, INC., CHENANGO BRIDGE, N.Y. Request for Waiver of Section 74.1107 of the Commission's Rules	CATV 100–6

MEMORANDUM OPINION AND ORDER

(Adopted June 29, 1966)

BY THE COMMISSION: COMMISSIONERS BARTLEY AND LOEVINGER CONCURRING IN THE RESULT; COMMISSIONER COX CONCURRING AND ISSUING A STATEMENT.

1. The Commission has before it for consideration the request by Chenor Communications, Inc. (Chenor), owner and operator of a CATV system in Chenango Bridge, N.Y., for waiver of the evidentiary hearing provisions of section 74.1107 of the Commission's rules.[1]

2. Chenor's CATV system in Chenango Bridge, N.Y., has been in operation since January 1, 1966. Chenango Bridge is within the grade A contour of television stations in the Binghamton market which, according to the American Research Bureau television market rankings, is rated as the 82d largest market. The system transmits the signals of the three local Binghamton stations: WNBE–TV (channel 12, CBS); WBJA–TV (channel 34, ABC); and WINR–TV (channel 40, NBC).[2] Because the system proposes to carry the signals of independent television stations WPIX and WOR–TV, New York, N.Y., beyond the grade B contours of those stations, unless a waiver is granted, an evidentiary hearing would be required.[3]

3. Chenango Bridge is about 10 miles from Binghamton. The net

[1] On Mar. 29, 1966, in connection with the application of Eastern Microwave, Inc., for a new domestic point-to-point microwave radio station (file No. 4617–C1–P–65) to provide to Chenor Communications, Inc., for its Chenango Bridge, N.Y., system the distant signals of independent television stations WPIX and WOR–TV, New York City, Chenor filed petitions entitled: "Request for an Evidentiary Hearing Pursuant to Section 74.1107 of the Commission's Rules" and "Petition for Waiver and Immediate Grant."

[2] Except for the above-named operating television stations, no other commercial television channels are allocated to Binghamton. There is an outstanding construction permit for an educational station on UHF channel 46 in Binghamton.

[3] The pertinent part of sec. 74.1107 of the rules states: "(a) No CATV system operating within the 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. Commission approval of a request to extend a signal in the foregoing circumstances will be granted when the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made * * *."

weekly circulation for the market is 231,100 (ARB 1965). It is estimated that there are about 481,200 television homes in the market. The town of Chenango has a population of 9,858 and has about 3,180 television homes. It is estimated that the part of the town of Chenango that is known as Chenango Bridge has about 1,200 television homes. Although the two UHF stations have a significantly smaller share of the market than does the VHF station, the UHF stations have substantially no other competition in Broome County, where Binghamton is located.

4. There is now considerable CATV penetration in the Binghamton market. As an example, it should be noted that Chenango Bridge is adjacent to Binghamton, which is bordered on the west by Vestal and Endicott, and on the north by the town of Chenango. In each of these municipalities, which are in the heart of the market, there is a CATV system. The signals transmitted by these systems include the signals of the independent television stations in New York City.[4] These systems have in excess of 5,000 subscribers at this time and they have an estimated potential of approximately 30,000 subscribers. According to ARB, Broome County, in which all of these localities are located, has a total of 70,700 households.

5. Station WSYE, channel 18, Elmira, N.Y., affiliated with NBC, is an operating station in the Binghamton market. Chenango Bridge appears to be beyond the predicted grade B contour of the station. Elmira is about 50 miles from Chenango Bridge and, because of the distance, the impact of the system upon the station is assumed to be minimal.

6. A construction permit has been granted for a television station to operate on channel 52 at Ithaca, a small city located about 40 miles from Chenango Bridge, which is at the outer limits of the proposed station's predicted grade B contour. Since Ithaca is overshadowed by the three VHF network affiliates in Syracuse, it appears that channel 52 will be independent. Since the station will have to depend principally on local advertisers, who will not be concerned with coverage in places as far away as Chenango Bridge, the addition of the New York independents to the Chenango Bridge system would hardly appear to affect the revenues of the Ithaca station.

7. From the facts presented here, the Commission is of the opinion that a waiver of the evidentiary hearing provision of section 74.1107 (a) of the rules is warranted. Since no unused commercial UHF channels are assigned to Binghamton, no question exists respecting the impact of CATV operations on an independent UHF operation in that city. The two UHF stations in Binghamton have network affiliations and, as we have noted, except for the Binghamton VHF station they have substantially no other competition in the heart of the market. It is believed that these stations will gradually increase their share of the market as all-channel receiver penetration increases. Chenango Bridge is a small community in the heart of the market, but, as we have indicated, CATV penetration in the heart of the market is

[4] Petitioner claims that it is not economically feasible to operate a system in Chenango Bridge without offering the signals of the New York independent stations.

already substantial. The net weekly circulation for the local stations now reflects the CATV subscriber diversion that results from importing the New York City signals. We find that permitting another system to transmit the signals of distant independent stations already being imported to the market by several other systems would not materially affect the service of the two Binghamton UHF stations.[5] As we have noted, Chenango, because of the distance from Elmira and Ithaca, is not considered to be a threat to any UHF operations there. We find, therefore, that the operations proposed by the petitioners would be consistent with the public interest, and specifically the healthy maintenance of television broadcast service in the Binghamton market area.

8. *Accordingly, it is ordered*, This 29th day of June 1966, the petition for waiver of hearing filed on March 29, 1966, by Chenor Communications, Inc., *Is granted;* the hearing provision of section 74.1107 of the Commission rules *Is waived;* and Chenor Communications, Inc., is authorized to carry the signals of television stations WPIX and WOR-TV, New York, N.Y., on its Chenango Bridge, N.Y., CATV system, subject to the provisions of section 74.1103 of the rules.

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

CONCURRING STATEMENT OF COMMISSIONER KENNETH A. COX

I concur in the result because the two New York signals are the only nonlocal signals carried on the CATV system and because other systems in the area are already carrying these two distant signals.

[5] We note that no oppositions have been filed against this proposal.

FCC 66-614

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202, TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS. (CHIPPEWA FALLS AND EAU CLAIRE, WIS.)	RM-973

MEMORANDUM OPINION AND ORDER

(Adopted July 7, 1966)

BY THE COMMISSION: COMMISSIONER JOHNSON NOT PARTICIPATING.

1. The Commission has before it for consideration a petition for rule-making filed on May 19, 1966, and amended on June 3, 1966, by Bushland Radio Specialties, prospective applicant for a new FM station in Chippewa Falls, Wis., requesting the deletion of channel 264 from Eau Claire, Wis., and the assignment of channel 265A to Chippewa Falls, Wis., as follows:

City	Channel No.	
	Present	Proposed
Chippewa Falls, Wis		265A
Eau Claire, Wis	231, 264, 283	231, 283

2. Chippewa Falls has a population of 11,708 and its county (Chippewa) has a population of 45,096. It is the county seat and located about 10 miles northeast of Eau Claire, the largest city in the county. WAXX, a daytime AM station, operates in the community. Eau Claire is located partly in Chippewa County and partly in Eau Claire County and has a population of 37,987. Eau Claire County has a population of 58,300. There are three AM stations in Eau Claire, one of which is a daytime-only station. WIAL(FM) operates on channel 231 and WEAU-FM is presently in the process of shifting from channel 264 to 283. See report and order in docket No. 16520, 3 F.C.C. 2d, 393. Channel 264 will thus soon be available for application by interested parties.

3. Petitioner submits that the proposal conforms to the separation rules and that it will apply for the proposed Chippewa Falls class A assignment, in the event it is adopted. It urges that a local FM station would better serve Chippewa Falls than would the Eau Claire stations, that Chippewa Falls does not have a full-time radio station, and that a similar FM assignment situation exists in the Wausau-Merrill, Wis.,

106-503—66

area. Finally, petitioner urges that Eau Claire itself would benefit from the additional program diversification.

4. In an opposition to the Chippewa Falls proposal, WBIZ, Inc., prospective applicant for a new FM station on channel 264 in Eau Claire, urges that Eau Claire needs and merits a third class C assignment, that the proposal would result in the waste of a valuable frequency or preclude its use in an area with sufficient population to support such a station, and that Chippewa Falls, being only 5 miles from Eau Claire, is generally considered part of the Eau Claire area and market. WBIZ also states that it is in the process of preparing an application for channel 264.[1]

5. In a recent rulemaking proceeding, docket No. 16520 (3 F.C.C. 2d, 393), the Commission added the assignment of channel 283 to Eau Claire as a third class C channel. We based this action upon a finding that this substantial market merited a third station, that it would provide a new outlet for local expression and a third competitive service, and that it could be accomplished without depriving any substantial community of a first FM assignment. Petitioner would delete one of the three class C assignments (channel 264) in order to place the adjacent class A channel 265A in nearby Chippewa Falls. Upon review of the contentions made in the petition and the situation in the general area, we are of the view that the third class C assignment in Eau Claire should not be deleted in order to make a class A assignment available for Chippewa Falls. There are not many class C or class A assignments in the general area around Eau Claire; the nearest class C stations are about 50 miles distant, one at Rice Lake and another at Neillsville. The only class A assignments within 50 miles of Eau Claire are at Menomonie (about 18 miles) and Ladysmith (about 50 miles). Thus, many people in the surrounding area would be deprived of an FM service if channel 264 were to be deleted at Eau Claire. As to the needs of Chippewa Falls for a local FM station, this can be met by channel 264, since it is available to any interested party in this community under the "25 mile rule," section 73.203(b).

6. In view of the foregoing, *It is ordered*, That the petition of Bushland Radio Specialties, RM–973, *Is denied*.

---

[1] In a second opposition filed by WECL, Inc., on June 28, 1966, the suggestion is made that channel 288A could be assigned to Chippewa Falls in the event it is deleted from Ladysmith, Wis., as proposed in a pending rulemaking proceeding, docket No. 16662, FCC 66–479.

FCC 66-571

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 83 OF THE COMMISSION'S RULES TO PERMIT SHIP RADIOTELEPHONE STATIONS WHICH OPERATE ON VHF TO OPERATE ON MORE THAN ONE PUBLIC CORRESPONDENCE FREQUENCY WITHOUT THE REQUIREMENT OF BEING ABLE TO OPERATE ON 156.3 AND 156.8 MC/S.	Docket No. 16082 RM-611

REPORT AND ORDER

(Adopted June 29, 1966)

BY THE COMMISSION:

1. A notice of proposed rulemaking in the above-captioned matter was released July 6, 1965, and was published in the Federal Register July 9, 1965 (30 FR 8696). The dates for filing comments and replies have passed.

2. The notice of proposed rulemaking was issued in response to a petition filed by American Telephone and Telegraph Co. (A.T. & T.) requesting that section 83.106 of the Commission's rules be amended to permit VHF ship radiotelephone stations to operate on more than one public correspondence channel without having a 156.3 and 156.8 Mc/s capability. The rules now permit such stations to operate on a single VHF public correspondence channel without being capable of transmitting and receiving on 156.8 Mc/s, the safety and calling frequency, and 156.3 Mc/s, the primary intership frequency. The main reason advanced by the petitioner is that most contiguous public coast stations with overlapping service areas do not operate on a common frequency because of electrical interference. Accordingly, a single channel VHF ship radio station cannot receive continuous public correspondence service when it moves from the service area of one public coast station to the service area of an adjacent public coast station where there is overlapping service because the latter station will be operating on a different frequency.

3. Comments were filed by Kaar Engineering Co. (KAAR); Lake Carriers' Association (LCA); Comite International Radio-Marine (CIRM); Southern California Marine Radio Council (SCMRC); American Telephone & Telegraph Co. (A.T. & T.); and a late filing was received from the Netherlands Postal & Telecommunication Services. Reply comments were filed by A.T. & T.

4. Of the comments received, those of the SCMRC and A.T. & T., the petitioner, fully support the proposal. SCMRC believes the proposal would aid development of marine VHF and provide maritime public correspondence communications without adding to the congestion in the 2-Mc/s band. KAAR and LCA oppose the proposal. CIRM and the Netherlands P. & T. oppose the proposed rules. Their comments also were directed to legislation contemplated by the U.S. Coast Guard which would require certain vessels being navigated on inland waters of the United States to be capable of exchanging navigational communications on a frequency reserved exclusively for that purpose.

5. Although KAAR and LCA oppose the proposal, they generally agree in substance with A.T. & T. and SCMRC that the VHF maritime service has not materialized as was anticipated. SCMRC believes the proposal would aid development of marine VHF and provide maritime public correspondence communications without adding to the congestion in the 2-Mc/s band. A.T. & T. points out that at least two channels are required if continuous coverage is to be afforded ship stations that move from the service area of one public coast station to that of another when the service areas overlap. With the establishment of numerous coast stations, A.T. & T. feels the two frequency principles should be approved as a minimum to provide continuity in coverage. From the viewpoint of the Commission, however, the current and planned availability of coast stations and service provided by the U.S. Coast Guard and the Army Corps of Engineers gives substantial encouragement to procurement of equipment which will provide 4, 5 or more channels rather than one or two. It appears also that more reasonably priced multichannel VHF maritime equipment is now available and the advantages of retaining the capability of the safety-calling frequency and at least one intership working frequency should warrant the additional expense involved.

6. Relaxation of the rules as set forth in the proposed rulemaking to provide multiple VHF frequencies does not foster the "calling-working" frequency concept provided by the Geneva radio regulations and we agree with KAAR that unless a common system is used by everyone, a gradual disintegration of the maritime VHF frequency plan may result. It would appear that ship stations requiring VHF radio for safety of their operation should have, as a minimum, the calling-and-safety frequency and one intership frequency. VHF public correspondence frequencies should be added as required by the ship operator as his needs and economics dictate.

7. Some confusion seems to exist in the industry with respect to the VHF maritime mobile system that should be developed within the framework of international treaties and the domestic regulations. Governmental decisions to allow piecemeal changes in the system lead to disintegration of the system and confusion and should be avoided. At the same time, it appears that some special purpose single-channel and dual-channel operations could be permitted in the system. The proposals in docket 16081 with respect to low power hand held or portable equipment used by pilots is an example of such a special use.

8. The comments filed in the proceeding are equally divided with respect to whether a further exception from the provisions of the Geneva radio regulations that ship stations be capable of operation on 156.8 and 156.3 Mc/s should be granted. The Commission agrees that neither 156.8 nor 156.3 Mc/s are required for public correspondence service but feels that an exception from this international requirement to provide these channels for use in the maritime mobile service is not justified on the basis of information submitted. A derogation to the Geneva radio regulations should not be taken without a clear and convincing showing that it is justified. Such a showing has not been made in this proceeding.

9. In the decision in docket No. 14375 (adopted July 13, 1962), the Commission's rules were amended to permit installation and use of equipment capable of operation only on one VHF public correspondence frequency without the capability for operation on the VHF safety and calling frequency, 156.8 Mc/s and the intership safety frequency, 156.3 Mc/s. In making this decision, the Commission considered, among other things, that there were more ship stations active in the public correspondence service in 1953 than there were in 1962, and agreed that there was evidence to support the belief that some improvement could be expected by permitting single-channel operation. The action taken by the Commission with respect to docket 14375 was a means to encourage expansion of the use of VHF and to make provision in the regulations whereby reasonable progress could be made in the future in implementing a maritime mobile VHF service. Assurance of the availability of such a service was given by the statement that: "The Commission clearly makes all frequencies in the 156–174 Mc/s band allocated in the United States for marine use available to all users who desire to take advantage of such availability."

10. During the period since 1962, some progress has been made toward better utilization of maritime VHF. The stimulus seems to have been provided by a number of independent factors. Among these has been the growing availability of reasonably priced, type-accepted VHF transmitting equipment. Then there has been the congestion on the high frequency radiotelephone channels. Of importance, also, has been the installation of new coastal stations equipped to serve the fleet on VHF. These taken together with the VHF service now available from the U.S. Coast Guard and the Army Corps of Engineers makes the very high frequency system particularly attractive.

11. It appears from information now available including that referred to above that implementation of the VHF maritime mobile service, at least in the United States, is making substantial progress. The requirement of the users for more than one channel is recognized. It follows that as better reasonably priced equipment becomes available, we should continue to encourage the use of a fully integrated maritime mobile service in which the safety frequency 156.8 Mc/s and the intership frequency 156.3 Mc/s is an integral part. Although it is reasonable to continue to authorize single channel equipment for special purpose use, it does not follow that we should encourage such use by also permitting two-channel equipment in the system. On the

contrary, since there is a discernible upswing in the use of VHF for public correspondence, there is all the more reason to preserve the ITU principles of a compatible system.

12. In view of the foregoing, the Commission is of the opinion that the public interest, convenience and necessity would not be served by adopting the proposed rules. Accordingly, *It is ordered*, That the petition RM–611 *is denied*.

13. *It is further ordered*, That this proceeding is hereby terminated.

FCC 66-597

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of WWIZ, INC., LORAIN, OHIO For Renewal of License of Station WWIZ, Lorain, Ohio	Docket No. 14537 File No. BR-3707

MEMORANDUM OPINION AND ORDER

(Adopted July 7, 1966)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING; COMMISSIONERS COX AND JOHNSON NOT PARTICIPATING.

1. The Commission has under consideration: the matters of record in the proceedings herein; its decision released March 31, 1964 (36 F.C.C. 562, 2 RR 2d 169) which, inter alia, denied the application of WWIZ, Inc., for renewal of license of station WWIZ, Lorain, Ohio; the Commission's order (36 F.C.C. 924, adopted April 22, 1964) providing that in the event of a petition for reconsideration of the Commission's decision or an appeal from such decision is timely filed, WWIZ shall cease operation and/or its authorization shall terminate 60 days after denial of the petition for reconsideration and/or the judicial affirmance of the Commission's decision; the Commission's memorandum opinion and order (37 F.C.C. 685, adopted September 16, 1964) which denied WWIZ, Inc.'s petition for reconsideration of the Commission's decision; the request for stay of the above-described decision, filed June 9, 1966, by WWIZ, Inc.; and the opposition thereto, filed June 17, 1966, by Lorain Community Broadcasting Co.

2. The United States Court of Appeals for the District of Columbia Circuit, on September 8, 1965, affirmed the Commission's decision and its denial of the petition for reconsideration of that decision. *The Lorain Journal Company* v. *F.C.C.*, —— U.S. App. D.C. ——, 351 F. 2d 824, 5 R.R. 2d 2111; petition for rehearing en banc denied November 19, 1965. The Supreme Court of the United States on April 4, 1966, denied the petition for writ of certiorari filed by WWIZ, Inc. (383 U.S. 967), and on May 16, 1966, that Court denied a petition for rehearing filed by WWIZ, Inc. (—— U.S. ——, 86 S. Ct. 1455). Accordingly, pursuant to the Commission's order of April 22, 1964, supra, and the Commission's public notice (FCC 66-441, 31 F.R. 7533), released May 19, 1966, station WWIZ must cease operation on July 15, 1966.

3. The Commission is of the opinion that it would serve the public interest to allow WWIZ, Inc., to continue operation of station WWIZ

for ninety (90) days, or until October 13, 1966, to afford the Commission the opportunity to consider any applications proposing to utilize, both on a permanent and on an interim basis, the frequency presently assigned to station WWIZ.

4. Accordingly, *It is ordered*, This 7th day of July, 1966, that WWIZ, Inc., *Is hereby authorized* to continue operation of station WWIZ until the end of the broadcast day on October 13, 1966.

FCC 66R-272

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
KWHK BROADCASTING CO., INC. (KWHK), HUTCHINSON, KANS.	Docket No. 16588 File No. BP-15356
COLUMBIA BROADCASTING SYSTEM, INC. (WCAU), PHILADELPHIA, PA.	Docket No. 16589 File No. BP-15446
KAKE-TV AND RADIO, INC. (KAKE), WICHITA, KANS.	Docket No. 16590 File No. BP-15968
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted July 13, 1966)

BY THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of KWHK Broadcasting Co., Inc. (KWHK), KAKE-TV and Radio, Inc. (KAKE) and Columbia Broadcasting System, Inc. (WCAU, hereinafter sometimes referred to as CBS). KWHK and KAKE request a construction permit for a new class II-A standard broadcast station (1210 kc, 50 kw, DA-2, U, class II-A) at Hutchinson, Kans. and Wichita, Kans., respectively. CBS requests authority for a construction permit to directionalize the existing operation (1210 kc, 50 kw, DA-1, U, class I-A) of station WCAU at Philadelphia, Pa. The applications were designated for hearing by memorandum opinion and order (3 F.C.C. 2d 409, released April 19, 1966) on issues concerning areas and populations, interference, section 307(b) and a contingent comparison of KWHK and KAKE.

2. The instant petition of KWHK requests additional hearing issues against KAKE and CBS.[1] KWHK seeks the addition of an issue against KAKE to determine whether a grant of the application of KAKE would be consistent with the provisions of section 73.35 of the Commission's rules; and an issue against CBS to determine whether a grant to CBS (a) would be inconsistent with the provisions of section 73.35 of the rules; (b) would result in a competitive advantage over the NBC and ABC networks; and (c) would be inconsistent with the Commission's policy favoring diversification of the ownership of the media of mass communication.

[1] Before the Review Board for consideration are the following pleadings: (1) motion to enlarge issues, filed by KWHK Broadcasting Co., Inc., on May 11, 1966; (2) opposition of KAKE-TV and Radio, Inc., to motion to enlarge issues, filed on May 23, 1966; (3) opposition to KWHK's motion to enlarge issues, filed by Columbia Broadcasting System, Inc. (WCAU), on May 24, 1966; (4) the Broadcast Bureau's comments, filed on May 25, 1966; and (5) reply to oppositions, filed by KWHK on June 3, 1966.

106-503—66——2

3. In support of the requested issue against KAKE, KWHK contends that KAKE recently acquired radio station KUPK, Garden City, Kans.; and that in the event KAKE's application is granted, the 1-mv/m contour of KAKE would overlap the 1-mv/m contour of KUPK in violation of section 73.35(a) of the Commission's rules.[2] In its opposition pleading, KAKE concedes that an overlap will exist with KUPK's 1-mv/m contour if its instant application is granted. However, KAKE states "that it will accept a grant of its application to improve the facilities of station KAKE subject to the condition that it dispose of station KUPK prior to the commencement of the operation proposed herein for station KAKE."

4. In a situation similar to the instant one, where an applicant's proposal involved prohibited overlap with an existing station owned by that applicant, the Commission denied a petition to dismiss the application in view of the applicant's stated intention to divest itself of the existing station in the event its application was granted. *Nebraska Rural Radio Association (KRVN)*, FCC 65–368, 5 R.R. 2d 67. In like manner, in the event KAKE's application is granted, KAKE will be required to divest itself of its interest in station KUPK.[3]

5. In support of the requested issue against CBS, KWHK states that CBS owns the maximum number of standard broadcast stations permitted under section 73.35 of the rules.[4] KWHK also points out that several companies that own from 1 to 3 percent of the stock of CBS also have interests in numerous other broadcast stations. KWHK next alleges that CBS is the only radio network with clear channel stations in both New York City and Philadelphia, and is seeking to expand the coverage of its Philadelphia station, thereby providing a further competitive advantage over the other networks. Thus, KWHK contends, CBS is clearly in violation of section 73.35 of the rules. Citing the Commission's notice of inquiry and notice of proposed rulemaking, in docket 15627, FCC 64–861, released September 18, 1964, KWHK urges that, as a minimum, CBS should be required to

[2] Sec. 73.35(a) of the Commission's rules states: No license for a standard broadcast station shall be granted to any party (including all parties under common control) if: (a) Such party directly or indirectly owns, operates or controls one or more standard broadcast stations and the grant of such license will result in any overlap of the predicted or measured 1-mv/m groundwave contours of the existing and proposed stations, computed in accordance with sec. 73.183 or sec. 73.186.

[3] The Bureau suggests that since KUPK was acquired by KAKE in August of 1965, and since no amendment to KAKE's application reflecting this acquisition has been filed, the Board may wish to add an issue on its own motion regarding this alleged nondisclosure. Although KAKE's application was originally filed on June 28, 1963, it was dismissed by letter of June 22, 1964, and was reinstated in the designation order herein, released on April 19, 1966. Since the subject petition was filed on May 11, 1966, the matter was brought to the Commission's attention prior to the expiration of the 30-day period in which KAKE was required, by section 1.65 of the rules, to notify the Commission. Thus, although a formal amendment reflecting the acquisition should have been filed, we do not believe that a substantial question of nondisclosure has been raised.

[4] Sec. 73.35(b) of the Commission's rules states: No license for a standard broadcast station shall be granted to any party (including all parties under common control) if: (b) Such party, or any stockholder, officer, or director of such party directly or indirectly owns, operates, controls, or has any interest in or is an officer or director of any other standard broadcast station if the grant of such license would result in a concentration of control of standard broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, classes of stations involved and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven standard broadcast stations.

secure the agreement of all stockholders in violation of section 73.35 not to vote their CBS stock during the pendency of the rulemaking proceeding. Finally, KWHK contends that the above mentioned circumstances raise a basic question as to whether a grant of the CBS application is in the public interest.

6. The matter of large investment companies acquiring stock interests of 1 percent or greater in more than the maximum number of broadcast stations provided for in the Commission's rules was specifically dealt with by the Commission in the notice of inquiry, cited by KWHK. Therein, the Commission indicated its concern with this matter, and provided for an interim procedure to govern the disposition of applications during the pendency of the inquiry. Where "acquisitions of additional broadcast interest" by a multiple owner would result in violation of the multiple ownership rules because of other interests of its stockholders, the Commission indicated that it would consent to such transactions, but would condition them on agreement by the stockholders in violation not to vote the stock in question, or to attempt to influence the policies of such companies during the pendency of the proposed inquiry. However, the Commission stated, "[a]pplications not changing the status quo during the pendency of this inquiry (e.g. applications for licenses, modifications of construction permits, and renewals) will continue to be processed in the usual manner (without conditions in this area) while the inquiry is pending."

7. The subject application of CBS is for a permit to directionalize the radiation pattern of its existing station, WCAU. Clearly, a grant of this application would not result in "additional broadcast interests" being acquired by CBS.[5] Moreover, although a grant of CBS's application might result in increased coverage by WCAU, it would not change the status quo with regard to the multiple ownership interests of CBS and its stockholders. CBS's application is not within the ambit of those where a condition is required, and clearly, therefore, no issue inquiring into this matter is required. KWHK's request for an issue to determine whether CBS's application would be consistent with the provisions of section 73.35, or in the alternative a condition requiring CBS stockholders in violation of this rule not to vote their CBS stock, will therefore be denied. KWHK sets forth no separate grounds for the requested issue as to whether a grant to CBS would be inconsistent with the Commission's policy favoring diversification of ownership of mass communications media. The Commission's diversification policy traditionally comes into play as an aspect of the standard comparative issue; since there is no such issue in this proceeding (contingent or otherwise) involving CBS, KWHK's request for a diversification issue is interpreted as looking toward a consideration of the pertinent facts from a basic qualifications standpoint. So interpreted, however, the request is merely repetitive of that seeking disqualification of CBS under section 73.35, and is denied for the reasons set forth above.

8. The only factual allegations made by KWHK in support of its request for an issue to determine whether a grant of CBS's application

[5] The cases cited by KWHK in support of the requested condition involved the acquisition of additional broadcast interests by multiple owners.

would result in a competitive advantage over the NBC and ABC networks is that CBS is the only radio network with clear channel stations in both New York City and Philadelphia, and that CBS is now seeking to expand the coverage of its Philadelphia station. No showing is made of the stations owned by the other networks, the relative size of the markets involved, or anything else which might justify an inference of competitive advantage. Thus, KWHK's allegations are conjectural, and are clearly insufficient under section 1.229 of the rules to warrant the requested enlargement of issues.

Accordingly, *It is ordered*, This 13th day of July 1966, that the motion to enlarge issues, filed by KWHK Broadcasting Co., Inc. (KWHK), on May 11, 1966, *Is denied;* and that any grant herein of the application of KAKE–TV and Radio, Inc. (KAKE), will be made subject to the condition that applicant divest itself of its interest in radio station KUPK, Garden City, Kans., prior to commencing the operation proposed in its application.

FCC 66-623

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of WMOZ, INC., MOBILE, ALA. For Renewal of License of Station WMOZ, Mobile, Ala.	Docket No. 14208 File No. BR-2797
Revocation of License of Edwin H. Estes for Standard Broadcast Station WPFA, Pensacola, Fla.	Docket No. 14228

MEMORANDUM OPINION AND ORDER

(Adopted July 13, 1966)

BY THE COMMISSION: COMMISSIONER COX NOT PARTICIPATING; COMMISSIONER JOHNSON ABSENT.

1. The Commission has under consideration: (*a*) Commission decision, May 11, 1966, released May 12, 1966, FCC 66-417, 3 FCC 2d 637; (*b*) petition for stay, filed June 13, 1966, by WMOZ, Inc.; (*c*) petition for reconsideration, filed June 13, 1966, by WMOZ, Inc.; (*d*) comments on petition for stay, filed June 23, 1966, by the Chief, Broadcast Bureau; (*e*) opposition to petition for reconsideration, filed June 27, 1966, by the Chief, Broadcast Bureau; and (*f*) reply to opposition, filed July 8, 1966, by WMOZ, Inc. Our decision denied renewal of the license of station WMOZ (WMOZ, Inc., Edwin H. Estes, 99-percent stockholder) and revoked the license of station WPFA (Edwin H. Estes, sole proprietor), subject to the proviso that the licensee of WPFA might arrange, with Commission approval, to sell WPFA and assign the license thereof within 90 days. The documents before us indicate that such a sale is in progress and no reconsideration of that portion of our decision is sought.

2. Petitioner claims no legal error in our decision insofar as it concerned station WMOZ. Its plea is addressed solely to the discretion of the Commission and is based, in part, upon Estes' complete disability, as well as the desirability of continuing the service of station WMOZ to the public. Both factors were thoroughly considered by us in reaching our decision, and we find no basis for reconsideration.

3. Accordingly, *It is ordered*, This 13th day of July 1966, that the above-described petitions for stay and reconsideration and the request for oral argument *Are denied.*

FCC 66R–262

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of REVOCATION OF THE LICENSE OF TINKER, INC., FOR STANDARD BROADCAST STATION WEKY, RICHMOND, KY.	Docket No. 16125

ORDER

(Adopted July 6, 1966)

BY THE REVIEW BOARD:

The Review Board has before it (*a*) an appeal from a ruling of the hearing examiner, filed by Tinker, Inc., on July 1, 1966; (*b*) comments on the appeal, filed by the Broadcast Bureau on July 1, 1966; and (*c*) the other matters of record herein.

It appearing, That the appeal is directed against the examiner's memorandum opinion and order of June 23, 1966 (FCC 66M–898), which denied Tinker, Inc.'s (*a*) written motion for stay of May 2, 1966, and (*b*) oral motion for continuance of June 23, 1966; and

It further appearing, That Tinker, Inc., sought a stay of the proceeding pending Commission action on Tinker, Inc.'s petition for review (filed May 2, 1966) of the Review Board's memorandum opinion and order of April 25, 1966 (FCC 66R–159); and that the examiner's denial of the stay was premised on a holding that, because of the subject matter of the petition for review, "it is more appropriate that a stay be considered by either the Review Board * * * or by the Commission"; and

It further appearing, That Tinker, Inc., later sought a continuance of the scheduled commencement of the hearing (from July 12, 1966 until September 12, 1966) on the ground "that the terminal illness of the mother of its principal, J. Francke Fox, prevents Mr. Fox from adequately participating in the preparation or hearing of Tinker's case"; and that the examiner, although sympathetic toward the request, denied it out of public interest considerations relating to the time that has already been expended since the designation of this matter for hearing;[1] and

It further appearing, That the Broadcast Bureau "believes that in the circumstances present, some continuance is warranted and that the establishment of a date in early fall (September or October) would be in order"; and

It further appearing, That a grant by the Commission, in whole or in part, of the above-mentioned petition for review could have substantial effect upon the future course and conduct of the proceeding;

[1] On his own motion, however, the examiner continued the hearing until July 26, 1966.

that a stay pending the Commission's determination could actually facilitate the orderly and expeditious progress of the hearing; that a stay of the proceeding until 20 days after the release of the Commission document disposing of the petition for review is appropriate in the total circumstances presented; and that the hearing examiner may thereafter establish such further procedural dates as are then warranted by the Commission's action and all other pertinent considerations;

It is ordered, This 6th day of July 1966, that the appeal from ruling of hearing examiner, filed by Tinker, Inc., on July 1, 1966, *Is granted* and the hearing herein *Is stayed* to the extent indicated above, and the appeal *Is denied* in all other respects.

FCC 66-619

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of REVOCATION OF THE LICENSE OF TINKER, INC., FOR STANDARD BROADCAST STATION WEKY, RICHMOND, KY.	Docket No. 16125

MEMORANDUM OPINION AND ORDER

(Adopted July 8, 1966)

COMMISSIONER LOEVINGER FOR THE COMMISSION (COMMISSIONER COX CONCURRING AND ISSUING A STATEMENT; COMMISSIONER JOHNSON ABSENT):

1. This is a proceeding for revocation of a broadcast license which comes before us now on the issue of the authority of the hearing examiner to require disclosure of exhibits and the names of witnesses in advance of the hearing.

2. By an order of March 28, 1966, Hearing Examiner Naumowicz directed exchange by the Broadcast Bureau and the respondent on specified dates of a statement identifying all nonstipulated exhibits which either party intended to offer in evidence, and a list of witnesses which each party proposed to call together with a brief statement as to the scope of testimony of each. The order provided that additional exhibits or witnesses would not be received or heard except for good cause and that each party should notify the other and the examiner if he decided not to produce an exhibit or witness listed. By a memorandum opinion and order of April 25, 1966, the Review Board set aside the examiner's order. The case comes to the Commission on respondent's petition for review of the Review Board's order and an opposition to such petition by the Chief of the Broadcast Bureau.

3. The trend of modern development in trials and hearings, both judicial and administrative, is toward the early informal disclosure of all relevant evidence and information and away from the view of trials and hearings as a sport or game in which the skill and strategy of counsel may be determinative. Thus the Administrative Conference of the United States approved the principle of discovery for adjudicatory administrative proceedings and recommended the adoption of discovery rules by each agency.[1] The Commission has taken steps to implement this recommendation by instituting a rulemaking proceeding looking toward the adoption of discovery procedures.[2] We

[1] Selected reports of the Administrative Conference of the United States, 88th Cong., 1st sess., S. Doc. No. 24, p. 63, Recommendation No. 30.
[2] Notice of Proposed Rulemaking (FCC 66-173), docket No. 16473, Feb. 28, 1966.

do not now intend to anticipate the result of that proceeding. We here decide only the issue presented by the instant case, although we note that the examiner's order is consistent with recommendations of the Administrative Conference and our own more recent actions.

4. The disclosure of the names of trial witnesses in advance of trial is a practice widely followed in Federal courts in recent years.[3] Although some authorities suggest that this power arises under the discovery rules,[4] there is also substantial authority that the power is part of the inherent power of the judge to control the course and conduct of proceedings.[5] In any event it is clear that the trial judge has ample authority to exercise discretion to protect informers and to limit disclosure for protection of the legitimate interests of the Government in civil proceedings.[6]

5. The precedents of the Federal courts are neither controlling nor decisive here and we do not hold the Federal Rules of Civil Procedure to be controlling. However the analogy of Federal civil proceedings is helpful and the experience of the Federal courts in similar proceedings is instructive. The Commission has delegated to its hearing examiners full authority to control the course and conduct of adjudicatory proceedings that have been referred to them, with the exception of particular matters specified in the rules to be acted upon by the Commission, the Review Board, or the Chief Hearing Examiner (47 C.F.R. 0.341). Pursuant to this general authority, we hold that the hearing examiner in the proceeding has the power to enter the order in issue here in his discretion. If the Broadcast Bureau believes that the names or identities of any witnesses should be withheld under the informer's privilege, or for other valid reasons, it may make an ex parte application to the examiner for an appropriate order upon a proper showing. Similarly, if the Broadcast Bureau finds it necessary to call witnesses not now known to it, as in the event of the need to authenticate documents, it may make application to the examiner as late as the time of hearing. Having authority to enter the order, the examiner has full authority to modify it and to adapt it to the exigencies of the proceeding and the hearing.

6. This ruling does not constitute a holding that each party in every Commission proceeding has a right to secure the names of witnesses of adverse parties in advance of hearing, or that the names of witnesses should be exchanged in advance of hearing in all adjudicatory proceedings. Whether or not such disclosure is appropriate, will expedite the proceeding and conduce to the ends of justice, and therefore should be ordered is a matter resting in the sound discretion of the hearing examiner in each proceeding, to be exercised upon a full consideration of all circumstances and after hearing the parties. We hold only that the hearing examiner, in an adjudicatory proceeding which has been referred to him, has the power to make such an order and that such an order rests in his sound discretion. While the Review Board understandably applied what it deemed to be controlling Commission prec-

[3] 1A Barron and Holtzoff, Federal Practice and Procedure 840, sec. 472.
[4] 4 Moore's Federal Practice 1075, sec. 26.19.
[5] *Wirtz* v. *Hooper-Holmes Bureau, Inc.*, 327 F. 2d 939 (C.A. 5th 1964); Barron and Holtzoff, op. cit. supra.
[6] *Wirtz* v. *Continental Finance & Loan Co.*, 326 F. 2d 561 (C.A. 5th 1964).

106-503—66— 3

edent in a situation such as this, we believe the new approach here followed by the hearing examiner to be the preferable one from the standpoint of more effective agency process.[7] It is commendable for a hearing examiner to exercise firm control of the course and conduct of a proceeding and to adopt such innovations in procedure as are consistent with the statutes, the rules of the Commission, the rights of the parties, and adapted to achieve expedition of proceedings, the full disclosure of facts and the attainment of justice.

7. Accordingly, *It is ordered*, That the petition for review filed May 2, 1966, by respondent herein *Is granted;* the memorandum opinion and order of the Review Board, released April 25, 1966, *Is reversed;* and the provisions of paragraph 4 of the order of Examiner Naumowicz, of March 28, 1966, *Are reinstated*, subject to the provisions of this memorandum opinion and order.

CONCURRING STATEMENT OF COMMISSIONER KENNETH A. COX

I concur in the result reached here. I agree that the modern trend is toward disclosure of evidence to be used in a forthcoming trial or hearing, but I think that the extent of this trend is somewhat exaggerated in the memorandum opinion and order. It is true that the Administrative Conference approved the principle of discovery in adjudicatory proceedings and recommended "that each agency adopt rules *providing for discovery to the extent and in the manner appropriate to its proceedings.*"[1] (Emphasis supplied.) And as is noted, the Commission is considering the adoption of appropriate discovery procedures in docket No. 16473. However, as the Review Board opinion in this matter points out, we there stated, in paragraph 6:

> It should be noted * * * that the proposed rules do not affect the present prehearing conference procedure of section 1.251. Under that procedure the parties can exchange a great deal of information, including a list of witnesses in appropriate cases. *Such exchanges are purely voluntary,*[7] and the FCBA has suggested that the Commission adopt the provision of Federal Rule 16 for mandatory exchanges of information, which may include lists of witnesses. We will be giving further consideration to use of the other Federal Rules of Civil Procedure, including Rule 16, and the question of lists of witnesses can be considered at that time. However, it would appear desirable in any event to await experience with the new discovery procedures before attempting to decide whether the mandatory furnishing of witnesses' names, with the attendant problems it may raise,[8] particularly in cases involving sanctions, should be adopted for Commission proceedings. (Emphasis supplied.)

[7] See also the procedure set out in *D and E Broadcasting Co.*, 5 Pike & Fischer, R.R. 2d 475 (1965), requiring the appropriate Commission Bureau to submit bills of particulars in certain cases.
[8] See *United States* v. *Manhattan Brush Co., Inc.*, 38 FRD (S.D.N.Y. 1965).

Thus I think the examiner here was anticipating what the Commission might decide to do in a future rulemaking, while the Review Board correctly applied our most recent precedents as to this question. I do not know what is meant by the reference, in the last line of paragraph

[7] As stated in our notice in docket No. 16473, we are considering the question of rule revisions with respect to prehearing procedures; such revisions, which we hope to consider in the near future, would be consistent with the present holding.
[1] Selected Reports of the Administrative Conference of the United States, 88th Cong., 1st sess., S. Doc. No. 24, p. 63, Recommendation No. 30.

3 of the memorandum opinion and order, to "our own more recent actions."

I have no reason to believe that, as qualified in the opinion, the requirement that the parties to this proceeding identify exhibits and witnesses in advance of the hearing will pose any problem—though I think that premature disclosure of the identity of witness can cause difficulties in certain cases, including revocation proceedings such as this one. I am therefore content to let the examiner's order, as modified, stand. However, I think that changes of policy of this magnitude should be made by the Commission in normal rulemaking proceedings and would have preferred that course here. Certainly, I think the decision of the Review Board and the position taken by the Broadcast Bureau were correct in the light of Commission policy and precedent prior to our action here.

FCC 66-645

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C. 20554, July 13, 1966.

WCHS-AM-TV CORP.
RADIO STATION WCHS
1111 Virginia Street, East
Charleston, W. Va. 25301

GENTLEMEN: This is with reference to your broadcast of the "Lucky Bucks" contest from June 7 through August 7, 1965, the subsequent correspondence regarding the contest and the Commission's investigation into the matter.

Monitoring of the "Lucky Bucks" announcements broadcast on WCHS revealed that most of the announcements stated that WCHS and the sponsor of the program were offering the listening public chances to win "over $6,000 in cash each week if you have the dollar bill that matches our serial numbers * * *." The Commission's investigation revealed that the total amount of the prizes actually awarded during the 9 weeks of the contest was $270. The dates and amounts of payments are as follows:

Date Won	*Amount*
June 7	$25
June 14	50
June 21	10
June 28	20
July 5	25
July 12	10
July 19	100
July 26	20
August 2	10

In response to our inquiries in this matter you contended that the statement that the listener was being offered $6,000 each week was not false if there was a possibility, no matter how remote, that this amount could be won. However, the Commission's investigation into the operation of the "Lucky Bucks" contest revealed that because of the manipulation of the odds by the contest syndicator [1] through a system of adjusting the number of digits to be read on the air, it was virtually impossible to win more than a small predetermined fraction of the prize total offered each week. The syndicator, whom WCHS paid a regular weekly fee for the contest, guaranteed payment of at least $365 in prizes during a 13-week run of the contest, which guarantee thus averaged approximately $28 per week. Inasmuch as the licensee was paying the syndicator only $49.50 per week for all rights to the contest plus syndicator's promise to pay all prizes and inasmuch as the licensee was aware of the methods by which the syndicator effectively controlled the amount of prize money to be paid, the licensee should have known that "offers" of $6,000 per week in prize money were false, misleading or deceptive.

[1] The syndicator was Azrael Productions of Baltimore, Md.

Moreover, certain other aspects of the "Lucky Bucks" contest as broadcast by WCHS appear misleading. We note that WCHS's advertising implied that listeners who trade dollar bills with the sponsor might receive a "Lucky Buck" which "can be worth up to $500 if it's a lucky buck." However, since the Commission's investigation revealed that serial numbers which might have won the $500 prize were not distributed in WCHS's coverage area, it was misleading to lead listeners to believe that there was an appreciable likelihood that they could acquire a $500 "lucky buck" at the sponsor's place of business.

It thus appears that in your advertising for the "Lucky Bucks" contest you fell short of the required degree of licensee responsibility regarding the broadcasting of false, misleading or deceptive advertising. Our policy in this regard was clearly set forth in our public notice of November 7, 1961, entitled "Licensee Responsibility with Respect to the Broadcast of False, Misleading or Deceptive Advertising." (See FCC 61–1316.)

In view of all of the circumstances of this case, we will place this letter in your station file as evidence of the Commission's disapproval and censure of your actions. We again remind all licensees of their duty to protect the public from false, misleading or deceptive advertising, whether such advertising is sponsored by other parties or is broadcast by the licensee in promoting its own station.

FCC 66D-28

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of HARMON DAVIS TR/AS TRI-CITY BROADCASTING CO., EUFAULA, OKLA. For Construction Permit	Docket No. 16292 File No. BPH-4482

APPEARANCES

Lawrence J. Bernard, Jr., on behalf of Harmon Davis trading as Tri-City Broadcasting Co.; and *Anthony J. Sobczak* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER H. GIFFORD IRION

(Effective July 7, 1966, pursuant to sec. 1.276)

1. The application of Tri-City was designated for hearing on November 10, 1965, in a consolidated proceeding with the application of Henryetta Radio Co. (docket No. 16293). The order of designation stated that Tri-City was legally, technically, financially and otherwise qualified to construct and operate its station as proposed but, because its proposal was mutually exclusive with that of the Henryetta Radio Co., it was designated for hearing on a section 307(b) issue and a contingent comparative issue. An initial prehearing conference was held on December 16, 1965, and subsequent conferences were held in 1966.

2. Early in 1966 a rulemaking proceeding was commenced at the instigation of Henryetta Radio Co., and this eventually resulted in the allocation of another FM channel to Henryetta, Okla. Accordingly, Henryetta Radio Co. petitioned for leave to amend its application to specify channel 258 in lieu of channel 272A. This petition was granted by the examiner on May 10, 1966, and the amended application of Henryetta Radio Co. was returned to the processing line. The record was closed on the same day.

3. As a result of these developments, the issues have been rendered moot and the application of Harmon Davis trading as Tri-City Broadcasting Co. is in a position to be granted. Both the applicant and the Broadcast Bureau have waived the right to file proposed findings and conclusions. Inasmuch as Tri-City has been found qualified in all basic respects and its proposal will make possible an early FM service to the community of Eufaula, Okla., it is in the public interest that the application be granted.

It is ordered, This 17th day of May, 1966, that, unless an appeal from this initial decision is taken by any of the parties or unless 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 Harmon Davis trading as Tri-City Broadcasting Co. (BPH-4482) for a construction permit for a new FM station to operate on 102.3 mc/s with 3 kw in Eufaula, Okla., *Is granted*.

FCC 66–594

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of COMMUNITY BROADCASTING SERVICE, INC., VINELAND, N.J. MORTIMER HENDRICKSON AND VIVIAN ELIZA HENDRICKSON, VINELAND, N.J. For Construction Permits	Docket No. 15265 File No. BPH–3949 Docket No. 15266 File No. BPH–4165

MEMORANDUM OPINION AND ORDER

(Adopted July 7, 1966)

BY THE COMMISSION: COMMISSIONER JOHNSON NOT PARTICIPATING.

1. The Commission has before it for consideration a petition for reconsideration of our memorandum opinion and order (FCC 66–435, released May 19, 1966; 3 F.C.C. 2d 711) filed June 17, 1966, by Community Broadcasting Service, Inc. (Community), requesting that the Commission either: (1) Grant the relief requested in Community's "Application for Review," or (2) set aside the decisions herein, reopen the record, and add issues to determine the daytime and nighttime coverage of the applicants' AM and proposed FM stations.

2. In requesting reconsideration, Community contends: (1) That the "slight preference" accorded it for its proposed duplicated FM programing is based on an error of fact insofar as it rests on Community's announced aim of developing separate and independent FM programing, since its "fully matured" program proposal for the FM station will continue to include the above-average public service programing exemplified by the past record of its AM station; and (2) that we erred in stating that Community could not rely in its application for review on questions of fact relating to its nighttime AM and FM coverage, which it did not present to the Review Board. We have carefully examined both of these contentions, and for the reasons stated hereinafter, find them to be without merit.

3. In our memorandum opinion and order we stated that since Community proposed for an indeterminate period of time to duplicate on its FM station the above-average public service programs carried on its AM station, such duplicated programing should be considered and that Community was entitled to a slight preference on this score. We further stated that, "Only a slight preference can be accorded for such duplicated programing since the programing will already be available to the population and area of the city of Vineland now served by Community's AM station, and since it is Community's declared aim to develop separate and independent FM programing for a separate FM-only audience." This latter reason for the slight pref-

erence was based on specific statements in Community's exhibit 2 that, "Proposed station WWBZ–FM will in its initial stages of operation, after technical operation has been perfected, duplicate the existing program schedule of station WWBZ," but that, "Community aims, eventually, to develop separate and independent FM programing for a separate FM-only audience." The slight preference accorded Community for its duplicated programing is substantially supported by the record.

4. Regarding Community's contention that it should have been permitted to rely in its application for review on questions of fact which it did not present to the Review Board, we need only note here that section 5(d)(5) of the Communications Act (47 U.S.C. 155(d)(5)) specifically provides that no application for review shall rely on questions of fact or law on which the Board has been afforded no opportunity to pass.

5. Community also contends that, since the issues in this proceeding were framed before adoption of our new policy statement on comparative broadcast hearings (1 F.C.C. 2d 393 (1965)), the record should be reopened and that there should be added coverage issues relating to the criterion of diversification of control of the media of mass communication. This contention is equally without merit. As stated in our policy statement (ibid, supra, at p. 400), we did not adopt new criteria which would call for the introduction of new evidence, but rather restricted the scope of existing factors and explained their relative importance. In our memorandum opinion and order, supra, we stated that, so far as diversification is concerned, the contention concerning coverage "ignores the important consideration that Community has the only nighttime radio facility in Vineland and that a grant to it would give it the only two nighttime radio stations in Vineland." No unusual or compelling circumstances warranting reopening of the record have been shown.

6. Accordingly, *It is ordered*, This 7th day of July 1966, that the petition for reconsideration, filed June 17, 1966, by Community Broadcasting Service, Inc., *Is denied;* and

7. *It is further ordered*, That the proceeding in dockets Nos. 15265–15266 *Is terminated.*

FCC 66R-263

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of McALISTER BROADCASTING CORP., LUBBOCK, TEX.	Docket No. 16489 File No. BPCT-3426
JOHN B. WALTON, JR., D/B/A KJJJ-TV, LUBBOCK, TEX.	Docket No. 16490 File No. BPCT-3527
For Construction Permit for New Television Broadcast Station	

MEMORANDUM OPINION AND ORDER

(Adopted July 6, 1966)

BY THE REVIEW BOARD: BOARD MEMBER KESSLER NOT PARTICIPATING.

1. The Review Board has before it a joint request for approval of agreement, filed May 24, 1966, by McAlister Broadcasting Corp. (McAlister) and KJJJ-TV,[1] in which the parties have submitted an agreement to dismiss the McAlister application and to reimburse McAlister for expenses incurred in prosecuting its application. The proceeding was designated for hearing by order, FCC 66-211, released March 8, 1966, on a financial issue against McAlister and the standard comparative issue.

2. The parties submitted their joint request beyond the 5-day filing period specified by section 1.525 of the Commission's rules. However, no objection has been raised and good cause exists for the late filing.

3. The agreement provides that KJJJ-TV will reimburse McAlister in the amount of $6,990 in payment of the legitimate and prudent expenses incurred by McAlister in the preparation, filing and advocacy of its application. The affidavits and explanations on file fully substantiate such expenses and show compliance with rule 1.525 in all respects.

4. According to the agreement, McAlister shall be given a right of first refusal should Walton attempt to transfer control or assign the license in the next 10 years; McAlister must meet any bona fide offer both as to price and terms. The Bureau objects only to this provision in the agreement, stating it constitutes "consideration in addition to the monetary payment" and that "a serious public policy question is presented by an agreement which limits sale of the station." The bare statement that a "serious public policy question is presented" is in-

[1] The pleadings before the Review Board are: (*a*) Joint request for approval of agreement, for withdrawal of application of McAlister Broadcasting Corp. and for grant of application of John B. Walton, Jr., d.b.a. KJJJ-TV, filed May 24, 1966, by McAlister Broadcasting Corp. and KJJJ-TV; (*b*) additional affidavit, filed May 25, 1966, by KJJJ-TV; (*c*) response, filed June 6, 1966, by the Broadcast Bureau; and (*d*) reply, filed June 16, 1966, by McAlister and KJJJ-TV.

sufficient. Even with a right of first refusal, any transfer of control or assignment of the license must ultimately be approved by the Commission. See *Spanish International Television Company, Inc.*, FCC 65–425, 5 R.R. 2d 479. The agreement does not involve excessive monetary consideration, for if McAlister is to exercise its right, it must first match the price and terms of an offer set by an independent third party. Furthermore, in the present case, McAlister has already demonstrated an interest in serving the area by having applied for the allocation. For these reasons, the provision for a right of first refusal in favor of McAlister does not preclude the Board from approving the agreement.

5. Moreover, the Board is further persuaded that the public interest will be served by approval of this agreement in that it will avoid the necessity of a lengthy comparative hearing and will allow the immediate effectuation of the first UHF television service to Lubbock, fostering a policy of the Commission to promote such operations.

Accordingly, *It is ordered*, This 6th day of July 1966, that the joint request for approval of agreement, filed May 24, 1966, by McAlister Broadcasting Corp. and KJJJ–TV *Is granted;* that such agreement *Is approved;* that the application of McAlister Broadcasting Corp. (BPCT–3426) *Is dismissed;* and that the application of KJJJ–TV (BPCT–3527) for UHF channel 28 in Lubbock, Tex., *Is granted.*

FCC 66-592

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of FLOWER CITY TELEVISION CORP., ROCHESTER, N. Y., ET AL. For Construction Permits for New Television Broadcast Stations (Channel 13)	Docket No. 14394 File No. BPCT-2929 Docket Nos. 14395, 14460, 14461, 14462, 14464, 14465, 14466, 14467, 14468

ORDER

(Adopted July 7, 1966)

BY THE COMMISSION: COMMISSIONERS COX, WADSWORTH, AND JOHNSON NOT PARTICIPATING.

At a session of the Federal Communications Commission held at its offices in Washington, D.C., on the 7th day of July 1966;

1. The Commission having under consideration a petition for assignment of this proceeding to a conference before the Review Board filed May 10, 1966, by Federal Broadcasting System, Inc.; and an opposition thereto filed May 19, 1966, by the Chief, Broadcast Bureau;

2. *It appearing*, That no other applicant has supported Federal's petition, that no showing has been made indicating that such a conference might reasonably be expected to contribute to the prompt resolution of this proceeding, and that such a procedure would not conduce to the orderly dispatch of the Commission's business;

3. *It is ordered*, That the petition for assignment to conference filed May 10, 1966, by Federal Broadcasting System, Inc., *Is denied.*

FCC 66-593

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of FLOWER CITY TELEVISION CORP., ROCHESTER, N.Y., ET AL. For Construction Permits for New Television Broadcast Stations (Channel 13)	Docket No. 14394 File No. BPCT-2929 Docket Nos. 14395, 14460, 14461, 14462, 14464, 14465, 14466, 14467, 14468

MEMORANDUM OPINION AND ORDER

(Adopted July 7, 1966)

BY THE COMMISSION: COMMISSIONERS COX, WADSWORTH, AND JOHNSON NOT PARTICIPATING.

1. This proceeding now involves nine mutually exclusive applications for construction permits for new television stations to operate on channel 13 in Rochester, N.Y. Eight of those applicants propose full-time operation. The ninth applicant, Rochester Telecasters, Inc. (RTI), proposing part-time operation, was a share-channel applicant with Rochester Area Educational Television Association, Inc. (RAETA). At RAETA's request, its application was dismissed with prejudice by the Review Board on January 21, 1966, 2 F.C.C. 2d 448, 2 F.C.C. 2d 1029.

2. On November 29, 1965 RTI filed a petition requesting acceptance of an amendment to its application to specify full-time, instead of part-time, hours of operation and to alter its financing proposal. RTI asserts that its petition is in pursuance of our memorandum opinion and order, FCC 65-403, released May 13, 1965, 5 R.R. 2d 434, in which the applicants were invited to update their applications to reflect involuntary changes and to modify their program proposals to reflect current needs. However, that memorandum opinion and order was set aside by our subsequent order, FCC 66-347, released April 21, 1966, in which we held that all matters of decisional significance are in the present record and that it would be more conducive to the orderly disposition of our business to decide this proceeding on the basis of the present record. Moreover, the amendment proposed by RTI is clearly beyond the scope of the invitation in our memorandum opinion and order of May 13, 1965, which was restricted to involuntary changes resulting from the death or disability of the principals of various applicants and to revision of program proposals based on a new evaluation of the community's needs. Our May 13, 1965, memorandum opinion and order was not intended to, and did not in fact, invite the applicants to specify entirely new financial

arrangements or broadly expanded program schedules and hours of operation, as RTI now proposes.

3. Under these circumstances, RTI's petition must be considered in the light of section 1.522(b) of the rules, which provides, in part, that requests to amend an application after it has been designated for hearing will be granted only for good cause shown. Oppositions have been filed to RTI's petition by Flower City Television Corp., Star Television, Inc., Federal Broadcasting System, Inc., Citizens Television Corp., and the Broadcast Bureau, which parties assert that RTI has failed to show good cause. They argue that RTI is proposing essentially a new application to eliminate the shortcomings of its association with RAETA, that RTI sought the benefits and advantages of its relationship with RAETA in this proceeding and should not now, in fairness to the other applicants, be permitted to avoid the unanticipated consequences of that voluntary association, and that RTI's proposed amendment would require further hearings to evaluate RTI's proposal and to compare it with each of the other applications. They also urge that the unilateral and voluntary dismissal of RAETA's application does not constitute good cause for RTI's proposed amendment, since its standing in this proceeding has always been contingent upon the continued prosecution of RAETA's application. Finally, they contend that good cause is absent since the proposed amendment would improve RTI's competitive position with respect to the other applicants, citing *Farragut Television Corp.*, FCC 65R–42, 4 R.R. 2d 342, *Cleveland Telecasting Corp.*, FCC 65R–32, 4 R.R. 2d 325, and *Cleveland Broadcasting, Inc.*, FCC 64R–278, 2 R.R. 2d 816.

4. In response to those oppositions, RTI urges that its proposed amendment is not being made voluntarily, since it could not control the withdrawal of RAETA's application. Although RTI concedes that its proposed amendment may affect its competitive position with other applicants, it urges that those other applicants would not be unduly prejudiced in light of the favorable position occupied by RTI when Hearing Examiner Huntting's initial decision was issued. In conclusion, RTI requests that its petition be granted and that its proposed amendment to its application be allowed.

5. Under the circumstances of this proceeding we are persuaded that RTI's petition should be denied. Revision of RTI's financial and programing proposals would require an additional hearing, thus further delaying the resolution of this proceeding. It is also apparent that RTI's amendment is proffered in an attempt to improve its position with respect to the other applicants and that the amendment would have an effect upon the comparative evaluation of the applicants in this proceeding. Since RTI's amendment would require further hearings long after the record has been closed in this proceeding and since the amendment would probably improve RTI's comparative standing with other applicants, we are convinced that good cause has not been shown and, therefore, that RTI's petition should be denied in accordance with section 1.522(b) of our rules.

6. Accordingly, *It is ordered*, This 7th day of July 1966, that the petition to accept amendment of application filed November 29, 1965, by Rochester Telecasters, Inc., *Is denied*.

FCC 66R-268

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of ASSOCIATED TELEVISION CORP., ST. PAUL, MINN.	Docket No. 15932 File No. BPCT-3318
DEIL O. GUSTAFSON, TR/AS CAPITOL CITY TELEVISION CO., ST. PAUL, MINN. For Construction Permit for New Television Broadcast Station	Docket No. 15933 File No. BPCT-3428

MEMORANDUM OPINION AND ORDER

(Adopted July 8, 1966)

BY THE REVIEW BOARD: BERKEMEYER, NELSON, AND SLONE.

1. This proceeding involves the mutually exclusive applications of Associated Television Corp. (Associated), and Deil O. Gustafson, trading as Capitol City Television Co. (Capitol City) for a construction permit for a new UHF television broadcast station to operate on channel 29, in St. Paul, Minn. On April 7, 1966, the Review Board released a decision, FCC 66R-136, 3 F.C.C. 2d 332, granting the application of Associated, and denying the application of Capitol City; these actions were based on the Board's conclusion that Capitol City did not meet its burden of proof under a financial qualifications issue. Briefly, this conclusion was grounded in findings that Capitol City had not shown the amount needed to construct and operate its proposed station for 1 year; and, even assuming approximately $180,500 as the minimum amount required, Capitol City had not established the availability of that amount since it had shown only a bank loan commitment for $100,000 or more, and since it could not rely upon Gustafson's personal assets for the reason that no satisfactory balance sheet for Gustafson had been submitted. Presently under consideration is a petition for reconsideration of the decision, filed by Capitol City, and a petition for leave to amend, filed by Associated.[1]

2. In support of its request for reconsideration, Capitol City first contends that the Board's decision as well as the initial decision were founded on procedural deficiencies. Capitol concedes that there were gaps and lapses in the proof. The short answer here is that to the extent that its failure to meet its burden of proof under the issues framed by the Commission constituted a procedural deficiency, it is correct. The fact remains, however, that its showing was given the

[1] The Board has the following pleadings before it: (*a*) Petition for reconsideration of the decision of the Review Board dated April 7, 1966, filed by Capitol City on May 2, 1966; (*b*) opposition to petition for reconsideration, filed by Associated on May 12, 1966; (*c*) opposition by Broadcast Bureau to petition for reconsideration, filed on May 17, 1966; and (*d*) petition for leave to amend, filed by Associated, on June 10, 1966.

most careful consideration and was decided on the merits. Where, as here, an applicant does not possess one of the basic qualifications to be a licensee, any further evaluation of the merits of the other aspects of that applicant's proposal would serve no useful purpose. *Deep South Broadcasting Co.* v. *FCC*, 278 F. 2d 264 (1960).

3. With regard to its financial proposal, Capitol City contends that the Board erroneously found that Gustafson's personal assets would be used as collateral for the proposed bank loan; whereas, in fact, no collateral would be required, and Gustafson's assets would be available to finance the proposal. This contention is without merit. In evaluating Capitol City's financial proposal, the Board noted that Gustafson's testimony appeared to indicate that he was merely to provide collateral for the loan. Nevertheless, the Board assumed that Gustafson would personally make up any inadequacy in the required funds. No credit for Gustafson's personal assets was given, however, because of Capitol City's failure to furnish a balance sheet for Gustafson, and not because of a finding that Gustafson's personal assets were committed as collateral for the loan.[2]

4. Capitol City next avers that an attempt was made to cure the deficiencies in Gustafson's balance sheet through the submission of a new balance sheet in a proposed amendment which was later denied; that a second (similar) amendment was thereafter allowed, although it did not contain the new balance sheet; and that the Board dismissed an appeal from the denial of the first amendment based, in part, on the fact that financial data contained in the first amendment was accepted in the second. This sequence of events, Capitol City suggests, might require corrective action by the Board. We disagree. Capital City did not petition for review or except to the dismissal of its appeal from the ruling denying its first amendment. Capitol City's first and second amendments contained identical financial information (including a statement that enlargement of the financial statement would follow), except that the second amendment did not include a balance sheet for Gustafson. Although Capitol City was, or should have been, aware from the time of designation that one of the deficiencies in its proposal was the inadequacy of the Gustafson balance sheet submitted with its application,[3] the only reason now set forth by Capitol City for not filing a balance sheet with the second amendment is that the balance sheet was not ready at the time of filing.[4] Moreover, Bureau counsel, at the hearing, specifically pointed out to counsel for Capitol City, that a financial statement for Gustafson was missing and asked counsel whether he intended to introduce such a financial statement. Counsel replied: "No" (Tr. 119). Subsequently, Bureau counsel pointed out this deficiency to Gustafson, and the fact that counsel for Capitol City indicated that Gustafson would supply no further financial statement, and asked Gustafson whether this was correct. Gustafson replied it

[2] Had the Board held that Gustafson was required to provide collateral for the proposed bank loan, it is doubtful whether the Board would have even given Capitol City credit for the loan, in view of the failure to supply information concerning Gustafson's financial status.

[3] The inadequacies of this balance sheet were specifically pointed out in the designation order.

[4] It is difficult to understand how the balance sheet could have been ready for the 1st amendment, but not the 2d.

was correct (Tr. 135–136). Under these circumstances, we fail to see why corrective measures are required to cure Capitol City's apparent omissions.

5. Finally, as previously indicated, Capitol City concedes that there were gaps and lapses in the proof, points out that its counsel is unfamiliar with the procedural requirements of the Commission, and requests the Board to reopen the record and direct Capitol City to submit such material as the Board deems necessary. Attached to Capitol City's petition is a new bank letter of commitment for $200,000. This new letter of commitment is dated December 13, 1965, which was less than 3 weeks after the initial decision herein was released, prior to the time that Capitol City filed its exceptions to the initial decision, and almost 4 months before the Board released its decision. The Commission has consistently held that it will not reopen a record in the absence of newly discovered evidence or unusual and compelling circumstances merely to allow an applicant who has suffered an adverse decision another opportunity to present evidence for a grant. See, for example, *WNOW, Inc.*, 38 F.C.C. 471, 4 R.R. 2d 857 (1965). This principle applies with particular force here. Moreover, Capitol City's allegations in no way attempt to dispute the Board's finding that Capitol City failed to establish the amount it would require in order to construct its station and operate it for 1 year. As stated in our decision, in view of Capitol City's failure to attempt to cure the deficiencies pointed out in the designation order and at the hearing, there is no justification for a further hearing. Capitol City has set forth no reason which would cause us to deviate from this holding now.[5]

6. In its petition for leave to amend, and the attached amendment, Associated seeks to show that a 4-percent stockholder has acquired, through an almost wholly owned corporation, AM and FM stations in Battle Creek, Mich. Associated points out that the proffered amendment, filed pursuant to section 1.65 of the rules, would not necessitate a change of issues, introduce new parties, or require further hearing. No opposition to the petition for leave to amend has been filed. The Board finds that Associated's petition was timely filed, and could have no effect on the outcome of this proceeding. Therefore, the petition will be granted.

Accordingly, *It is ordered*, This 8th day of July 1966, that the petition for reconsideration of the decision of the Review Board dated April 7, 1966, filed by Deil O. Gustafson, trading as Capitol City Television Co. on May 2, 1966 *Is denied;* and that the petition for leave to amend, filed by Associated Television Corp. on June 10, 1966, *Is granted*, and the amendment attached thereto *Is accepted.*

[5] Although the Board has found it very difficult to determine the precise nature of all Capitol City's arguments, we have attempted to set forth these arguments and deal with them on the merits.

FCC 66–596

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of CONNECTICUT RADIO FOUNDATION, INC. (ASSIGNOR) AND CONNECTICUT TELEVISION, INC. (ASSIGNEE) For Assignment of the Construction Permit of Television Station WTVU(TV), Channel 59, New Haven, Conn.	Docket No. 16576 File No. BAPCT–370

MEMORANDUM OPINION AND ORDER

(Adopted July 7, 1966)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING AND ISSUING A STATEMENT IN WHICH COMMISSIONER LEE JOINS; COMMISSIONER JOHNSON NOT PARTICIPATING.

1. The Commission has before it: (*a*) A petition for expeditious action filed May 3, 1966, by Impart Systems, Inc. (Impart); (*b*) an opposition filed May 13, 1966, by the Chief, Broadcast Bureau; (*c*) a statement filed May 18, 1966, by Connecticut Television, Inc.; and (*d*) a reply filed May 26, 1966, by Impart Systems, Inc. Impart seeks consideration of an informal objection, filed September 23, 1965, to the above-captioned assignment application and dismissal of such application. Petitioner also requests that the Commission accept for filing and process its tendered application for a construction permit for a UHF station on channel 59 at New Haven, Conn.

2. Impart alleges, in part, that grant of the assignment application would constitute a violation of section 73.636 of the Commission's rules. This proceeding was designated for hearing by memorandum opinion and order (FCC 66–297), released April 13, 1966. Issue 1 specified therein pertains to compliance by the assignee with section 73.636 of the Commission's rules. To the extent that Impart's informal objection is addressed to the question of compliance with section 73.636, it has been mooted by the hearing order calling for determination of such question.

3. Impart also alleges that our grant of an extension of the construction permit for station WTVU(TV) on September 10, 1965 (*Joe L. Smith, Jr., Inc., et al.*, docket No. 15889 et al., 1 FCC 2d 664, 6 R.R. 2d 27) was invalid. Impart argues that Connecticut Radio Foundation, Inc.'s permit was automatically forfeited when we denied an extension of such permit on June 17, 1965, *Joe L. Smith, Jr., Inc., et al.*, docket No. 15889 et al., FCC 65–528, 5 R.R. 2d 582; that we were without authority to extend the permit for the purpose of assignment of the

permit to a party who would complete construction; that channel 59 is therefore vacant; and that Impart's application should be accepted for filing.

4. We disagree. The action of June 17, 1965, denying the request for extension was subject to a petition for reconsideration pursuant to section 1.106 of the rules. Such a petition was duly and promptly filed by Connecticut Radio Foundation, Inc., and it was thereafter granted. Section 319(b) of the Communications Act of 1934, as amended, confers upon the Commission discretion to reinstate and extend an expired construction permit, cf. *Mass Communicators, Inc.* v. *F.C.C.*, 286 F. 2d 681, 18 R.R. 2098 (D.C. Cir. 1959). Impart's suggestion that such an extension may be effected only if the original permittee will complete construction is without merit. Section 310(b) of the act recognizes that assignments of both licenses and construction permits may take place, requiring an application therefor and a prior finding that the public interest, convenience and necessity will be served thereby. As we concluded in *Joe L. Smith, Jr., Inc.*, FCC 65–528, supra, grants of extensions looking toward assignment of UHF permits to persons who will construct, and grants of applications for modification where construction will be undertaken within a specified time, will foster the institution of additional UHF television service. Such grants represent a proper exercise of the discretion conferred by section 319(b).

5. An additional reason exists for rejection of Impart's contentions. Because Impart had no application pending before the Commission at the time the Commission entered an order granting Connecticut Radio's petition for reconsideration and extending its construction permit, Impart had no standing as a person aggrieved or whose interests were adversely affected by such order. Accordingly, on this basis as well Impart's objection does not lie. See *KFAB Broadcasting Co.* v. *F.C.C.*, 85 U.S. App. D.C. 160, 177 F. 2d 40, 5 R.R. 2022 (1949).

6. In view of the foregoing, Impart's objection will be denied, its application for a new construction permit will be returned as unacceptable for filing because channel 59 is not available in New Haven, pending motions to dismiss Impart's application will be dismissed as moot and the petition for expeditious action will be denied.

7. Accordingly, *It is ordered*, This 7th day of July 1966, that the objection filed September 23, 1965, by Impart Systems, Inc., *Is denied:* and

8. *It is further ordered*, That the application for a construction permit for a UHF television station on channel 59 tendered for filing September 23, 1965, by Impart is returned as unacceptable for filing, and the motions to dismiss said application, filed September 30, 1965, by Connecticut Radio Foundation, Inc., and Connecticut Television, Inc., *Are dismissed* as moot; and

9. *It is further ordered*, That the petition for expeditious action, filed May 3, 1966, by Impart Systems, Inc., *Is denied*.

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY IN WHICH COMMISSIONER ROBERT E. LEE JOINS

Impart's September 23, 1965, pleading was not considered by the Commission in relation to (*a*) its September 10, 1965, grant of reconsideration and extension of the WTVU–TV construction permit, (*b*) letter of December 22, 1965, to WTVU–TV stating that the assignment application would be dismissed unless a hearing was requested, or (*c*) the order of April 6, 1966, setting the WTVU–TV assignment application for hearing.

Impart contended in its September 23, 1965, pleading that the Commission action of September 10, 1965, was in error and the WTVU–TV assignment application should be dismissed.

I agree with Impart that "the issues it has raised in its objection concerning whether or not Connecticut Radio Foundation has a valid construction permit are worthy of more than being ignored * * *", which they were in relation to the Commission's above-mentioned actions.

One of the basic issues raised by Impart was whether the Commission erred in granting, upon reconsideration, WTVU–TV's application for extension of completion date merely so it could assign the construction permit to WHNB–TV for use as a satellite of its New Britain station, when Impart had filed simultaneously with its pleading an application for use of the channel as a regular outlet for New Haven, to which the channel is assigned.

I believe that the filing of an application for use of the channel as a regular outlet for New Haven, to which it was assigned, destroyed any reason to extend the WTVU–TV permit merely for assignment and use as a satellite of a New Britain station. Accordingly, I believe the Commission should have timely considered Impart's September 23, 1965, pleading and should have, on its own motion, set aside the September 10, 1965, extension and canceled the WTVU–TV permit.

With timely consideration of and correct action on Impart's September 23, 1965, pleading, the Commission would not have reached the sending of its December 1965 prehearing letter or its April 1966 order designating the assignment application for hearing.

In my opinion, the Commission erred in not timely considering and disposing of Impart's September 23, 1965, pleading, and I dissent to the action here taken.

FCC 66–607

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of:	
McCULLOCH COUNTY TRANSLATOR CO-OP, BRADY, TEX.	Docket No. 16745 File No. BPTT–1349
McCULLOCH COUNTY TRANSLATOR CO-OP, BRADY, TEX.	Docket No. 16746 File No. BPTT–1350
McCULLOCH COUNTY TRANSLATOR CO-OP, BRADY, TEX.	Docket No. 16747 File No. BPTT–1351
McCULLOCH COUNTY TRANSLATOR CO-OP, BRADY, TEX.	Docket No. 16748 File No. BPTT–1352
For Construction Permits for New UHF Television Broadcast Translator Stations.	

MEMORANDUM OPINION AND ORDER

(Adopted July 7, 1966)

BY THE COMMISSION: COMMISSIONER LOEVINGER CONCURRING IN THE RESULT; COMMISSIONER JOHNSON NOT PARTICIPATING.

1. The Commission has before it for consideration: (*a*) The above-captioned applications filed by John P. Threadgill, an individual, under the name McCulloch County Translator Co-op (applicant); (*b*) a petition to deny, filed on December 3, 1965, by Television Enterprises, Inc. (petitioner), operator of a community antenna television system (CATV) in Brady, Tex., directed against a grant of (*a*) above; (*c*) an addendum to petition to deny, filed December 6, 1965, by the petitioner with respect to (*b*) above; (*d*) an answer to petition to deny, filed May 16, 1966, by the applicant directed against (*b*) and (*c*) above; and (*e*) a motion to strike, filed May 25, 1966, by the petitioner directed against (*d*) above.

2. On October 26, 1965, the applicant filed the following applications for construction permits for new UHF television broadcast translator stations: (BPTT–1349) which proposes a 20-watt UHF translator to serve Brady, Tex., by rebroadcasting station KRLD–TV, channel 4 (CBS), Dallas, Tex., on output channel 70; (BPTT–1350) which proposes a 20-watt UHF television broadcast translator station to serve Brady, Tex., by rebroadcasting station WBAP–TV, channel 5 (NBC), Fort Worth, Tex., on output channel 72; (BPTT–1351) which proposes a 20-watt UHF translator to serve Brady, Tex., by rebroadcasting station WFAA–TV, channel 8 (ABC), Dallas, Tex., on output channel 74; and (BPTT–1352) which proposes a 20-watt UHF translator to serve Brady, Tex., by rebroadcasting station KTVT, channel 11 (Ind.), Fort Worth, Tex., on output channel 76.

The applicant estimates that the translators will serve approximately 8,000 persons (an estimated 2,197 TV homes) in and about Brady, Tex. There is no predicted television broadcast service to Brady. The petitioner operates a CATV in Brady which supplies an estimated 1,400 subscribers[1] with the following television signals: WFAA–TV; KRLD–TV; KTVT; KTBC–TV, channel 7 (ABC, CBS, NBC), Austin, Tex.; and KRBC–TV, channel 9 (NBC), Abilene, Tex.

3. The petitioner claims standing as a party in interest within the meaning of section 309(d) of the Communications Act on the basis of the competitive impact of the applicant's translators on its CATV system. It is clear that the potential competitive effect of the translators is sufficient to give the petitioner standing as a party in interest within the meaning of section 309(d) of the act. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470. On the merits, the petitioner charges that Mr. Threadgill filed the present applications solely for the purpose of coercing petitioner to purchase or lease certain real estate or make other forms of monetary payment not required of it by contract or by law.

4. The parties appear to be in substantial agreement regarding the following events which took place before the present applications were filed and which, petitioner charges, led to the filing of these applications. Mr. Threadgill constructed the Brady CATV in 1954, and, in 1955, entered into a partnership with Mr. James H. Franks and others to own the CATV. Through the years, resentment developed between the partners as a result of various incidents. The only relevant dispute resulted when Mr. Threadgill entered into a building lease with his son (now deceased) on behalf of the CATV for a rental considered unreasonable by his partners. Apparently as a result of the civil action brought by Mr. Threadgill's partners, the partnership finally sold the CATV to the petitioner which, however, refused to assume the building lease. Petitioner charges that the present applications were filed in order to create damaging competition for its CATV and, thereby, to force it to reimburse Mr. Threadgill for the building lease as consideration for the withdrawal of the present applications. These allegations are supported by the affidavits of six persons (R. D. Huffman, Mrs. R. Hodges, J. Guthals, E. M. Pearson, T. D. Bratton, and S. McCollum, III) whose cumulative testimony is that they have personal knowledge of statements made by Mr. Threadgill, which support the view that the present applications were filed for the specific purpose of coercing the petitioner into assuming the cited building lease.

5. The applicant did not respond to the petition to deny within the time specified by the Commission's rules. Consequently, on April 8, 1966, a letter was sent to the applicant which inquired whether these applications would be prosecuted, and cautioning the applicant that failure to respond to the letter within thirty (30) days would lead to dismissal of its applications. The applicant filed its answer to petition to deny on May 16, 1966. The petitioner has filed a motion to strike in which it urges that this response should not be considered

[1] *Television Factbook* (1966 ed.).

since it was not filed within the 10-day period for filing an opposition specified by section 1.45 of the Commission's rules, and since good cause has not been demonstrated for the late filing. Further, the petitioner urges that consideration of the answer would be prejudicial to its rights and, finally, that should the Commission rule against its motion to strike, it wishes to reserve the right to file a responsive pleading.

6. The petitioner is certainly correct in arguing that the answer was not timely filed. However, the Commission recognizes that many translator applicants are not represented by communications counsel so that they frequently—if unwittingly—violate our procedural rules. In this case, we believe the applicant could reasonably construe the letter of April 8, 1966, which the petitioner has not challenged, as an implied waiver of section 1.45 of the rules. In view of the foregoing considerations, we believe that the ends of justice will be served by waiving section 1.45 of the Commission's motion, and denying the motion to strike. The remaining procedural question is whether the petitioner should be allowed to file a further pleading. The petitioner has not alleged how consideration of the applicant's answer could prejudice its rights; further, our rules make no provision for reservation of the right to file a pleading and a party adopts this tactic at its own risk. Consequently, we will deny the petitioner's request to file a further pleading. In the present case, in view of our disposition of this proceeding, we do not believe that our ruling can prejudice the petitioner.

7. Before considering the applicant's answer, we must note that it is not supported by an affidavit as required by section 309(d) of the Communications Act and that it does not allege facts which the Commission can properly take notice of. Consequently, the answer is, at best, of limited value for rebuttal purpose. Nonetheless, we believe we are entitled to consider it for the purpose of determining the scope of the present dispute. Although the answer contains a general denial of the petitioner's allegations, it also contains admissions which we cannot ignore. The applicant admits that its ownership of the building in question was a consideration in filing the present applications and that the applicant "desires to again be associated with a community antenna system. This is his prime reason for making this application." And although the applicant has challenged various of petitioner's affidavits as containing hearsay and surmise as to its motives in filing these applications, it is not alleged that the conversations referred to, in which Mr. Threadgill allegedly revealed his motives for filing these applications, did not take place or that they have not been accurately reported. In these circumstances, we believe it only reasonable that Mr. Threadgill be called upon to explain his prior statements. And since serious questions have been raised with respect to Mr. Threadgill's qualifications, we believe it necessary to designate the present applications for evidentiary hearing in order to permit full exploration of the charges which have been made.

8. The issues which have been raised involve a charge of serious misconduct against the applicant, and were raised initially in the peti-

tioner's petition to deny. Since the petitioner is a party to this proceeding, we believe that it would be appropriate to require the petitioner to make the initial presentation of evidence under issues 1 and 2, below. *D and E Broadcasting Company*, 1 F.C.C. 2d 78, 5 R.R. 2d 475; *Washington Broadcasting Company*, FCC 66-450. However, since the principal information concerning the applicant's purpose in applying for these translators is peculiarly within the knowledge of the applicant, and since the issues concern the applicant's proposed use of broadcast facilities, the applicant will have the burden of proof on these issues. *Elyria-Lorain Broadcasting*, FCC 65-857, 6 R.R. 2d 191.

9. In view of the foregoing, except as indicated by the issues specified below, the applicant is legally, technically, financially, and otherwise qualified to construct and operate as proposed. However, the Commission is unable to make the statutory finding that a grant of these 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.

Accordingly, *It is ordered*, That, pursuant to section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications of McCulloch County Translator Co-op *Are designated for hearing* at a time and place and before a hearing officer to be specified in a subsequent order upon the following issues:

1. To determine all of the facts and circumstances surrounding the preparation and filing of the above-captioned applications.
2. To determine whether the above-captioned applications were filed in good faith or for the purpose of coercing Television Enterprises, Inc., to purchase or lease certain real estate or make other forms of monetary payment not required by contract or law.
3. To determine in view of the evidence adduced pursuant to the foregoing issue whether a grant of the above-captioned applications would serve the public interest, convenience and necessity.

It is further ordered, That Television Enterprises, Inc., is hereby made a party respondent to the above-captioned proceeding.

It is further ordered, That Television Enterprises, Inc., *Is directed* to proceed with the initial presentation of evidence with respect to issues 1 and 2 of this proceeding, but that, following Television Enterprises, Inc.'s initial presentation, McCulloch County Translator Co-op must proceed with the burden of going forward with the evidence and will have the burden of proof with respect to issues 1 and 2.

It is further ordered, That, to avail themselves of the opportunity to be heard, the applicant and the party respondent herein, 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 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(f) 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.

FCC 66-618

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of CEASE AND DESIST ORDER TO BE DIRECTED AGAINST JACKSON TV CABLE CO., OWNER AND OPERATOR OF A COMMUNITY ANTENNA TELEVISION SYSTEM AT JACKSON, MICH.	Docket No. 16711

ORDER

(Adopted July 8, 1966)

BY THE COMMISSION: COMMISSIONERS BARTLEY AND LOEVINGER NOT PARTICIPATING; COMMISSIONER JOHNSON ABSENT.

At a session of the Federal Communications Commission held at its offices in Washington, D.C., on the 8th day of July, 1966;

1. The Commission having under consideration its order to show cause in this proceeding, FCC 66-530, released June 20, 1966; and the petition for reconsideration of said order, filed on July 5, 1966, by Jackson TV Cable Co.;

2. *It appearing*, That a prehearing conference in this case is scheduled for July 13, 1966, and the evidentiary hearing is scheduled to commence on August 2, 1966; and that, in view of the need for expedition in this show cause proceeding, the public interest would be better served by the disposition of the matters raised in the petition for reconsideration without awaiting responsive pleadings;

3. *It further appearing*, That contentions substantially similar to those advanced on behalf of petitioner concerning the validity of our rules governing the operation of community antenna television systems, the applicability of such rules to cable systems which commenced operations after February 15, 1966, and the validity of the expedited hearing procedure adopted in show cause proceedings for violation of section 74.1107 of the rules, were considered and rejected by the Commission in *Buckeye Cablevision, Inc.*, 3 F.C.C. 2d 539, released April 27, 1966, 3 F.C.C. 2d 798, released May 27, 1966, and 3 F.C.C. 2d 808, released May 27, 1966; and in *Mission Cable TV, Inc.*, and *Trans-Video Corp.*, FCC 66-394, released April 28, 1966, and FCC 66-548, released June 22, 1966; and

4. *It further appearing*, That petitioner has submitted no valid reasons for either setting aside or modifying the order to show cause issued in this proceeding;

5. Accordingly, *It is ordered*, That the petition for reconsideration, filed on July 5, 1966, by Jackson TV Cable Co. *Is denied.*

FCC 66R-273

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of RAYMOND W. GILL, DUNN LORING, VA. Order To Show Cause Why the License for Radio Station KMI-3224 in the Citizens Radio Service Should Not Be Revoked	Docket No. 16617

ORDER

(Adopted July 13, 1966)

BY THE REVIEW BOARD:

The Review Board having under consideration the order to show cause in this proceeding (Mimeo No. 83531, released May 2, 1966) issued by the Chief, Safety and Special Radio Services Bureau, and a motion of the Chief, Safety and Special Radio Services Bureau to amend the order to show cause;

It appearing, That subsequent to the release of the order to show cause, additional notices of violation of Commission rules have been mailed to the licensee; and

It further appearing, That no opposition to the Bureau's motion has been filed;

It is ordered, This 13th day of July 1966, that the order to show cause in this proceeding released May 2, 1966, *is amended* by deletion of the allegations contained therein and substitution of the following allegations:

It appearing, That on December 30, 1965, January 5, 8, 16, and 30, February 2, 6, and 27, March 4, April 14 and 24, May 7, 14, and 22, 1966, citizens radio station KMI-3224 was used as a hobby or diversion, i.e., as an activity in and of itself, in violation of section 95.83(a)(1) of the Commission's rules; and

It further appearing, That on December 30, 1965, January 5, 8, and 16, February 2 and 27, March 4, April 14 and 24, May 7, 14, and 22, 1966, citizens radio station KMI-3224 was not identified at the times and in the manner prescribed by section 95.95(c) of the Commission's rules; and

It further appearing, That on February 2 and May 22, 1966, citizens radio station KMI-3224 was used to communicate or to attempt to communicate over a distance of more than 150 miles, in violation of section 95.83(b) of the Commission's rules; and

It further appearing, That on February 27, 1966, citizens radio station KMI-3224 was willfully operated with a type of emission not authorized by section 95.47(d) of the Commission's rules; and

It further appearing, That on December 30, 1965, January 8, 16 and 30, February 2, 6, and 27, March 4, April 14 and 24, May 7, 14, and 22, 1966, transmissions from citizens radio station KMI-3224 were not limited to 5 consecutive minutes, in violation of section 95.91(b) of the Commission's rules; and

It further appearing, That on February 27, April 24, May 7, 14, and 22, 1966, an exchange of communications from citizens radio station KMI–3224 to another citizens radio station was not followed by a 5 minute silent period, in violation of section 95.91(b) of the Commission's rules; and

It further appearing, That on February 27, March 4, April 14 and 24, May 7, 14, and 22, 1966, citizens radio station KMI–3224 was used for transmitting communications to stations of other licensees which related to the technical performance, capability, or testing of radio equipment, in violation of section 95.83(a)(13) of the Commission's rules; and

It further appearing, That on February 27 and May 22, 1966, licensee used his citizens radio station KMI–3224 for communications with other citizens radio stations on a frequency not authorized for communications between units of different citizens radio stations, in violation of section 95.41(d)(2) of the Commission's rules; and

It further appearing, That on January 16, 1966, citizens radio station KMI–3224 was used to transmit nonemergency communications for a person other than the licensee or members of his immediate family, in violation of section 95.83(a)(14) of the Commission's rules; and

It further appearing, That on February 2, 1966, communications from citizens radio station KMI–3224 were not directed to specific stations or persons, in violation of section 95.83(a)(6) of the Commission's rules; and

It further appearing, That official notices of violation concerning the above-mentioned violations of the Commission's rules were sent to the licensee on January 21, February 11, March 10, May 5 and 24 and June 8, 1966; and

It further appearing, That in view of the foregoing, the licensee has repeatedly violated sections 95.83(a)(1), 95.83(a)(13), 95.83(b), 95.95(c), 95.41(d)(2), and 95.91(b) and has willfully violated section 95.47(d) of the Commission's rules; and

It further appearing, That the above-mentioned violations of sections 95.83(a)(1), (13) and (b), 95.95(c), 95.47(d) and 95.41(d)(2) of the Commission's rules and the related facts create apparent liability by the licensee to monetary forfeitures totaling $300 under section 510 of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules, and also subject the license for the captioned radio station to revocation under the provisions of section 312 of the Communications Act of 1934, as amended; but further proceedings in this docket should be limited to action looking toward a determination as to whether an order of revocation should be issued; and

It further appearing, That in view of the above-described rule violations by the licensee, the Commission would be warranted in refusing to grant an application from this licensee for a citizens radio station if the original application were now before it.

It is further ordered, That the Secretary send a copy of this order by certified mail—return receipt requested to licensee at his last known address of Box 154, Dunn Loring, Va. 22027.

It is further ordered, That the hearing in this proceeding shall not commence until at least 30 days after the receipt by the licensee of this order.

FCC 66–658

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

AMENDMENT OF PART 0 OF THE COMMISSION'S RULES TO DELEGATE AUTHORITY TO THE STAFF, TO GRANT REQUESTS FOR WAIVER OF APPLICATION PROCEDURES IN THE SAFETY AND SPECIAL RADIO SERVICES, TO ALLOW THE MODIFICATION OR ASSIGNMENT OF A NUMBER OF OUTSTANDING AUTHORIZATIONS WITHOUT FILING A SEPARATE APPLICATION FOR EACH STATION

ORDER

(Adopted July 20, 1966)

BY THE COMMISSION: COMMISSIONER JOHNSON NOT PARTICIPATING.

1. At a session of the Federal Communications Commission held at its offices in Washington, D.C., on the 20th day of July 1966, the above-entitled matter was under consideration.

2. In many instances, a licensee in the Safety and Special Radio Services may hold a large number of station licenses. During the term of such licenses, it may become necessary to apply for identical modification or assignment of all or a large part of the licenses held by the licensee. In most cases, the application procedures require that an application be submitted for each station. Licensees in the past have requested, and the Commission has granted, waivers of the application procedures to allow the filing of one blanket application to cover all stations involved in order to save the time, effort, and expenses of preparing numerous similar applications. The fee charged is the same as if separate applications were filed.

3. The benefit of this so-called blanket application is recognized; however, the circumstances that make its use feasible from a Commission standpoint vary with respect to the manner in which applications are processed in the various services. It is felt, therefore, that those situations where a blanket application may be in order should be determined on a case-by-case basis as they arise.

4. Inasmuch as a number of requests for waiver to permit a blanket application are received each year, it is felt that a delegation of authority to the Chief, Safety and Special Radio Services Bureau to grant waivers of this nature will result in a more efficient administration of the Commission's functions. Waivers will be granted only when the circumstances are such that it is deemed administratively feasible to process a single application which modifies numerous sta-

106-504—66——1

tions. The fee requirement will be the same as if an application were filed for each station because processing of a blanket application will still require reference to the respective station files and issuance of separate station authorizations.

5. The amendment adopted herein relates to practice and procedure and is procedural in nature; therefore, the prior notice, procedure and effective date provisions of section 4 of the Administrative Procedure Act are not applicable. The authority for the amendment is contained in sections 4(i) and 5(d)(1) of the Communications Act of 1934, as amended.

6. In view of the foregoing, *It is ordered*, Effective July 29, 1966, that part 0 of the Commission's rules *Is amended*.

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

FCC 66-626

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF § 1.550, RULES OF PRACTICE AND PROCEDURE

ORDER

(Adopted July 13, 1966)

BY THE COMMISSION: COMMISSIONER JOHNSON ABSENT.

At a session of the Federal Communications Commission, held at its offices in Washington, D.C., on the 13th day of July 1966;

Section 1.550(c)(1) of the rules of practice and procedure provides that requests for new or modified call sign assignments for standard, FM, or television broadcast stations shall include a statement that a notice pertaining to the request has been mailed to broadcast stations located within 35 miles of the community in which the applicant is authorized to operate. As presently phrased, this provision indicates, at least implicitly, that the notice must be separately prepared and mailed some time in advance of the day on which the request is filed. In our judgment, it would be simpler for the person filing the request, and more useful to the stations receiving notice, to require that a copy of the request rather than a separate notice be served upon the stations in question. As provided in section 1.47(b) of the rules of practice and procedure, service is properly made on or before the day on which the request is filed. Also, it would appear that the request should be served upon nearby stations whose construction has been authorized but who have not been licensed, since holders of construction permits may have requested or received call sign assignments. We are therefore amending section 1.550(c)(1) in these respects.

Authority for this amendment is contained in sections 4 (i) and (j) and 303 (o) and (r) of the Communications Act of 1934, as amended. Because the amendment is procedural in nature, compliance with the notice and effective date provisions of section 4 of the Administrative Procedure Act is unnecessary.

In view of the foregoing, *It is ordered*, Effective July 22, 1966, that section 1.550 of the rules of practice and procedure is amended.

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

FCC 66-644

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202, TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS (MOUNT CARMEL, ILL.)	RM-955

MEMORANDUM OPINION AND ORDER

(Adopted July 13, 1966)

BY THE COMMISSION: COMMISSIONER JOHNSON ABSENT.

1. The Commission has before it for consideration the petition for rulemaking (RM-955) filed on May 2, 1966, by Jel-Co. Radio, Inc., licensee of station WVMC (AM), Mount Carmel, Ill., requesting the addition of channel 272A to Mount Carmel as follows:

City	Channel number	
	Present	Proposed
Mount Carmel, Ill.	235	235, 272A

2. Mount Carmel is a community of 8,594 persons and is the county seat and largest community in its county, which has a population of 14,047. At the present time station WSAB (FM) operates on the class B FM channel (235) assigned to Mount Carmel. There is, in addition, a daytime-only AM station (WVMC), licensed to petitioner. Petitioner submits that WVMC is the only station rendering local service to Mount Carmel and that it needs an FM assignment to satisfy the needs of the local public at night. It urges that the proposal conforms to all the spacing requirements and that it would not preclude any other assignments except on channel 272A, the one proposed for Mount Carmel. In the engineering statement attached to the subject petition, there is a showing that on all the adjacent channels, existing stations and assignments already preclude any possible assignments in the area which would be affected by the proposed assignment. However, with respect to channel 272A itself, there is a large, irregularly shaped area in which this channel may be placed if it is not assigned at Mount Carmel. Petitioner states that there are a number of assignments in this area already and that the other communities are all under 4,000 population.

3. In an opposition filed on May 31, 1966, WSAB, Inc., licensee of WSAB (FM), Mount Carmel, Ill., states that it has been operating

WSAB as an independently owned and operated station since November 1960, that it is providing the listeners of its service area with programing of a diverse and varied point of view, and that it has continued to operate in spite of an unfavorable gap between cost of operation and income. It urges that this small market can support only two independent radio services, the present daytime AM service of WVMC, and the full-time FM service, and that both stations so operating are providing all the local public interest needs adequately. WSAB contends further that the proposed additional FM assignment will conflict with the stated interest of the Commission in promoting FM as an independent radio service, since it would place in jeopardy the economic success of the existing independent FM station.[1]

4. After careful consideration of the subject petition and the showings made therein, and the opposition thereto, we are of the view that the addition of a second FM assignment in such a small community, located in a general area in which available assignments are rather scarce, would not serve the public interest. In the area in which the assignment of channel 272A to Mount Carmel would preclude cochannel assignments, there are a number of substantial communities, which, while smaller than Mount Carmel have up to 3,500 population and do not have any radio stations (e.g., Eldorado, Ill. [population 3,573], and Oakland City, Ind. [population 3,016]). In fact, depending on where channel 272A is first used, there is a possibility of making two such assignments in the area. Since therefore, the proposed second assignment to Mount Carmel could preclude a future needed assignment in a community which has no radio station or FM assignment, we are of the view that the request should be denied.

5. In view of the foregoing, *It is ordered*, That, the petition of Jel-Co. Radio, Inc., RM–955, *Is denied.*

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

[1] WSAB also included some contentions relative to the holdings of Jel-Co., which we do not believe germane to a rulemaking proceeding such as this and therefore we are not considering further herein.

FCC 66–659

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 83 AND 85 OF THE COMMISSION'S RULES TO PERMIT CERTAIN CHANGES IN RESPECT TO THE TRANSMITTING EQUIPMENT OF A SHIP RADIO STATION WITHOUT THE NEED FOR FILING APPLICATION FOR MODIFICATION OF SHIP STATION LICENSE	RM–924

ORDER

(Adopted July 20, 1966)

BY THE COMMISSION: COMMISSIONER JOHNSON NOT PARTICIPATING.

1. At a session of the Federal Communications Commission held at its offices in Washington, D.C., on the 20th day of July 1966, the Commission considered the above-captioned matter.

2. Parts 83 and 85 of the Commission's rules now require licensees of all ship stations to file application for modification of ship station license whenever there is a change in equipment in the station.

3. North Pacific Marine Radio Council, Inc., 610 Pontius Avenue North, Seattle, Wash., has filed a petition to amend parts 83 and 85 of the Commission's rules to permit ship station licensees to substitute type accepted radiotelephone transmitters and/or radar units without the need for modification of ship station license.

4. In support of the request, petitioner has indicated that the current regulations requiring application for modification of ship station licenses when there is a change in equipment tends to discourage ship owners to upgrade their equipment. The time needed to comply with the licensing requirements is such that the repair of old equipment instead of replacement with modern equipment is necessary to avoid delaying the vessel. Petitioner has further stated that the amendment requested would be consistent with the Commission's program to upgrade marine radio and thus enhance safety in the maritime services.

5. Recently, we have been reexamining our requirements for filing formal applications. As a result, we have concluded that in many instances, our practices and procedures requiring application for modification of license regarding minor changes are no longer necessary. In light of this and the instant petition, we are amending the rules in parts 83 and 85 to eliminate certain requirements that necessitate the filing of application for modification of ship station license when changes occur in regard to the authorized transmitting equipment.

6. Accordingly, the petitioner's request is granted to the extent that parts 83 and 85 of the Commission's rules are amended to permit ship

station licensees to replace type accepted radiotelephone transmitters and/or type approved radar units which operate in the same frequency band or bands as specified in the license without the need for filing application for modification of license. On our own motion, we are further amending parts 83 and 85 to eliminate the requirement that application for modification of license be filed when deletions occur with respect to the authorized transmitting equipment in a ship station. Also, no application for modification will be required to add transmitting equipment that operates in the same frequency band or bands specified in the ship station license if the equipment is type accepted or type approved.

7. Since ship stations in the maritime services are allocated numerous frequency bands for operation by international agreement, we are of the opinion it is necessary for proper administration that the Commission's files contain complete and up-to-date information in this regard. Therefore, the rule amendments ordered herein will still require ship station licensees to submit application for modification of license when they replace or add type accepted radiotelephone transmitters and/or type approved radar units that operate in a frequency band or bands other than specified in the station license. Licensees, however, should exercise caution in interchanging or adding used transmitting equipment, some of which may not be type accepted.

8. Moreover, licensees of ship stations subject to the requirements of title III, part II of the Communications Act of 1934, as amended, will continue to be required to file application for modification of ship station license whenever there are additions, deletions or replacement with respect to the transmitting equipment required by the act to be installed because section 362 of the act requires that the particulars of such equipment be included in the station license.

9. These rule amendments adopted herein to reflect revisions in the Commission's practices and procedures with regard to licensing should result in a convenience to both licensees and the Commission. The rule amendments adopted herein are procedural in nature and hence the public notice, procedure, and effective date provisions of section 4 of the Administrative Procedures Act are not applicable. Authority for the amendments ordered herein is contained in sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

10. In view of the foregoing, *It is ordered*, Effective August 1, 1966, that parts 83 and 85 of the Commission's rules are amended.

11. *It is further ordered*, That this proceeding is terminated.

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

FCC 66-640

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 87, 89, 91, AND 93 OF THE COMMISSION'S RULES TO PERMIT EXPANDED COOPERATIVE SHARING OF OPERATIONAL FIXED STATIONS Petition of the Central Committee for Communication Facilities of the American Petroleum Institute Concerning Cooperative Use of Private Microwave Systems in the Petroleum Radio Service	Docket No. 16218 RM-533

REPORT AND ORDER
(Adopted July 13, 1966)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING; COMMISSIONER JOHNSON ABSENT.

1. On October 21, 1965, the Commission issued a notice of proposed rulemaking in the above-entitled matter. The notice was published in the Federal Register on October 27, 1965 (30 F.R. 13652). Comments were requested by December 29, 1965, and reply comments by January 28, 1966. These dates were later extended to January 28, 1966, and to February 28, 1966, respectively, by order released January 17, 1966 (FCC 66-29).

2. Briefly, in the notice we proposed to permit persons eligible in the same public safety, industrial, and land transportation radio services, and persons eligible for operational stations in the Aviation Radio Service, to share the use of fixed stations or systems[1] on a nonprofit, cooperative basis. In addition, we proposed to permit cross service sharing among governmental entities and regulated companies on frequencies commonly available to all participants. (In docket 11866, *In the Matter of Allocation of Frequencies above 890 Mc/s*, sharing of private point-to-point microwave stations was limited to public safety services and to right-of-way entities and to companies whose rates and services are regulated by a governmental body, 27 FCC 359, 408.) Also we proposed to require joint users of fixed stations to file a statement with the Commission describing the proposed sharing arrangement before it went into effect, and an annual financial statement showing the relationship between the pro rata sharing of the system and the pro rata contribution of the costs. Finally, we asked for comments on whether licensees of fixed stations

[1] The proposal considered herein concerns the sharing of fixed stations operated on microwave as well as on lower frequencies. However, for convenience, these stations are referred to hereinafter as microwave stations or microwave systems.

should be required to render service to others on a cost-sharing, nonprofit basis, on request, if their systems have sufficient capacity.

3. Twenty-nine comments and twelve reply comments were timely filed. The comments and reply comments are listed in appendix B attached hereto. On March 25, 1966, the Halliburton Co. of Duncan, Okla., filed comments in this proceeding. However, since its comments were filed well beyond the closing dates for filing comments or replies and since there was no request for accepting late filing and no showing was made why its late comments should be accepted, this document has not been considered. All timely comments have been considered. In reaching our determinations herein, however, we have considered information available to us from other sources. In general, users and potential users and their representatives supported the proposed wider sharing of microwave systems enthusiastically. The communication common carriers, on the other hand, opposed the proposed rules strongly. Their comments, beginning with those of the carriers, are summarized in more detail below.

COMMENTS IN OPPOSITION

4. The common carriers that filed comments and reply comments argued that our proposed rules would result in the proliferation of shared private microwave systems and that they would encourage undesirable situations where microwave cooperatives would have many of the attributes of common carriers without their burdens and responsibilities. They suggested that "multiple and unregulated quasi-common carriers" will construct facilities duplicating the existing facilities of common carriers, and would develop along high-density routes leaving to the common carriers the responsibility of serving low-density, high-cost routes to the eventual detriment, in terms of higher costs, to small users of common carrier communications service who are not in a position to establish cooperative microwave systems. They argued that, although the proposed rules would be of short-run advantage to selected groups of users, their long-range consequences would be detrimental to the interests of the communications users as a whole.

5. The carriers seemed to agree that shared usage would result in more efficient utilization of microwave systems, but argued that shared communications facilities should be provided by regulated common carriers. They maintained that the only possible justification for permitting cooperative sharing of private microwave is the lower cost to those who may establish such systems, but that lower cost does not constitute a valid reason for departing from the Commission's existing policy limiting shared use of microwave facilities. It was variously argued that the responsibility for rendering communications service should be left exclusively with the common carriers. However, the Western Union Telegraph Co. (Western Union) and the National Association of Radiotelephone Systems (NARS) suggested that in isolated situations sharing of private microwave systems may be appropriate. A.T. & T. stated that the petition filed by the American Petroleum Institute—

> relates to a very special situation which can be considered on its own merits without raising the much more complicated considerations and issues * * * involved in the proposed rulemaking.

Western Union and NARS suggested that sharing may be permitted on a case-to-case basis if the service is needed and common carrier service is not available.

6. Practically all carriers referred to the Commission's 1959 microwave decision in docket 11866 which limited sharing of microwave systems to public safety organizations, right-of-way companies, and to companies whose rates and services are regulated by a governmental body. They stated that the Commission has not disclosed the information that led it to depart from that policy, and argued that the same considerations that persuaded the Commission then still exist today and that the public interest will not be served, as G.T. & E. Service Corp. (G.T. & E.) put it, by "refighting the old battles of 11866". However, G.T. & E. stated that the crucial issue in this proceeding is the impact of the Commission's proposal upon the communications common carriers, which was a central issue in docket 11866, that this question is being considered in docket 14650, *In the Matter of Domestic Telegraph Service*, and indirectly in docket 16258, *In the Matter of American Telephone & Telegraph Co. and Associated Bell System Companies Charges for Interstate and Foreign Communications Service*, that all these matters should be considered together, and that the Commission should not adopt the proposed rules but should continue the present ban on sharing of private microwave systems. In this connection, A.T. & T. argued that the "spread of private microwave systems would intensify the regulatory problems" with which the Commission is concerned in the Telpak proceeding, docket 14251, and with which it will be concerned in the abovementioned Bell System rate investigation proceeding in docket 16258.

7. Western Union argued that, in addition to their direct adverse economic impact, shared private microwave systems would have indirect adverse effect on Western Union. Thus, it claimed that the Commission's 1959 microwave decision in docket 11866 resulted in A.T. & T.'s Telpak offering which, Western Union claims, has affected it seriously and that, if the proposed rules are adopted, it expects A.T. & T. to adopt the same provisions on sharing of its Telpak circuits causing additional adverse competitive impact on Western Union.

8. The National Association of Radiotelephone Systems (NARS), an association of common carriers rendering mobile radiotelephone service, alleged that our more liberal policy concerning sharing in the private land mobile services has encouraged "an extensive and unhealthy growth of pseudo-common carriers * * *" which "* * * compete directly and destructively with regulated carriers," and argues that the "cooperative system should be flatly prohibited in all services * * * not encouraged," or "should be permitted * * * only under the most closely regulated waiver situations." In support of its arguments, NARS discussed in some detail certain communication systems established in the Safety and Special Radio Services which involve the shared use of mobile radio facilities and it concluded that all such systems are common carrier operations and should not be permitted.

It claimed that the Commission exceeds its statutory authority when it permits unregulated pseudo-carriers to compete with regulated carriers and that, even if the Commission has statutory authority, it should not permit such competition. NARS claimed that in the mobile field so-called pseudo-common carriers attract the more profitable trade and leave the low-density, high-cost service to mobile common carriers and that these alleged conditions substantiate the arguments of A.T. & T. and other carriers that the same situations would develop in the microwave field if our proposed rules are adopted.

9. NARS requested the Commission to refuse to adopt the proposed rules, to terminate the instant proceeding, and to institute an inquiry looking towards the prohibition of all cooperative arrangements in both the mobile and microwave fields and to permit sharing only in specific cases on showing of a need which would include a showing that common carrier service is not available.

COMMENTS IN SUPPORT

10. As mentioned above, private users and potential users of private microwave systems enthusiastically endorsed our proposal to permit wider sharing. They maintained that expanded sharing is the logical extension of the Commission's decision in the microwave proceeding in docket 11866 in that it would encourage the development of private microwave systems which the Commission has found to be in the public interest. They claimed that current limitations on sharing have been one of the prime inhibiting factors in the development of private microwave, along with the costs of microwave equipment and the availability of competitive service, such as A.T. & T.'s Telpak, from the common carriers.

11. The Idaho and California highway departments, whose comments were included in the filing of the American Association of State Highway Officials, stated that the ability to share a microwave system by various State agencies, under authorizations in the Local Government Radio Service, has enabled these States to establish statewide microwave systems which are used as control and repeater systems associated with mobile systems and for other communication purposes. The State of Nevada states that sharing will enable it to make arrangements with utility and industrial organizations for mutual use of buildings, roads, power supply, and sites, and in some cases microwave stations, which will enable the State to establish a statewide system to cover the vast and sparsely populated areas where the State needs communications. Many claimed that suitable transmitter sites are scarce and inaccessible and that sharing will permit them to make the best possible use of the best available sites. Union Oil Co. of California stated that it has been operating a microwave system on a cooperative basis with two other oil companies (which was established before the Commission's decision in docket 11866 and whose status quo had been maintained) and claimed that their relationship has been excellent permitting them maximum use of the facilities with sensible investment and costs.

12. It was argued that the ability to share a microwave system would permit the establishment of communications in areas where the need, though present, did not justify either the cost of common carrier service or the cost of an unshared private microwave radio system. For example, the State of California argued that sharing with utilities and other regulated companies would permit it to extend its system to remote areas and would enable small communities to obtain the benefits of microwave service. NCUR claimed that cross-service sharing will permit utilities to extend microwave control to remote and isolated utility stations.

13. The NAM Communications Committee claimed that the demand for communications in the manufacturing industry continues to grow and that the industry is at the "threshold of fantastic new development for data transmission and other techniques" and that they must have a choice between common carrier and private facilities if a full development of communications is to be achieved. Union Oil and others claimed that industry needs more communications in its operations to control cost and to achieve more efficient operations, and that sharing will contribute to the more extensive use of communications by industry.

14. Others argued that less restrictive sharing provisions would increase usage of microwave equipment and thus broaden the manufacturing and technical base of microwave communications; would contribute to the business expansion of those furnishing related equipment, services, and supplies; and would aid the general advancement of the communications art.

15. Land mobile radio system users claimed that the ability to share microwave stations would encourage the use of microwave frequencies rather than VHF and UHF frequencies for control and repeater operations in the mobile services thus making more frequencies available for mobile communications. Use of microwave frequencies, it was claimed, would also enable licensees of mobile systems to employ strategically located base station transmitter sites and increase the effective coverage of mobile communications systems.

16. The private users argued that the most significant effect of the proposed rules would be conservation of microwave frequencies and the fuller and more efficient utilization of microwave systems by avoiding duplication of facilities and frequencies and by employing the microwave equipment to its fullest capacity.

REPLIES TO COMMON CARRIER OPPOSITION

17. Supporters of the proposed rules urged that the arguments of the common carriers concerning proliferation of pseudo-carriers and their impact on common carriers should be rejected as baseless and claimed that these arguments were considered and rejected by the Commission in docket 11866, and that they have no more validity now than when the Commission allegedly disposed of them in that proceeding.

18. Beyond that, it was argued that shared private microwave facilities will be limited because the nature of the operation is self-limiting.

The Special Industrial Radio Service Association (SIRSA), for example, claimed that the inherent necessity for joint users to have communication needs along substantially the same narrow path and a willingness to work closely under precise contractual arrangements for operation and financing of a system, plus the requirement that joint shared users must be eligible in the same radio service, involving more often than not business competitors, would limit the growth of shared private systems. SIRSA argued that experience thus far indicates that joint use would be limited, claiming that in the petroleum industry, where sharing has been permitted for more than 16 years in connection with pipelines and from 1949 to 1959 in connection with other petroleum activities, and where microwave is heavily used, there are no more than 20 shared systems. The Forest Industries Radio Communications Association (FIRC) claims that the need for microwave service in the forest products industry is in rural areas where common carriers have shown no particular interest in providing service and where no modern communications service is available. It too argued that experience thus far shows that shared systems have not developed along high-volume, low-cost routes nor paralleling common carrier facilities. NCUR argues that the need for shared service for utilities is primarily in remote areas to control isolated hydro stations or gas or water pumping stations requiring a small number of highly reliable communications circuits that can be shared by others having similar requirements.

19. The Central Committee for Communication Facilities of the American Petroleum Institute (API) argued that even if private microwave systems would divert traffic from common carriers, the national growth patterns create enough communications demand to make up for whatever revenue losses might result and to utilize whatever circuits are duplicated. Dow Jones & Co. claimed that there is an explosive demand for advanced communication systems and, therefore, there is no evidence that a selective expansion of private microwave would materially hurt the common carriers. On the contrary, API argued, the long-range results of microwave sharing in which the users have the choice of either providing their own or receiving service from common carriers will benefit the common carriers in terms of the stimulating effect of competition on the quality, characteristics, and cost of service.

20. It was also claimed that it is not true, as the carriers argued, that the most effective joint use of facilities can be achieved through the use of common carrier facilities. NCUR argued that utilities need highly reliable microwave systems, to activate remote equipment and for other purposes, under close control of the user, and that the necessary degree of control can be achieved through contractual arrangements with one or two others but that the same degree of control cannot be achieved from facilities available from common carriers. API pointed to the inefficiencies of common carrier circuit utilization because of indirect routing that often occurs in sending communications over common carrier facilities.

21. The suggestion of G.T. & E. that the instant proposal should be considered in the Commission's investigation of A.T. & T. interstate

rate structure was vigorously opposed on the basis that expanding the permissible sharing of microwave systems has no bearing on the issues of that proceeding and would unduly delay the instant matter.

22. It was also argued that the carrier's position in this proceeding is not consistent with the absence of their objections in docket 15586 where the Commission decided to permit sharing of microwave stations among Community Antenna Radio Service licensees since there was no difference between the need for joint use of systems in that service and the need for joint use in other services.

23. Supporters of the proposed rules urged that the arguments presented by NARS are inappropriate and irrelevant to the question of sharing in the fixed field and that they lack creditability because, they claimed, NARS has no experience in the microwave field, that it is simply looking for a forum to redress alleged grievances of its members in the mobile radio field and that whatever problems may exist in the mobile radio field have no bearing in the instant proceeding. They argued that sharing of microwave systems has been permitted since 1949 and there are no known abuses or complaints with respect thereto. API argued that the NARS proposal to prohibit cooperative use or multiple licensing of transmitting equipment was an attempt to restrict freedom of choice between private and common carrier services by radio users. It maintained that no possible argument could be made that pro rata sharing of cost of radio equipment is a common carrier operation; that the cases cited by NARS are inapplicable and not in point; that there can be no common carrier operation unless there is for hire status of the parties; and that the Commission has long considered sharing agreements not to constitute common carrier operations. Communication Industries, Inc., an MCC operator and radio equipment supplier, disagreed with NARS that all cooperative systems should be prohibited because, although there may have been abuses in the mobile radio field, the cooperative and multiple licensing arrangements have merit from the engineering and spectrum management point of view since they conserve frequency spectrum.

COMMENTS ON OTHER MATTERS

24. Some of those who supported the proposed rules urged that sharing should be expanded further than was proposed by the Commission. Dow Jones argued that cross-service sharing should be permitted to all on the most desirable frequency available to any one participant. NCUR argued that cross-service should be permitted for right-of-way companies (which are not rate regulated) to enable certain electric cooperatives to share cross-service in the same manner as other utilities. It claimed that the rates and services of electric cooperatives are regulated in some States and not in others—although they are right-of-way entities in all—and, unless permitted cross-service sharing, there would be an anomalous situation where some electric cooperatives would be able to share but not others although the purpose of all such cooperatives is to provide low-cost electric service and there is no real distinction between them and regulated privately owned electric utility companies.

25. NCUR, SIRSA, FIRC and others urged that cross-service sharing should be permitted among commonly owned companies. NCUR stated that there are many situations in the utilities industry where several subsidiaries may be engaged in different activities towards a common end, such as mining, private rail transportation of coal, land acquisition and development, and the production of electricity, that all these activities are coordinated and closely managed and have similar communications requirements and, unless permitted cross-service sharing, they would not be able to use a common microwave system because they all are not eligible in the same radio service. SIRSA and FIRC described similar situations. All argued that it would be unreasonable to deny common use of a system where integrated and closely coordinated activities of this type require common communications facilities.

26. There were divergent views on the procedures we proposed for insuring that sharing be on a cooperative, nonprofit basis. Almost all agree with our proposal that the Commission examine all proposed sharing arrangements before they become effective. However, not all agreed with the proposed requirement for filing annual statements. Many suggested that there should be no annual statement where service is rendered free of charge. Public safety licensees also see no need for annual statements where the system is shared by public safety licensees only. Others suggested that the statement should be filed when there is a change in the arrangement, such as where a new user is added, that the statement be kept with the station file available for inspection but not submitted to the Commission. Some suggested that the statement should be filed only with the application for renewal.

27. Almost all those who commented on it argued against the requirement for mandatory sharing. They claimed that systems must be engineered with some excess capacity to take care of future expansion, that joint use of a system requires a special kind of relationship and arrangements that can only be arrived at by voluntary agreements, and that involuntary sharing would compromise the control a licensee must have over his system. In this connection, it was suggested that the rules specify that, in all sharing arrangements, the licensee must have complete control of the system and that he alone must be responsible for its proper operation.

ANALYSIS OF THE COMMENTS AND CONCLUSIONS

28. The comments summarized above, especially those discussing the issue of whether sharing of microwave systems should be expanded, must be considered in relation to the history of microwave usage in the Safety and Special Radio Services in order to place them in the proper prospective. Microwave frequencies have been available to private users since 1949, mainly to public safety organizations and to right-of-way companies, some 10 years prior to our microwave decision in docket 11866. Also, to the extent that microwave frequencies were available, before that decision, intraservice sharing was also permitted. In docket 11866, we made microwave frequencies available

to all private users generally on a regular basis and without regard to the availability of common carrier service, but we permitted intra-service sharing only among public safety licences, right-of-way companies and regulated entities. Thus, since 1960 (when our decision in docket 11866 became final), and in some cases since 1949, intra-service sharing has been available to public safety organizations (police, fire, highway and conservation departments, county, and municipal governments), to right-of-way companies (railroads, pipelines, gas, electric, and other utilities), and entities whose rates and services are regulated (truckers, buslines, airlines, and similarly regulated enterprises). In the instant proceeding, we proposed to permit inter-service (cross-service) sharing between public safety organizations and regulated entities and extend intraservice sharing to such industries as manufacturing, petroleum (for activities in addition to pipeline operations such as producing, collecting, or refining petroleum), forest products, construction, mining, farmers, ranchers, ready-mix concrete and asphalt dealers, the press, the movie film producers, auto clubs, and others. In addition, we proposed to permit commercial entities, such as banks, department stores, service companies, and retailers, eligible in the Business Radio Service, to share microwave systems on frequencies above 10,000 Mc/s. Our proposal to expand permissible intra- and inter-service sharing was made against the background of experience of microwave usage in those services where sharing has been permitted, and we think that the various comments on this issue should be considered on the basis of that experience.

29. Thus, although microwave usage on a shared basis has been available for a number of years, the common carriers offered no evidence to substantiate their argument that, either under the current conditions or under the more flexible proposed conditions, there has been or would be a proliferation of "pseudo-common carriers" along high-density, low-cost routes to the substantial detriment of the carriers and to communications users in general. In fact, in services where sharing has been permissible, relatively few shared microwave systems have been established and in good part these systems provide service along predominantly rural routes to functions such as pipeline pumping stations, electric power substations, railroad stations, and specialized functions of this type. Experience thus does not support a finding that to permit sharing of microwave systems would result in such an undesirable multiplication of such systems as to adversely affect the public interest.

30. Nor do the comments filed in this proceeding by users and potential users indicate that there will be a surge of shared microwave systems in the immediate future, although A.T. & T. so argued in its reply comments. As a matter of fact, the comments, while stating potential needs or tentative plans for microwave communications, at the same time indicated that no conclusion had been reached to satisfy those needs solely through shared private microwave systems. The thrust of the comments was rather that enlarged sharing of private microwave facilities would enable a more reasoned choice among communications facilities under the particular circumstances. For example, NAM stated that a competitive choice in the manufacturing

industry between common carrier service and private microwave service is a necessity for the full development of communications in that industry and argued that the availability of sharing "will contribute to the strengthening of this * * * choice." The Aerospace Flight Coordinating Council described possible joint use of a microwave system by the aircraft manufacturing industry in the Los Angeles area and pointed out that the industry has no plans to establish such systems, but favorable action in this proceeding "can set the stage" for serious and meaningful exploration "to determine the possible desirability of cooperative usage of facilities." SIRSA argued that sharing would remove one of the primary inhibiting factors which thus far have made the establishment of microwave systems in the Special Industrial Radio Service unfeasible. The National Retail Merchants Association pointed out a number of reasons why private microwave systems have not been established in the retail industry and claimed that sharing would eliminate cost as one of the inhibiting factors. On the other hand, Humble Communications argued that the proposed rules will allow increased flexibility in the use of communications by the petroleum industry and that such flexibility is essential in those instances where the common carriers are unable to commit themselves to provide the required service. Others, such as FIRC and a number of public safety licensees, argued that sharing would make it economically feasible to provide communications service in remote areas where adequate service is not available and by, substituting microwave frequencies in control and repeater systems, free other frequencies for mobile use.

31. Moreover, the principal factors that have affected the growth of private microwave systems—shared and nonshared—thus far, will continue to exist even if enlarged sharing is permitted. It is clear that although microwave frequencies have been available to all private users since 1960, the development of private systems has been modest and the systems that have been established traverse almost totally remote and rural areas. Thus, the cost of microwave systems, the availability of competitive service from common carriers and the interconnection policies of the common carriers have all been inhibiting factors. Sharing will, of course, tend to reduce the cost of microwave service to individual users, but shared systems, by their nature, are not practical in all cases. Only persons with communications needs over the same routes can normally share a system, and even such users must meet our eligibility criteria and must be able to work out the practical problems inherent in cooperative arrangements of this type.

32. Thus, the conclusion urged by the carriers that permitting further sharing of private microwave systems would result in an undesirable proliferation of such systems and cause substantial injury to the carriers and to the general public is not supported by the record, nor by experience thus far. Nor do we find any basis for reversing our long-standing policy by prohibiting cooperative sharing of microwave systems generally and permitting them only in isolated cases where common carriers are not available, as has been urged by Western Union and NARS. This general issue was considered in docket 11866 and we concluded that the public interest would be served by author-

106-504—66——2

izing private microwave systems whether or not common carrier facilities are available. The same principle applies here. There is nothing in the record of this proceeding or our experience since 1960 requiring reversal of that policy. Thus, we find no reason to consider separately the petition (RM–533) of the American Petroleum Institute, as suggested by A.T. & T., nor any reason to postpone action in the instant proceeding until after the conclusion of our common carrier investigatory proceedings as suggested by G.T. & E.

33. As more fully set forth above, the common carriers have argued that the extent to which sharing should be permitted was considered and disposed of by the Commission in docket 11866; that the same reasons for limiting sharing exist now as then; and that the Commission has not disclosed the considerations that have led it to depart from existing policy. But the Commission's decision in docket No. 11866 in this regard clearly contemplated future reexamination. It stated that the number of cases where sharing would be permitted under that decision would provide a "basis upon which to make meaningful observations as to the desirability and impact of such [cooperative] arrangements," 27 FCC 359, 401. Almost 6 years have elapsed since that decision, and we are unaware of any significant problems arising out of the sharing arrangements permitted to date. On the other hand, the comments filed by various communications users in this proceeding indicate that the limitations on sharing of microwave systems have restricted unreasonably the fuller and more efficient utilization of microwave frequencies in the Safety and Special Radio Services.

34. The arguments of NARS to the effect that the experience [2] with sharing in the mobile field militates against the liberalization of the sharing policy in the microwave (fixed) field are not persuasive. Even if NARS's allegations with respect to alleged abuses in the mobile services were established, they would not support the conclusion that the same situation would develop in the microwave field. Sharing of microwave stations—though somewhat more limited than sharing of mobile systems—has been permitted for more than 16 years and we have no evidence, nor indeed any allegations, of any abuses or unhealthy growth with respect to sharing of microwave stations. Thus NARS's request to broaden the instant proceeding to include an investigation of sharing practices in the mobile radio field is denied.

35. In summary, we are not discussing herein the establishment ab initio of a policy regarding sharing of private microwave facilities. The issue at hand is whether the already established policy should be broadened. The record herein and our experience of over 15 years show that the shared microwave systems that have been established have worked well. Sharing has enabled the users to obtain the benefit of microwave communications which might not have otherwise been

[2] In support of its allegations, NARS described the activities of a few mobile radio equipment suppliers which NARS claims are "pseudo-common carrier" operations and should be prohibited. We need not decide what the nature of these operations is and what action, if any, the Commission should take with respect to them. This is beyond the scope of this proceeding. However, we are looking into the specific allegations made by NARS and the staff is reviewing the cooperative and joint usage of radio equipment in the mobile services, and, following such review, the Commission will take such action as may be appropriate.

possible. Furthermore, even those who opposed the proposed rules conceded that joint usage of a microwave system generally results in its fuller and more efficient use; that sharing generally conserves frequency spectrum and antenna sites; and that the attendant economies enable more potential users to obtain the benefits of microwave radio service. However, as we stated in the notice, jointly used systems generally are feasible between two or more persons who have communication needs substantially along the same route and, in these cases, the alternative to sharing is the construction of parallel systems which we think, absent special circumstances, are wasteful in many respects. Shared systems, such as have been established, also enable the users to maintain the necessary control and flexibility to meet special communications requirements. Such reasons have already led us to authorize the shared use of microwave facilities by community antenna television systems in the Community Antenna Radio Service. The same reasons lead us to conclude that liberalized sharing in the Safety and Special Radio Services generally would result in the fuller and more efficient utilization of microwave frequencies in those services and would be in the public interest.

36. In reaching this conclusion, we have considered the question, raised in the comments of the carriers, of whether we have statutory authority to permit the shared use of private microwave systems on a cooperative, nonprofit basis and have concluded that we have. The touchstone for the regulation of the use of radio is the public interest and we think that, under that standard, we have ample authority to permit cooperative use of radio stations if we find, as we have, that the public interest would be served and the larger and more effective use of radio would be encouraged. Furthermore, we have long made the distinction between persons engaged in providing service as common carriers and those rendering service on a nonprofit, cooperative basis. Thus, the rules governing practically all Safety and Special Radio Services provide for the cooperative use of facilities authorized therein (see, for example, secs. 81.352, 81.531, 87.291, 87.335, 87.349, 87.453, 89.13, 91.6, 93.3, and 95.87 of the Commission's rules and *Aeronautical Radio Inc.* v. *American Telephone and Telegraph Co.*, 4 FCC 155 (1937)).[3] The Communications Act has given broad authority to the Commission to regulate the use of radio and to prescribe the service of radio stations in the public interest. Also, the act neither prohibits the use of radio on a cooperative basis, nor prescribes a method for regulating that use, and we think we have ample authority to prescribe any special method of regulating the cooperative use of private systems that would best serve the public interest. See *Philadelphia Television Broadcasting Co.* v. *FCC*, — U.S. App. D.C. —, 359 F. 2d 282 (1966).

37. Turning now to other matters, we have considered the arguments suggesting that we permit wider cross-service sharing than proposed in the notice of proposed rulemaking. First, we believe that the unre-

[3] Basically, all stations authorized in the Safety and Special Radio Services are flatly prohibited from rendering communications common carrier service (see, for example, secs. 89.7, 91.2, 93.2, 95.87) with the exception of certain specific types of stations, especially in the maritime and aviation services, which are authorized to engage in public correspondence.

stricted sharing suggested by Dow Jones is not desirable because, for example, persons solely eligible in the Business Radio Service may not generally use microwave frequencies below 10,000 Mc/s and to permit such persons to share a system licensed in another service would nullify that policy. However, "unrestricted" sharing will be permitted as a practical matter, on frequencies above 10,000 Mc/s because most of those eligible for authorizations in the various Safety and Special Radio Services are also eligible in the Business Radio Service. But we want to limit cross-service sharing below 10,000 Mc/s so that we will be able to observe the development of cooperative systems on a cross-service basis before removing the remaining restrictions in this regard.

38. We are not persuaded by the argument of the American Automobile Association that cross-service sharing should be made available to automobile clubs. Auto clubs would be permitted to share systems on frequencies in the 952–960 Mc/s band and above 10,000 Mc/s with others eligible in the Business Radio Service, if there is no other entity in a particular area with whom to share a system in the Automobile Emergency Radio Service. As a practical matter, similar situations could exist in other radio services where a particular company or entity would be unable to find another entity eligible in the same radio service and with similar communication needs with whom to share a microwave system. In that respect, the position of the automobile clubs is not unique. In these situations, the Business Radio Service would be available. Nor are we persuaded that cross-service sharing should be available to commonly owned companies, because giving that preference to organizations merely because they are substantially under common ownership would be a factor favoring concentration of economic interests and discriminating against smaller competitive enterprises.

39. However, we agree with NCUR that it is not appropriate to treat electric cooperatives whose rates and services happen not to be regulated in a particular State differently from regulated cooperatives and privately owned utility companies since all perform essentially the same service to electricity users. Accordingly, the privilege of cross-service sharing will be extended to right-of-way entities even though their rates and services may not be regulated in all jurisdictions.

40. We have also considered the various arguments and suggestions with respect to our specific proposal for prior review [4] of all sharing arrangements and the submission of annual reports. We agree that when two or more governmental agencies share a system, there is no need for the filing of the annual statement. However, their arrangement must be submitted to the Commission for prior review, and, if a governmental entity is to share a system with a nongovernmental entity, the annual statement would be required. We also agree that there is no need for filing annual statements when service is rendered free of charge or without any other consideration flowing from the person who receives service. The various other suggestions concern-

[4] SIRSA seems to have interpreted the proposed rules concerning prior review of cooperative arrangements by the Commission as self-licensing. It should be made clear that although prior authorization will not be required to begin rendering service to another, the facilities must be properly licensed, and, if the particular radio station involved is to be changed in any material respect, such as adding a point of communication, appropriate prior Commission authorization would be required.

ing reporting requirements are rejected. We think that the Commission has a duty to supervise closely the operation of cooperative use of microwave systems, and the requirement for submitting a financial statement each year and a statement showing the relation of the contributions of each participant to his use of a station will be helpful to us in discharging that responsibility.

41. In view of the almost universal opposition to mandatory sharing and, since there appears to be no need therefor, we will not impose such requirement and licensees will be permitted to share their systems, under the conditions specified in the rules, on a voluntary basis. However, a party who has been refused unreasonably access to a system with sufficient excess capacity despite his offer to bear a proportionate share of the costs thereof may request the Commission to review his situation to see whether there is any unfair discrimination involved.

42. In the notice, we proposed to extend eligibility for radio station authorizations in all radio services governed by parts 87, 89, 91, and 93. to nonprofit cooperative enterprises (associations or corporations) whose sole function would be to establish and run microwave systems on behalf of their members. Such cooperative organizations are now permitted and are licensable in some of these radio services but not in others. If the proposal were adopted, such communications cooperative entities would be made eligible for licenses in all of these services. The comments did not indicate any particular need for this, nor do we see any. Communications cooperatives do not appear to be necessary to make sharing of microwave systems fully effective. A shared microwave system can be licensed under existing rules to a company which has a need therefor and is itself eligible and it can render service to other companies on a nonprofit, cost-sharing basis. Authorizing a system to an organization that is formed solely for the purpose of operating the system is not desirable because it offers the opportunity to third persons to enter the picture who might be tempted to abuse and commercialize shared microwave systems. For these reasons, that proposal is not adopted.

43. The rules governing the shared use of fixed radio systems are set forth in new sections 87.467, 89.14, 91.7, and 93.4. Sections 89.13, 91.6, and 93.4 have been modified only for the purpose of deleting therefrom existing provision with respect to sharing of fixed radio stations.

44. Accordingly, *It is ordered*, This 13th day of July 1966, that parts 87, 89, 91, and 93 of our rules are amended effective August 22, 1966. Authority for adopting these amendments is found in section 4(i) and 303 of the Communications Act of 1934, as amended.

45. *It is further ordered*, That this proceeding *Is terminated.*

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

APPENDIX B

List of Those Who Filed Comments and Reply Comments

Comments generally in support of our proposals were filed by:

Nevada Highway Department
Idaho Highway Department
Arizona Highway Department
Association of American Railroads
National Retail Merchants Association
Union Oil Co. of California
Litton Systems, Inc.
Forest Industries Radio Communications
The State of Colorado
Forestry, Conservation Communications Association
Dow Jones & Co., Inc
The American Trucking Associations, Inc.
The American Automobile Association
International Association of Chiefs of Police, Inc.
Aerospace Flight Test Radio Coordinating Council
Central Committee on Communication Facilities of the American Petroleum Institute
National Committee for Utilities Radio
Associated Public Safety Communications Officers, Inc.
National Association of Motor Bus Owners
The NAM Communications Committee
The Great Northern Railway Co.
Southern California Gas Co.
American Association of State Highway Officials
Special Industrial Radio Service Association, Inc.

Comments generally in opposition of our proposals were filed by:

Western Union Telegraph Co.
American Telephone & Telegraph Co.
G.T. & E. Service Corp.
The United States Independent Telephone Association
The National Association of Radiotelephone Systems

Reply comments were filed by:

Communications Industries, Inc.
Forest Industries Radio Communications
Humble Communications Co.
National Retail Merchants Association
National Committee for Utilities Radio
Special Industrial Radio Service Association, Inc.
Xerox Corp.
Central Committee on Communication Facilities of the American Petroleum Institute
American Telephone & Telegraph Co.
National Association of Radiotelephone Systems
Frank Chalfont
Allied Telephone Cos. Association

FCC 66-677

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AUTHORIZED ENTITIES AND AUTHORIZED USERS UNDER THE COMMUNICATIONS SATELLITE ACT OF 1962	Docket No. 16058

MEMORANDUM OPINION AND STATEMENT OF POLICY

(Adopted July 20, 1966)

BY THE COMMISSION: COMMISSIONER JOHNSON NOT PARTICIPATING.

PRELIMINARY STATEMENT

1. During April, May, and June 1965, the Commission received requests from several concerns (including press wire services, a newspaper, a television network, and an airline) for information regarding procedures to be followed in order that such concerns might be authorized to obtain satellite telecommunication services directly from the Communications Satellite Corp. (Comsat). On May 28, 1965, Comsat forwarded to the Commission its initial tariff, offering channels of communication via satellite to communications common carriers only. In an accompanying letter of transmittal, the corporation stated that in the event that any other entities, foreign or domestic, were to be authorized to obtain channels directly from Comsat, it would expect to supplement its tariff to provide for the offering of such channels.

2. On June 16, 1965, the Commission issued a notice of inquiry stating that the foregoing developments presented issues concerning the extent to which, as a matter of law, entities in the United States other than communications common carriers can be authorized, under the Communications Satellite Act of 1962 (Satellite Act), to obtain telecommunication services directly from Comsat; the extent to which, as a matter of policy, such entities should be authorized to obtain services; the nature and scope of such services; the type of entities which may be deemed eligible to obtain the services; the nature and extent of the authorization required; and the policies and procedures which the Commission should establish to govern applications for such authorization.

3. Legal briefs and comments were received on or before November 1, 1965, from Aeronautical Radio, Inc. (ARINC), and the Air Transport Association of America (ATAA), filing jointly; the American Telephone and Telegraph Co. (A.T. & T.); the Columbia Broadcasting System, Inc. (CBS); the Communications Satellite Corp. (Comsat); the Administrator of General Services (GSA); the

G.T. & E. Service Corp. (G.T. & E.); the Hawaiian Telephone Co. (Hawaiian); the International Business Machines Corp. (IBM); the International Educational Broadcasting Corp. (IEBC); ITT World Communications, Inc. (ITT); Merrill Lynch, Pierce, Fenner & Smith, Inc.; the Communications Committee of the National Association of Manufacturers (NAM); United Press International, Inc. (UPI); the United States Independent Telephone Association (USITA); Western Union International, Inc. (WUI); and the Western Union Telegraph Co. (WU).

4. In addition to the briefs and comments received from the above-listed parties, general comments or statements were received from American Broadcasting Co., Inc. (ABC); the American Communications Association (ACA); the American Newspaper Publishers Association (ANPA); the American Petroleum Institute (API); the American Trucking Association (ATA); the Associated Press (AP); the Communications Workers of America AFL-CIO (CWA); Dow Jones & Co., Inc.; Eastern Airlines, Inc.; RCA Communications, Inc. (RCAC); and the Washington Post Co. (the Post).

5. On or before January 3, 1966, reply comments were received from ARINC and ATAA filing jointly; A.T. & T.; the Association of American Railroads (AAR); Comsat; GSA; Hawaiian; IBM; ITT Worldcom; RCAC; WUI; and WU.

6. An analysis of the briefs, comments, and reply comments indicates that the filing parties have focused primarily on the initial question of the notice of inquiry, i.e., the extent to which, as a matter of law, entities in the United States other than communications common carriers may be granted access to the facilities and services of Comsat. The second point to which attention was given is the question of policy relating to noncarrier access to the satellite system directly through Comsat. Relatively few parties addressed themselves to the questions of the nature of authorized entities, the nature and scope of authorized services, and the policies and procedures to be adopted by the Commission for handling and disposing of applications for authorization of direct access to the satellite system.

7. We shall discuss first the basic legal questions raised and then the policy issues. However, the two are interrelated and aspects of policy are necessarily developed in the ensuing discussion of the legal issues.

BASIC LEGAL ISSUES

8. The critical question is the extent to which the Satellite Act contemplates, permits, or requires that Comsat be authorized to provide service directly to entities other than carriers. In general, respondents to our notice took one of the following positions:

(*a*) The terrestrial carriers allege that the Satellite Act does not contemplate or permit Comsat to be authorized to provide service to any noncarrier entity, with the possible exception of the Government;

(*b*) The noncarrier entities allege that the act contemplates that Comsat should be permitted to provide service to them and that the Commission should issue authorizations upon appropriate findings that the particular service sought would be in the public interest;

(*c*) The Administrator of General Services (GSA) alleges that Comsat

is authorized by the Satellite Act to provide service directly to the Government without restriction or limitation whenever the Government desires to take such service;

(*d*) Comsat alleges that it should provide service to noncarriers when: (i) The carriers fail to provide a requested service via satellite although capacity is available; (ii) there is a need for development of technology or provision of new satellite services and then only during the early developmental stage; and (iii) in which, and any other case, there is a finding that the public interest would be served by the authorization. Comsat also took the position that it is authorized by the Satellite Act to provide service directly to the Government in any instance when the Government requests service.

9. We note that the term "authorized users" appears twice in the Satellite Act. The first time is in the section setting forth the policy and purpose of the act where, among other things, it is declared that "it is the intent of Congress that all authorized users shall have nondiscriminatory access to the system * * *" (sec. 102(c)). The second time is among the powers and purposes of Comsat when it is stated that Comsat is authorized "to contract with authorized users, including the United States Government, for the services of the communications satellite system * * *" (sec. 305(b)(4)). Reference is also made to another term "authorized entities" in section 305(a)(2), which states that Comsat may "furnish, for hire, channels of communication to United States communications common carriers and to other authorized entities, foreign and domestic * * *." Neither the term "authorized user" nor "authorized entity" is defined in the Satellite Act, nor is the use of the different terms, "channels of communications" in section 305(a)(2) and "service of the communications satellite system" in section 305(b)(4), explained in the act or the legislative history. In addition to those terms the Satellite Act makes reference to "authorized carriers," particularly in section 201 (c)(2) and (c)(7). This term is defined in section 103(7) as part of the definition of "communications common carrier." [1]

The Contention That "Users" and "Entities" Are "Carriers"

10. A.T. & T. contends that because there are different possible categories of "carriers" it was necessary "to recognize in the language of section 305 that Comsat could deal with foreign entities authorized by the Commission to act as carriers here in the United States." (A.T. & T. brief, Nov. 1, 1965, p. 13.) A.T. & T. also claims "it must be recognized that there are United States telecommunications entities which operate offices abroad, such as RCA Communications, Inc., and Globe Wireless, Ltd." (Ibid.) It is not explained why both classes of entities are not reasonably to be considered as included in the term

[1] Communications Satellite Act of 1962, sec. 103(7): "As used in this act, and unless the context otherwise requires—the term 'communications common carrier' has the same meaning as the term 'common carrier' has when used in the Communications Act of 1934, as amended, and in addition includes, but only for purposes of secs. 303 and 304, any individual, partnership, association, joint-stock company, trust, corporation, or other entity which owns or controls, directly or indirectly, or is under direct or indirect common control with, any such carrier; and the term 'authorized carrier,' except as otherwise provided for purposes of sec. 304 by sec. 304(b)(1), means a communications common carrier which has been authorized by the Federal Communications Commission under the Communications Act of 1934, as amended, to provide services by means of communications satellites."

"carriers," but A.T. & T. concludes that because of the nondomestic status of these "carriers" they had to be referred to as "entities" or "users" in the act. This contention completely ignores the language of section 305 (a)(2) and (b)(4) and the broad language of section 102(c).

11. In particular, section 305(a)(2) refers to "United States communications common carriers and to other authorized entities, foreign and domestic." In section 305(b)(4) the act provides that Comsat is authorized "to contract with authorized users, including the United States Government * * *." In these provisions it is clear that Congress contemplated that Comsat could be authorized to provide service directly to entities other than common carriers. We note that that finding is further supported by the declaration in section 102(c) that, "It is the intent of Congress that all authorized users shall have nondiscriminatory access to the system * * *." Since "authorized users" may include the U.S. Government, a noncarrier (sec. 305(b)(4)), and since under the act Comsat may be authorized to furnish channels for hire to carriers and "other authorized entities, foreign and domestic," the terms "authorized users" and "authorized entities" must include more than only "communications common carriers." We therefore reject the contention that the terms "carriers," "entities," and "users," as used in the Satellite Act, are synonymous, and must be read as synonymous.

12. ITT Worldcom contends that in view of the necessity for any "authorized user" to utilize earth terminal station facilities for access to the satellite system, and in view of the specific language of the act, particularly section 201(c)(7), limiting authorized construction and operation of satellite earth terminal stations to Comsat and "authorized carriers":

> the term "authorized users" in section 305(b)(4) can thus include only those authorized to use the satellite system to create telecommunications channels pursuant to authority to operate a satellite terminal. No one else: neither television networks, news wire services, nor other users of leased channels are or can be within the scope of the term. (Brief, Oct. 29, 1965, pp. 7–8.)

ITT is confusing authorized operation with *access*. Authority to operate satellite terminal stations is limited as ITT alleges. However, Congress differentiated between the two matters by its statement in section 102(c) that: "* * * it is the intent of Congress that *all* authorized users shall have nondiscriminatory access to the system." [Emphasis supplied.] In view of this statement of intent and in the absence of any provision excluding any entity not an operator from access to the system, we reject ITT's contention that to be a user of the system one must be eligible to construct and operate a satellite terminal facility.

The Contention That the Commission Is Empowered Only To Authorize Carrier Access to the Satellite System

13. A.T. & T., RCAC and others point out that, as a matter of law, the Commission may exercise only those powers expressly delegated

to it by Congress. All concur that the Satellite Act empowers the Commission to authorize "carriers" to use and have access to the facilities of the satellite system. However, RCAC, after citing selected provisions of section 201(c), contends that "these are the only provisions of the Satellite Act which grant the Commission the power to authorize use of the satellite system and, as is evident, they are limited to carriers." (Statement of RCAC, Nov. 1, 1965, p. 4.)

14. We agree that the provisions of section 201(c) of the Satellite Act delegate to the Commission positive power to assure equitable and nondiscriminatory access to the satellite system by communications common carriers. We believe, however, that this provision was inserted because of the fact that Comsat was to serve primarily as a carrier's carrier. Heretofore, under the Communications Act of 1934, as amended, the rendering of service by a carrier to a carrier has not been considered a common carrier function subject to regulation in the same way as service to the public. Instead, such control as the Commission found essential has been exercised by the imposition of conditions in instruments of authorization. Congress was fully aware of this situation and made both general and specific provisions to assure that the Commission had ample direct legislative authority to deal with the matter. In section 401 of the Satellite Act it made the services rendered by one carrier to another a regulated service, and in section 201(c)(2) specifically spelled out how this requirement was to be implemented in the case of access to earth terminals.

15. A similar situation does not obtain with respect to any possible service Comsat may be authorized to provide to noncarrier entities. The Satellite Act provides specifically (sec. 401) that Comsat is deemed a common carrier within the definition of that term in the Communications Act and is fully subject to the provisions of titles II and III of the Communications Act not inconsistent with the Satellite Act. Thus, any noncarrier entity whom Comsat might be authorized to serve is already guaranteed just and reasonable charges by section 201(b) of the Communications Act and protected against unjust or unreasonable discrimination in charges, practices, classification, regulations, facilities, or services by section 202 of that act. These provisions are further implemented by detailed requirements for tariff filing and powers given the Commission to prescribe charges and practices. Under these circumstances no additional provisions were necessary to protect the rights of noncarrier entities. The carriers would have us read section 201(c)(2) of the Satellite Act as a directive to exclude all noncarrier entities from access to the system. The above discussion makes it clear that the carriers are attempting to convert a shield included by Congress to protect them against possible improper acts into a sword to strike down others who might seek to be given such access under other provisions of law. This is not what Congress meant by this provision. The Satellite Act must be read as a whole and administered to give effect to its general purposes. We therefore reject this contention of the carriers.

The Contention That the Commission Is Without Guidelines or Criteria To Authorize Noncarrier Access

16. The carriers contend that the Satellite Act contains no standards pursuant to which the Commission might authorize access to the system by any entity other than a communications common carrier. The Satellite Act and the expressly incorporated Communications Act provide for necessary determinations of this kind by the Commission. The Communications Act directs that the Commission, acting in accordance with the standard of public convenience, interest, or necessity, grant radio licenses (sec. 307(a)); "prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class" (sec. 303(b)); study new uses for radio and generally encourage the larger and more effective use of radio in the public interest (sec. 303(g)); and make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of the act. (Sec. 303(r).) [2] Complementing these provisions, which are expressly incorporated into the Satellite Act (sec. 401 of that act), the Satellite Act itself contains the declaration that "it is the intent of Congress that all authorized users shall have nondiscriminatory access to the system; * * * [and] that the corporation created under this act be so organized and operated as to maintain and strengthen competition in the provision of communications services to the public * * *" (sec. 102(c)). To implement this intent, the Commission is directed to "make rules and regulations to carry out the provisions of this act." (Satellite Act, sec. 201(c)(11).)

17. Congress thus specified the necessary broad standards or guidelines to be followed by the Commission in making requisite judgments. *NBC* v. *U.S.*, 319 U.S. 190 (1943). It did not establish rigid or detailed criteria for regulation of new and dynamic techniques of communication. See *Philadelphia Television Broadcasting Co.* v. *FCC*, —— U.S. App. D.C. ——, 359 F. 2d 282, decided March 28, 1966. Rather, Congress left to the informed discretion of the Commission the establishment of the methods, procedures, and particular criteria for authorization of provision of services by communications common carriers to other carriers and the general public. The Commission is to make its judgment based upon an evaluation of the often changing situation and the congressional concern with the public interest in: (1) Encouraging wider and more effective use of radio techniques: (2) assuring that competition is maintained and strengthened in the provision of communication services to the public; (3) assuring that access to the satellite system shall be available to all authorized users on a nondiscriminatory and equitable basis; and (4) assuring that the benefits of new technology shall be reflected in service made available to the public through both improvements in the quality of service and the realization of all possible economies. The standards established by the Communications Act for authorizing carriers to provide

[2] Further, sec. 201(b) provides that communications by wire or radio subject to this act may be classified into such "* * * classes as the Commission may decide to be just and reasonable * * *."

service to the public are applicable to satellite services as well as to other telecommunication services. The contention that the Commission cannot authorize Comsat to provide noncarrier users direct access to the satellite system because there are no guidelines or standards for such authorization is, therefore, without merit.

The Contention That the Legislative History of the Act Indicates Congressional Intent To Limit Access Exclusively to Carriers

18. We think that the act clearly empowers the Commission to authorize Comsat to provide service to entities other than carriers. The legislative history of the Satellite Act further supports this conclusion. Comsat was intended by Congress to serve primarily as a carrier's carrier, that is, Comsat is to use its licensed facilities primarily to provide satellite capacity to other carriers which in turn will utilize such capacity, together with all of their other facilities (e.g., cable, HF radio, scatter systems), to furnish service to the using public. But the legislative history of the act indicates congressional intent that entities other than communications common carriers could be authorized direct access to the satellite system under appropriate circumstances. In a speech made on the floor of the Senate immediately prior to Senate passage of the Satellite Act (108 Cong. Rec. 16920), Senator John O. Pastore explained that "* * * the satellite corporation under H.R. 11040 will serve *mainly* the carriers." [Emphasis added.] Significantly, he did not say that Comsat would serve *exclusively* as a carrier's carrier.

19. On February 7, 1962, President Kennedy submitted a proposal to the Congress calling for establishment of a privately owned communications satellite corporation in which carriers were to have a share of ownership. The President's letter of transmittal states that the administration's proposed bill sets forth "purposes and powers of the new corporation (which) would include furnishing for hire channels of communication to authorized users, including the U.S. Government." In the course of subsequent hearings, testimony was heard from all Government agencies concerned with the legislation, several Senators, communications common carriers, and other interested persons. The comprehensive and detailed committee report on the bill, delivered by Senator Pastore from the Senate Committee on Commerce on June 11, 1962, states:

> It will be the purpose of the corporation to plan, initiate, construct, own, manage, and operate, in conjunction with foreign governments and business entities, a commercial communications satellite system, including satellite terminal stations when licensed therefor by the Federal Communications Commission. It will also be its purpose to furnish for hire channels of communication to United States communications common carriers who, in turn, will use such channels in furnishing their common carrier communications services to the public. *Provision is also made whereby the corporation may furnish such channels for hire to other authorized entities, foreign and domestic* (pp. 10–11). [Emphasis added.]

Thus, both the President's message transmitting the bill to Congress, and the Report of the Senate Commerce Committee recognized that the corporation could be authorized to render telecommunication services

to entities other than communications common carriers. We conclude that it was the intent of Congress that the Commission could authorize Comsat to afford access to the satellite system by noncarrier entities upon a proper finding that such access would serve the public interest and comport with the purposes and policies of the Satellite Act.

Authorization of Noncarriers To Deal With Comsat Must Be Regulated by the Commission and Be on a Specified Basis

20. Comsat can thus be authorized to serve noncarriers directly. But it does not follow, as some of the noncarriers appear to contend, that such authorization is to be left unregulated—that Comsat and the noncarriers are free to contract as they wish. Were that the case, Comsat could readily become, to a very substantial extent, a common carrier dealing directly with the public. But as stated (par. 18), and indeed acknowledged by all parties, Comsat was and is to serve primarily as a common carrier's common carrier.[3] Further, under unrestricted dealings between Comsat and noncarriers, large users might tend to contract directly with Comsat, while members of the general public are left to deal with the carriers. In such circumstances, it would be clearly impossible for the Commission to carry out its responsibility under section 201(c)(5) to "* * * insure that any economies made possible by a communications satellite system are appropriately reflected in rates for public communication service." We also note here our responsibility under the Communications Act to conduct our regulatory activities in such fashion,

> * * * as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges * * *

There is another basic tenet of the Satellite Act which would be violated by unrestricted dealings between Comsat and noncarriers. At least insofar as international common carrier communications services are concerned, Comsat is given a virtual statutory monopoly position with respect to the operation of the space segment of the commercial communications satellite system. See sections 102(d) and 305(a)(1) of the act. The Commission is not given authority to license any other U.S. carrier to operate the space segment of a satellite system to provide international communication service; instead, such carriers must procure the space segment facilities from Comsat. Clearly, if there were to be unrestricted dealings of Comsat with the public, it would mean that Comsat would be using its monopoly position to the detriment of the other carriers and, indeed, to deprive them of the opportunity to serve segments of the public under fair and equitable conditions.

21. Direct access by noncarriers to the satellite system must therefore be regulated in such manner as to insure consistency with the acts' purposes and with Comsat's primary role as a common carrier's common carrier. There is no question but that such regulation is a

[3] Senate Committee on Commerce, Rept. No. 1584, June 11, 1962, pp. 18, 28–29; see also remarks by Senator Pastore on the floor of the Senate, 108 Cong. Rec. 16920.

function which the Commission must discharge. This follows from the provisions of the Communications Act and the Satellite Act cited in paragraph 16. Just as the Commission is to authorize the communications common carrier, so also it is the agency to specify the "other authorized" domestic entities referred to in section 305(a)(2) (and see 305(b)(4)); indeed, the user must be "authorized" and no one can seriously argue, in light of the statutory scheme, that such authorization can stem from other than this agency.[4] For, under section 401 of the Satellite Act, Comsat is designated as a communications common carrier subject to the provisions of titles II and III of the Communications Act. In the process of issuing authorizations to Comsat as a common carrier and reviewing its tariffs, the Commission is required, under the public interest standard, to take into account and specify the conditions under which Comsat can depart from its primary role as a common carrier's carrier and provide service directly to the public.[5] Further, it is the Commission's responsibility to issue regulations or policy statements to insure that authorized users have nondiscriminatory access to the system. See sections 102(c); 201(c)(11) of the Satellite Act. Finally, we note here that the intent of Congress was stated by then Deputy Attorney General Katzenbach in response to questions from Senator Kefauver regarding use of the services of Comsat for various purposes, including weather reporting:

> You have to have an agency [the Federal Communications Commission] which is going to control these users, which is going to act in the governmental interest * * *[6]

The Government's Position As Authorized User—GSA's Contentions

22. We turn now to consideration of the Government's position as an authorized user. There is no question but that the Government is to be included in the category of "authorized user." See section 305(b)(4). We disagree, however, with GSA's assertion that Comsat may provide direct satellite communications service to the Government, without any limitation or restriction. Rather, the Satellite Act makes clear that Comsat's direct dealings with the Government must be of such a nature as to be consistent with the act's purposes and objectives. Thus, Comsat is authorized in section 305 to furnish channels of communication "* * * to *other authorized entities* * * *" ((a)(2)) and "to contract with *authorized users, including the United States Government* * * *", in "order to achieve the objectives and to carry out the purposes of the Act." [Emphasis supplied.] These provisions must therefore be read in terms of the objectives and purposes of the act. Section 102(c) sets forth the following pertinent purposes:

---

[4] Significantly, the "authorized user" provision in sec. 305 is in the section setting forth "the purposes and powers of the corporation"; the corporation, in turn, is subject to the regulation of the Commission ("the FCC shall be responsible for the regulation of the corporation", Sen. Rept. 1584, 87th Cong., 2d sess., p. 12).

[5] There is nothing unusual about the concept of a special purpose carrier. The Commission has, since its inception, licensed Press Wireless, Inc., except in unique circumstances, to handle only press traffic. The contention of ARINC and ATAA that "there would appear to be no need for the Commission additionally to undertake the unprecedented action of regulating users of Comsat" (comments of ARINC and ATAA, Nov. 1, 1965, p. 12), is thus based upon a misconception of the Commission's role.

[6] Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 87th Cong., 2d sess., pp. 55–56 (1962).

> * * * It is the intent of Congress that all authorized users shall have nondiscriminatory access to the system; that * * * the corporation created under this act be so * * * operated as to maintain and strengthen competition in the provision of communications services to the public * * *

23. Some further brief comment upon the last listed statutory purpose is appropriate. Were Comsat to be operated as GSA urges—unrestricted direct dealings with the Government—the result, as we develop with specific figures (see par. 32), would not be to maintain or strengthen competition in the provision of communications services to the public. Rather, it would seriously weaken the competitive forces. Section 201(a)(6) lends added support to the congressional intent to maintain or strengthen competition in the provision of communications services to the public. The main thrust of that section is to insure that satellite facilities provided by Comsat will be utilized for general governmental purposes except where a separate system is required in the national interest. See Senate Report No. 1319, 87th Congress, 2d session, page 4; [7] Senate Report No. 1584, 87th Congress, 2d session, page 15.

24. The foregoing considerations are thus consistent with the general concept pervading the Satellite Act of Comsat as a monopoly (insofar as the space segment of international communications is concerned) and as primarily a carrier's carrier, created to provide at least the space segment of international communications as part of an improved global communications network consisting of all means of providing such communications services, so that lower rates should be possible to all the using public. There is, we believe, every indication in the statute that the nature and extent of direct dealings between Comsat and GSA or any other Government agency, in its role as a user, must be considered in the light of the effect of such dealings upon the statutory scheme, the rights of the other carriers in the face of Comsat's monopoly, the total global network of services, which includes cables, HF radio and other media as well as satellite facilities, and the quality of services or charges to the general using public.

25. This does not mean that the Government does not have a special status under the Satellite Act. As shown by the provision in section 305(b)(4), it clearly does. We believe that the explicit specification of the Government as an authorized user stemmed from congressional recognition of the special or unique nature of the communications needs that may arise in the Government's case, precisely because of the special or unique functions of the Government. We believe that the standard for direct dealings between Comsat and the Government is thus embodied in the act in the sections dealing with the somewhat related question of a separate Government system—namely, if such dealing "is required to meet unique governmental needs, or is otherwise required in the national interest" (sec. 201(a)(6); sec. 102(d)). Clearly, if resort can be had to a separate governmental system in order to meet unique Government needs or if otherwise required in the national

[7] The committee, which originated the provision essentially in the form in which it now stands, described the provision in the following terms: that the President is to ["t]ake necessary steps to insure utilization of the commercial system for general governmental purposes whenever there is no requirement for a separate communications system to meet unique governmental needs." Sen. Rept. No. 1319, p. 4.

interest, a fortiori, such circumstances warrant departure from the carrier's carrier approach if that approach would not effectively meet the Government's unique needs or the national interest. In short, we stress our full recognition that in the Government's case, unique or national interest circumstances can and do arise where the needs of the Government cannot be effectively met under the carrier's carrier approach. The authorization to Comsat to meet the needs of NASA's Apollo project through a specially designed system is a current example of such unique circumstances. See also *Bendix Aviation Corp.* v. *United States*, 106 U.S. App. D.C. 304, 272 F. 2d 533, *cert. den.*, 361 U.S. 965. We emphasize that in all cases where such national interest circumstances exist, we shall act promptly to authorize Comsat to provide service directly to the Government at just and reasonable rates.

BASIC POLICY ISSUES

26. In reaching our basic policy determinations we are aware that in this instance we are not confronted by a normal competitive situation; namely, one where one entity through its initiative, ability, or inventiveness produces a cheaper or better means of providing service and thus captures a market. Instead, we have a situation where there is an artificial restraint upon the terrestrial carriers. They cannot ordinarily be licensed to provide the essential space segment of the international satellite circuits and thus compete with Comsat on equal terms, but must rely on Comsat which was created to provide these facilities to them. Sound policy indicates that, absent a statutory requirement to the contrary, that they should not be required to depend solely on Comsat for satellite circuits while Comsat is simultaneously allowed to siphon the most profitable part of the business from them. Neither Comsat nor anyone else proposes that Comsat meet the needs of all users, i.e., message, Telex, and all other switched services. Thus, this is not a situation where a proposed competitor would meet all or even a major portion of the essential public needs should it supplant the other carriers.

27. No lengthy discussion of the policy considerations is needed since we have already covered a number of these considerations in the foregoing treatment of sections such as 102(c) and 201(c)(5) of the Satellite Act. In light of those considerations and the act's basic concept of Comsat as primarily a carrier's carrier, we believe that it would be in derogation of the policy of the act to permit Comsat to compete with the conventional carriers in furnishing to users those communication services and channels which customarily and conventionally are or can be furnished by such carriers within the framework of their general tariff offerings. In other words, Comsat would be authorized to deal directly with the users in only those instances where the requirement for satellite service is of such an exceptional or unique nature that the service must be tailored to the peculiar needs of the customer and, therefore, cannot be provided within the terms and conditions of a general public tariff offering. In this connection, a current example is the satellite service which Comsat has been

106-504—66——3

authorized to furnish to NASA for support of the Apollo program. Of course, Comsat should also be permitted to furnish a satellite service or channel to a user in any case where the conventional carriers fail or refuse to meet reasonable demand therefor, although they are or would be otherwise capable of doing so in accordance with general tariff offerings.

28. The wisdom of this policy is evident from the serious adverse consequences that would result if Comsat were permitted without limitation to furnish service in competition with their principal customers for satellite services and channels—the conventional carriers. In this connection, we have reviewed the nature of the proposals before us from entities which seek to be authorized users and take service directly from Comsat. It is clear from the filings herein that the services sought are primarily leased channel services, i.e., service which customarily and conventionally are provided by common carriers within the framework of their general tariff offerings. Comsat does not propose to, nor does anyone seek to have Comsat, provide message telegraph, message telephone, or any other exchange type of service. Yet these exchange-type services provide the bulk of the international or transoceanic services offered the public. In 1965 there were 24.2 million oversea telegrams which originated in, terminated in, or transited the United States. In the same year there were 7.9 million telephone calls between the United States and foreign or oversea points or transiting the United States between foreign points. Insofar as Telex is concerned, in 1965 there were 3.9 million messages originating in, terminating in, or transiting the United States.[8] On the other hand, in 1965 there were a total of about 200 voice-grade circuits (179 to U.S. Government agencies) and 400 telegraph-grade circuits (68 to U.S. Government agencies) leased between the United States and oversea points. Essentially, therefore, only a very small part of the using public using international communciations facilities had sufficient traffic to justify or require leased circuit facilities.

29. When we turn to the revenue side of the picture, we find that revenues from leased circuits provide an important, if not indispensable, part of the carriers' total receipts. Thus, in 1965 all oversea carriers, voice and record, other than Comsat, reported that leased circuits provided about 16 percent of total oversea revenues or some $34,900,000 ($25,300,000 from leases to U.S. Government agencies) out of a total of $222,700,000. The importance of revenues from leased circuit traffic becomes manifest when such revenues are compared with the international record carriers' net operating revenues before Federal income taxes. Reports to the Commission show that in 1965 these carriers, as a whole, had net operating revenues, before Federal income taxes, of about $20,300,000. Their revenues from leased circuit services for the same year were $20,200,000 ($11,083,000 from leases to U.S. Government agencies). Because of the relatively low nonfixed or variable costs associated with this service, the loss of such business could come close to wiping out completely the record carriers' earnings, unless the facilities could be immediately

[8] All figures exclude United States-Canada and United States-Mexico traffic.

used for other services and produce substantial revenues, which appears unlikely.

30. Separate figures regarding net revenues or earnings of telephone carriers from oversea communication services are not readily available. However, data filed with the Commission indicate that total revenues for such services in 1965 were about $116 million. Leased circuit services provided about $14.7 million or 12.7 percent of these revenues. In the case of Hawaiian Telephone Co., the ratio of its leased circuit to total revenues is much greater, accounting for about one-third of its total gross oversea revenues.

31. The danger of the loss by the terrestrial carriers of existing or additional leased circuit business to satellite facilities is not merely theoretical.[9] A recent complaint filed by ITT World Com, and a press release issued by Comsat in response thereto, indicate that Comsat would propose to charge both authorized users and carriers approximately the same amount for leased circuits and that the amount is substantially below current or recently proposed charges for leased cable circuits. Accordingly, the terrestrial carriers could reasonably be expected to lose a substantial share of their leased circuit revenues to Comsat. Under these conditions and in light of the data set forth above, it could very well be necessary to permit these carriers to increase rates charged other users in order to enable them to earn a fair return. Certainly such detriment to the vast majority of users for the apparent benefit of a few large users would be in derogation of the objectives of the act.[10] The fact is that the Satellite Act requires the opposite result; namely, that the benefits of these lower rates be made available to all users.

32. In light of GSA's contentions, we believe it appropriate to consider the revenue effects of Comsat providing service on an unlimited basis to the Government. We have analyzed above the potential effect of a loss of leased circuit revenues upon the terrestrial carriers. The Government as a user provided over 70 percent of total leased circuit revenues. In the case of voice-grade circuits which provide the bulk of such revenues, the Government is an even more important factor as it accounted for 90 percent of the total number of circuits leased by all users. The importance of revenues from Government leases to the international telegraph carriers and to the Hawaiian Telephone Co. is shown by the table below:

---

[9] The situation here is not unlike that facing the international telegraph carriers when A.T. & T. laid its trans-Atlantic high capacity cables which made voice-grade leased circuits feasible. During 1960 the Government canceled leases for circuits to Europe with Commercial Cable and Western Union's cable system resulting in a loss of revenues in that year of about $0.5 million for each of the carriers as compared with 1959. The full annual effect of these cancellations was much greater. They could not compete effectively with A.T. & T. because the latter proposed to lease voice-grade circuits to them at the same price as it leased these circuits to the ultimate users. The problems raised by this development were finally resolved in our TAT IV decision, American Telephone & Telegraph Co., 37 FCC 1151 (1964), wherein we required that the necessary cable facilities be owned jointly and excluded A.T. & T. from all participation in future international voice-data leased business. This was done because of the effects that provision of such service could have on the ability of the international record carriers to provide efficient and economical record services to the public as well as the fact that the carriers could not be expected to obtain a meaningful share of the business in competition with A.T. & T.

[10] We say "apparent benefit" because we will show hereinafter that even most large-scale users would probably suffer no economic detriment by a requirement that they take service from the carriers rather than directly from Comsat.

Year 1965

[In thousands of dollars]

Carrier	Total revenues	Net revenues before Federal income tax	Total leased circuit revenues	U.S. Government leased circuit revenues [1]
ITT World Com	$29,808	$4,546	$5,952	$3,200
RCAC	51,054	11,512	11,438	6,433
WUI	18,124	2,543	1,924	1,407
Hawaiian [2]	14,280	NA	4,741	4,606

[1] Partly estimated.
[2] Data are for oversea services only.

NA=Not available.

For each carrier, revenues from services to the Government are essential to a fair rate of return and provide a sizable part of its total profit margin. Thus, the loss of a substantial proportion of Government leased circuit revenues could have serious adverse effect upon the carriers. Instead of being able to reduce rates to reflect the lower costs of satellite circuits, they would probably have to seek substantial rate increases.

33. It might be argued that in our discussion thus far we have ignored the interests of Comsat in our concern about the potential effects of direct service by Comsat to "authorized users." This is not so. It will be recalled that Comsat has a virtual monopoly in the provision of at least the space segment for international common carrier service. Thus, to the extent that any U.S. user desires to lease satellite circuits or to the extent that Comsat, by selling activities, induces users to demand such circuits, the carriers must come to Comsat for at least the space segment of the facilities. Since, as noted above, Comsat's proposed charges to the carriers and other users would be substantially the same, it should realize substantially the same revenues whether the carriers or others lease the circuits from it.

34. We now address ourselves to the question of the effect upon prospective users of any refusal to permit Comsat to lease circuits directly to them. It appears to us that in general these users would also benefit from such a policy. We are mindful of the injunction in section 204(c) of the Satellite Act that the Commission shall—

> insure that any economies made possible by a communications satellite system are appropriately reflected in rates for public communication services;

Satellite circuits now becoming available should enable the carriers to secure facilities at lower costs in relation to terrestrial facilities and thereby permit them to reduce rates to reflect such cost reductions. We, therefore, expect the common carriers promptly to give further review to their current rate schedules and file revisions which fully reflect the economies made available through the leasing of circuits in the satellite system. Failure of the carriers to do so promptly and effectively will require the Commission to take such actions as are appropriate. Even though satellite circuits are not now and will not for some time be available to all points to which users presently lease

circuits from terrestrial carriers, implementation of this policy by the carriers should also reduce charges to many points to which satellite circuits are not now available. Furthermore, major users, require redundancy and diversity in their facilities and thus would normally be expected to use a combination of terrestrial and satellite facilities to the same points to provide such redundancy. These users may very well find that the average charge per circuit will be less if the terrestrial carriers supply all their needs than if Comsat were to be permitted to lease satellite circuits to them at lower rates, while the other carriers meet their needs for diversity and redundancy at rates reflecting the higher cable costs associated with conventional facilities such as cable and high frequency radio.

35. Aside from the foregoing considerations we note that entities which have sufficient traffic to require the lease of circuits are also large users of other international services such as message telephone, message telegraph, and Telex. To the extent that loss of leased circuit revenues might require upward adjustments or prevent contemplated reductions in rates for other services, such large users could very well find their total international communications bills increased if Comsat were to be permitted to provide leased service directly to them without limitation.

36. We, therefore, conclude that only in unique or exceptional circumstances should noncarrier entities deal directly with Comsat. We believe that the ascertainment of such circumstances must be left to a case-by-case approach, since it is dependent upon the nature of the particular service requested. We can state, however, that refusal or failure of the terrestrial carriers to provide, upon reasonable demand, satellite leased circuit facilities, otherwise available, would, in absence of a valid explanation, constitute exceptional circumstances. Similarly, we believe it our duty to encourage development of new uses of satellite facilities and will, upon application, issue authorizations which are best designed to further such ends. Finally, as already set forth more fully in paragraph 26, we again stress the special position of the Government, and specifically, that in the Government's case, unique or national interest circumstances can and do arise where the needs of the Government cannot be met under the carrier's carrier approach.

CONCLUSIONS

37. We have reached the following policy conclusions:

(*a*) The terrestrial carriers cannot under existing law themselves be licensed to operate the space segment of the international system and, therefore, cannot compete effectively in furnishing satellite service to the public.

(*b*) Comsat is not and does not propose to be a full service carrier meeting directly the needs of the vast majority of users of international services for all classes of communication services.

(*c*) If Comsat were to be permitted to provide leased channel services directly to users, other than in unique or exceptional circumstances, the basic purposes of Congress in enacting the Satellite Act—reflection of the benefits of the new technology in both quality of service and charges therefor—would be frustrated.

(*d*) A requirement that, except in unique and extraordinary circumstances, users take service from the terrestrial carriers, should not have adverse effects upon either Comsat or the users but instead should make it possible to reduce rates for all classes of users.

38. Our ultimate conclusions are:

(*a*) Comsat may as a matter of law be authorized to provide service directly to noncarrier entities;

(*b*) Comsat is to be primarily a carrier's carrier and in ordinary circumstances users of satellite facilities should be served by the terrestrial carriers;

(*c*) In unique and exceptional circumstances Comsat may be authorized to provide services directly to noncarrier users; therefore, the authorization to Comsat to provide services is dependent upon the nature of the service, i.e., unique or exceptional, rather than the identity of the user. The U.S. Government has a special position because of its unique or national interest requirements; Comsat may be authorized to provide service directly to the Government, whenever such service is required to meet unique governmental needs or is otherwise required in the national interest, in circumstances where the Government's needs cannot be effectively met under the carrier's carrier approach.

39. We do not now propose to set forth specific procedures. However, any request by Comsat for authorization to provide service directly to any user desiring to take such service in particular circumstances should include showings by Comsat as to:

(i) Whether the proposed service via satellite is available from terrestrial carriers, including evidence of request made therefor and the response of the carriers;

(ii) Whether the facilities to provide this service are available, and, if not, a description of the new or expanded facilities required as well as the cost thereof;

(iii) A statement showing why the circumstances involved are so unique and exceptional as to require service directly from Comsat or what the national interest requirements are that indicate that service cannot be provided under the carrier's carrier approach.

(iv) Any other facts which would indicate that the public interest would be served by a grant.

The above required information shall be set forth in support of the applications for modification of the applicable earth station and/or satellite station licenses as well as for authorization to acquire units of satellite utilization which Comsat shall file in each case in which it is requested to provide a particular service directly to any noncarrier users. Unless and until such authorizations are granted, Comsat shall not provide services to any noncarrier entity. In addition Comsat, of course, must also have an effective tariff on file before it can provide service directly to any noncarrier entity it may be authorized to serve.

40. This inquiry was instituted under authority set forth in section 403 of the Communications Act of 1934, as amended; the policies and procedures set forth herein are adopted pursuant to authority contained in sections 4(i), 4(j), 201(b), 303, and 307 of the Communications Act of 1934, as amended, and sections 102(c), 201(c)(11), 305(a), 305(b), and 401 of the Communications Satellite Act of 1962.

41. Accordingly, *It is ordered*, This 20th day of July 1966, that the statement of policy set forth in this memorandum opinion and order *Is adopted*, and that the proceeding *Is terminated*.

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

FCC 66R-279

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of WHOO RADIO, INC. (WHOO) ORLANDO, FLA. For Construction Permit	Docket No. 15985 File No. BP-13708

APPEARANCES

Gene A. Bechtel, *Thomas Schattenfield* and *George H. Shapiro*, on behalf of WHOO Radio, Inc.; *Leo Resnick*, on behalf of Clarke Broadcasting Corp. (WLOF); *Gerald Scher*, on behalf of the Outlet Co. (WDBO); and *Joseph Chachkin*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted July 19, 1966)

BY THE REVIEW BOARD: BERKEMEYER, NELSON, AND PINCOCK.

1. WHOO Radio, Inc. (WHOO), which presently operates on the frequency 990 kc/s with daytime power of 10 kw (nondirectional) and nighttime power of 5 kw (directional antenna), seeks authority to increase daytime power to 50 kw (10 kw-critical hours)[1] utilizing a directional antenna; WHOO's nighttime operation would remain unchanged.

2. WHOO's application was designated for hearing by Commission order, FCC 65-356, released May 6, 1965, on issues to determine: the areas and populations which would gain or lose primary service from the proposed operation and the availability of other primary services thereto; whether the proposed operation would be in compliance with section 73.24(g) of the Commission's rules[2] and, if not, whether a waiver of that section is warranted; and whether a grant of WHOO's application would serve the public interest, convenience and necessity. On May 26, 1965, subsequent to the first prehearing conference,[3] Clarke Broadcasting Corp. (WLOF), and the Outlet Co. (WDBO), petitioned to intervene, alleging economic interest. Their petitions were granted by order (FCC 65M-781), released June 16, 1965. The hear-

[1] Critical hours: From 2 hours before local sunset to sunset and from local sunrise to 2 hours thereafter. WHOO proposes a nondirectional operation during these critical hours.

[2] Sec. 73.24(g) provides that an authorization for an increase in facilities of an existing station will be issued only after a satisfactory showing "[t]hat the population within the 1-v/m contour does not exceed 1 percent of the population within the 25-mv/m contour." Sec. 73.24(g) also contains a proviso (not here material), rendering the restriction inapplicable in situations where the population within the 1-v/m contour is 300 or less.

[3] Only WHOO and the Broadcast Bureau attended the first prehearing conference at which the parties agreed, in effect, to a "written case" procedure. (Tr. 18-19.) The intervenors, WLOF and WDBO, have objected to this procedure. The Commission has held that an intervenor must accept the posture of the proceeding as of the time of intervention and abide by the hearing agreements made by the parties prior to that time; that precedent is controlling in this proceeding. See *A.T. & T. Co.*, FCC 57M-902, 15 R.R. 1010 (1957), and *Akron Broadcasting Corp. (WCUE)*, 10 R.R. 1189 (1954).

ing examiner, Basil P. Cooper, in an initial decision (FCC 66D–4), released February 1, 1966, recommended a waiver of rule 73.24(g) and a grant of WHOO's application. WLOF and WDBO excepted, urging reversal of the initial decision. Oral argument was held before a panel of the Review Board on June 14, 1966. The board has reviewed the record herein in light of the exceptions, briefs, and arguments and, except as otherwise modified by this decision or the attached rulings on exceptions, the examiner's findings and ultimate conclusions are affirmed.

3. WHOO's present daytime service area (0.5-mv/m contour) is circular in shape and extends approximately 42.5 miles in all directions, except to the east where it bulges another 7.5 miles. The 0.5-mv/m contour extends northeast to within 2 to 3 miles of the Atlantic Ocean. As proposed, WHOO's 0.5-mv/m contour would extend northeast to the Atlantic Ocean and southwest approximately 80 miles, encompassing the city of Tampa, Fla. The proposed operation would continue to provide service to all areas and populations presently receiving service from WHOO and would not cause or receive objectionable interference to or from any existing station.[4] The following tabulation is included to facilitate comparison of the present operation with that proposed:

Contour	Area (square miles)		Gain	Population		Gain
	Present	Proposed		Present	Proposed	
25 mv/m	145	295	150	145,710	232,348	86,638
5 mv/m	620	1,275	655	275,700	320,677	44,977
2 mv/m	1,470	3,075	1,605	342,139	390,198	48,039
0.5 mv/m	5,900	10,450	4,550	461,871	668,879	207,008

It is thus apparent that the proposed operation would provide a new service to 207,008 people. All of the proposed gain area receives primary service (0.5 mv/m or greater) from station WGTO, Cypress Gardens, Fla., and portions of the gain area receive service from 64 other stations.[5] The minimum number of primary services available to any part of the WHOO gain area is 5, and the maximum number is 21. The areas and populations presently receiving five primary services were not determined; however, those areas are located about 40–55 miles from Orlando and are of minimal size and significance.

4. As the examiner noted, when WHOO located its transmitter at its present site, the population within its 1-v/m contour was not more than 14. However, at the time of the hearing, WHOO's 1-v/m contour encompassed an area of 1.06 square miles wherein 2,073 persons

[4] Contrary to the intervenors' theory, the absence of interference is a relevant consideration in the board's evaluation of the requested waiver of rule 73.24(g) (issue 2) and determination of the public interest issue (issue 3).

[5] WHOO's gain area is served by numerous Florida stations: WDBO, Orlando (more than 75 percent); WSUN, St. Petersburg and WINQ, Tampa (between 50 and 75 percent); 13 other stations (between 50 and 25 percent); and another 47 stations (less than 25 percent).

resided.[6] The population within this contour represents 1.43 percent of the 145,710 persons (1960 U.S. census) residing within the present 25-mv/m contour. Thus, even as presently operated, WHOO does not meet the limitation imposed by section 73.24(g) of the rules. Operating as proposed (50 kw), WHOO's 1-v/m contour would encompass an area of 3.54 square miles wherein 6,191 persons reside (1965 house count); this population constitutes 2.66 percent of the 232,348 persons (1960 U.S. census) residing within the proposed 25-mv/m contour. Since WHOO's proposed operation would not comply with the provisions of rule 73.24(g), the applicant requests a waiver of that rule.

5. The purpose of rule 73.24(g) is to encourage the location of transmitting antennas in the least congested areas to assure that the strong signal intensity of a broadcast station will not cause interference to a disproportionate number of receivers being utilized to receive other broadcast signals, and to avoid cross-modulation.[7] (Notice of proposed rulemaking in docket No. 10591, 18 Fed. Reg. 4324, published July 23, 1953.) WHOO has undertaken to establish that its proposal will not in fact result in any of the technical problems which section 73.24(g) was established to prevent and that therefore the rule should be waived.

6. An engineering consultant retained by WHOO conducted a survey at 30 sites (homes) within the present 1-v/m contour selected by a random sample method.[8] Nine of the test sites were located in the immediate vicinity of WHOO's transmitter site where the WHOO field strength measured from 2.2 to 4.7 v/m. At each site, three transistor receivers,[9] one inexpensive, one medium priced, and one expensive, were tuned across the entire broadcast band. The consultant reported that the eight stations in the Orlando area were clearly received and no blanketing or cross-modulation effects were observed, even near the pole grounds of the overhead powerlines where there is the greatest likelihood of poor ground connections which can result in such effects. Moreover, none of the residents of the 30 homes which contained radio receivers of a wide variety of makes and ages reported having had any difficulty receiving the signal of other stations in the Orlando area. The engineering consultant who made the survey noted a spurious response on the test receivers at 1290 kilocycles. With careful tuning and volume control turned up high, signals of stations WHIY (1270 kc) and WHOO (990 kc) could be heard, but

[6] This population figure for the 1-v/m contour was determined by a count of houses from an aerial photograph multiplied by the population factor for the area, 3.52 persons per household; the computation was then refined to reflect nonresidential and multifamily structures.

[7] In the presence of the very strong radio signals pertinent here, 3 types of interference may result: Blanketing interference occurs when the strong signal in the vicinity of a transmitter site overloads (blankets, swamps) the input circuits of a radio receiver. External cross-modulation is the term applied to spurious frequencies generated by nonlinear ("poor") contacts in wiring or metallic piping located in areas of strong signal strength. Internal cross-modulation may occur when 2 strong signals of different frequencies present in a receiver circuit interact, resulting in the appearance of "cross-talk" in the loudspeaker, or when the strong signal of 1 station enters the transmitter circuits of another station, resulting in the radiation of spurious signals in addition to the main signal.

[8] At the 2d prehearing conference (Tr. 42–43) WHOO offered to recheck its blanketing survey in the presence of representatives of the intervenors. The offer was not accepted. The random sample utilized by WHOO was set up by a professional economist retained by WHOO for this purpose.

[9] Transistor receivers were used because the consulting engineer conducting the tests considered them to be more susceptible to the effects of cross-modulation in strong signal fields than are vacuum tube receivers.

none of the residents of the homes used as test sites was aware of this phenomenon and no existing station in the area operates on the frequency 1290 kc.

7. The chief engineer of WHOO testified that he had been employed by WHOO since May 1964, and that only one complaint of blanketing interference had been received during that period.[10] The interference complained of was caused to an improperly wired homemade amplifier. The owner was given instructions regarding proper wiring and construction; thus the problem was eliminated.

8. In view of WHOO's operating experience, and the results of his survey, the applicant's consulting engineer does not anticipate any blanketing problems. He noted that, even at points where the signal from WHOO was as high as 4.7 v/m, there was no blanketing on any of the three receivers used in the survey and that, in view of the absence of blanketing at the signal levels observed, it is unlikely that a blanketing problem will occur within the 1-v/m contour proposed by WHOO. Moreover, he does not anticipate any internal cross-modulation problems since the nearest standard broadcast stations are approximately 3 miles from the WHOO transmitter and are located generally in the minimums of the proposed radiation pattern. Thus, at those locations, the increase in the field received will be very slight. Since most of the buildings and homes located within the present and proposed blanketing contours are of recent construction, there is little cause for concern that there will be external cross-modulation.[11] Both respondents in this proceeding had the advice of consulting engineers but they did not seek to offer any evidence contrary to the opinions advanced by WHOO's engineering consultant.[12] The record thus supports a conclusion that WHOO can operate at its present site as proposed without creating either blanketing or cross-modulation problems. Moreover, the applicant has stated on the record that should any legitimate blanketing or cross-modulation complaints arise, it will satisfy those complaints as required by section 73.88 of the rules.

9. As noted in paragraph 4, supra, WHOO's proposal does not comply with the provisions of rule 73.24(g). In requesting a waiver of rule 73.24(g) an applicant has the burden of proving that such action is warranted by the particular circumstances of the proceeding and that the public interest would be served by a grant of its application. There is no exclusive formula by which this burden can be satisfied; the quantum of proof necessary to justify waiver of a technical rule varies with the seriousness of the problem presented. The rule is designed for the protection of the population within the 1-v/m contour; in the past the provisions of rule 73.24(g) have been waived upon a showing that this population would not be adversely affected. See *Radio Hawaii, Inc.* (*KPOA*), 24 FCC 131, 16 R.R. 453 (1958); *O.K. Broadcasting Corp.* (*WEEL*), 36 FCC 621, 2 R.R. 2d 311 (1964).

---

[10] In addition, 2 persons complained of blanketing interference to their car radios when passing directly in front of WHOO's transmitter.

[11] The phenomenon of external cross-modulation is a product of poor contacts in electrical wiring and plumbing. Such poor contacts are rare in buildings constructed in compliance with modern building codes such as the Orange County, Fla., electrical code which controls in this case.

[12] We agree with respondents that they had no obligation to come forward with rebuttal evidence, but, in choosing the limited route of adversary scrutiny, respondents also assumed the risk that their attack would not impair applicant's case. *Marion Moore*, 2 FCC 2d 911, 914, 7 R.R. 2d 142, 145 (1966).

10. WHOO has satisfactorily demonstrated by competent, unrebutted evidence that the population located within its proposed 1-v/m contour would not, in fact, be subject to blanketing or cross-modulation interference. Moreover, it is clear from the record that WHOO, operating as proposed, will continue to provide a primary service to all of the persons presently receiving its service and will bring a new primary service to 207,008 persons without creating objectionable interference to any existing station or receiving objectionable interference from any existing station. We must therefore conclude that the public interest will be served by waiving section 73.24(g) of the rules and granting of WHOO's request to increase its daytime operating power.

11. The intervenors have urged reversal of the initial decision on procedural as well as substantive grounds. Procedurally, WLOF and WDBO assert that the imposition of the "written case" (see footnote 3, supra) and the examiner's curtailment of cross-examination in certain instances resulted in "less than a fair hearing," particularly with respect to WHOO's alternate site showing. The intervenors contend that WHOO has not made a presentation which justifies waiver of rule 73.24(g) and has not demonstrated that a grant of its application would serve the public interest. Among other things, the intervenors assert that WHOO's showing that no feasible alternate site is available for its proposed operation is incomplete and inadequate. The intervenors acknowledge that "the applicant did not have to project the question of the feasibility of a move into the proceeding"; however, they argue that once this question had been raised, the examiner erred in precluding extensive cross-examination of WHOO as to its financial ability to undertake the costs which it claimed would be incurred by changing its transmitter location.

12. The objections raised by the intervenors demonstrate neither a denial of a fair hearing to the intervenors, nor a failure of proof by WHOO. Although the examiner appears to have confused "qualifying questions" and "cross-examination," this does not in this case constitute reversible error since it has not resulted in prejudice to the intervenors. For in this proceeding, regardless of his statements, the examiner did in fact reserve rulings on the admissibility of several of WHOO's evidentiary exhibits until counsel for the intervenors asked questions of the sponsoring witnesses which were qualifying in nature (see, e.g., Tr. 74, 79, 109, 151, and 431). Consequently, the intervenors were, in substance if not in form, accorded their procedural right to qualifying questions. Moreover, the board has studied each of the instances complained of by the intervenors and concludes that WLOF and WDBO were given adequate opportunity to cross-examine WHOO's witnesses in all relevant areas. In many instances the examiner curtailed certain lines of inquiry during cross-examination because they were irrelevant; in other instances the examiner, in a proper exercise of his regulatory function under section 1.243(f) of the rules, precluded repetitive and argumentative cross-examination. However, these proper exercises of the examiner's discretion did not deprive the intervenors of the full and fair hearing to which they are entitled. Furthermore, as we noted in paragraph 9 above, the quan-

tum of proof necessary to justify the waiver of a technical rule varies with the seriousness of the problem presented and in this case the showing presented by the applicant is adequate to warrant a waiver of section 73.24(g) of the rules.

13. In the face of the existing thorough and undisputed showing that no blanketing or cross-modulation interference problems will occur, it would be unreasonable to place upon the applicant the additional burden of demonstrating the superiority of its mode of operation to all hypothetical alternatives. This is not a case where the proposal is inherently deficient; the record indicates affirmatively that it is not. Under these circumstances it would be unreasonable to require WHOO, an existing station seeking to improve its facilities, to divulge the most intimate details of its economic position to its competitors, WLOF and WDBO, to justify a waiver which it has affirmatively shown to be warranted.

Accordingly, *It is ordered*, This 19th day of July 1966, that the application of WHOO Radio, Inc. (WHOO) (BP-13708), for a construction permit to increase daytime power to 50 kw-LS (10 kw-CH) with a directional antenna, at Orlando, Fla., *Is granted*, subject to the following conditions:

The installation of a properly designed phase monitor 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.

Field measuring equipment being available at all times and, after commencement of operation, the field intensity at each of the monitoring points being measured at least once every 7 days and an appropriate record kept of all measurements so made.

A complete nondirectional proof of performance, in addition to the required proof on the directional antenna system, being submitted before program tests are authorized.

Before program tests are authorized, permittee shall submit sufficient field intensity measurement data made on the nighttime array to establish that the installation of the additional tower for daytime operation has not adversely affected the nighttime radiation pattern.

DEE W. PINCOCK, *Member.*

APPENDIX

Rulings on Exceptions to the Initial Decision

Exceptions of Clarke Broadcasting Corp. and the Outlet Co.

Exception No.	*Ruling*
1	Denied. See pars. 11 and 12 and footnote 3 of the decision.
2	Denied. See footnote 4 of the decision.
3	Denied. Not of decisional significance.
4	Denied. The examiner's finding is supported by WHOO exhibit 8 and by the testimony of James W. Moore, chief engineer of WHOO, who is competent to testify to the question of previous complaints relating to blanketing.
5	Denied. Evidence complained of was supported by witnesses competent to testify thereto and is relevant to a determination of issue (2) in this proceeding. See also par. 8 of the decision.
6	Denied. The witness, Louis King, testified of his own knowledge that he was familiar with the electrical code of Orange County, Fla., and that if that code were complied with, there would be little probability of "external cross-modulation." Moreover, he observed the age of the houses in the community. The examiner's ruling "that as a matter of judicial knowledge it is assumed that construction in an area complies with the law in that area" was correct. Any further cross-examination on this point could not be expected to produce decisive testimony.
7	Denied. Not of decisional significance.
8	Denied. See pars. 3 and 12 of the decision.
9A and 9B	Denied. See par. 13 of the decision.
10(a)	Granted. The sentence complained of is of no decisional significance and is deleted.
10(b)	Granted insofar as the last sentence in footnote 5 could be interpreted to place the burden of proof on the intervenors; however, the burden of coming forward with rebuttal evidence shifted to the intervenors after a *prima facie* showing was made by the applicant. See *Marion Moore*, 2 FCC 2d 911 (1966).
10(c)	Denied. The examiner permitted adequate cross-examination. The witness explained his statement (Tr. 325) and was not qualified to testify as to the feasibility of real estate development of the area in question.
11	Denied. The examiner's finding is supported by the record (WHOO exhibits 5, 12, 13; Tr. 330–332, 378, 406, 427) and was not rebutted by other evidence.
12	Denied. See par. 13 of the decision.
13	Granted as indicated in par. 5 of the decision.
14	Granted. There is no basis in this record upon which to predicate such an assumption.
15	Granted. See par. 11 of the decision.
16, 17, 18	Denied. See par. 13 of the decision.
19	Denied for reasons stated in the decision.

FCC 66D–4

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of
WHOO RADIO, INC. (WHOO), ORLANDO, FLA.
For Construction Permit

Docket No. 15985
File No. BP–13708

APPEARANCES

Gene A. Bechtel, Thomas Schattenfield, and *George H. Shapiro*, on behalf of WHOO Radio, Inc.; *Leo Resnick*, on behalf of Clarke Broadcasting Corp. (WLOF); *Gerald Scher*, on behalf of the Outlet Co. (WDBO); and *Joseph Chachkin*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER BASIL P. COOPER

(Adopted January 28, 1966)

PRELIMINARY STATEMENT

1. In this proceeding, WHOO Radio, Inc. (WHOO), licensee of station WHOO, Orlando, Fla., which now operates on the frequency 990 kc, 10 kw-LS, 5 kw at night, using a directional antenna at night, unlimited time, class II, requests a construction permit to increase the daytime power to 50 kw-LS (10 kw-critical hours), using a directional antenna, and to continue to operate with 5 kw at night, unlimited time. Under the proposed operation, station WHOO will remain a class II station.

2. The Commission by order dated April 28, 1965, released May 6, 1965, found that except as indicated in the issues, the applicant was legally, technically, financially and otherwise qualified to construct and operate station WHOO as proposed, but designated the application for hearing on the following issues:

> 1. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of station WHOO and the availability of other primary service to such areas and populations.
>
> 2. To determine whether the proposed operation is in compliance with section 73.24(g) of the Commission's rules concerning population within the 1000-mv/m contour and, if not, whether circumstances exist which would warrant a waiver of said section.
>
> 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.

The Commission also ordered that in the event of a grant of the application, the construction permit shall contain the following conditions:

> The installation of a properly designed phase monitor 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.

Field measuring equipment being available at all times and, after commencement of operation, the field intensity at each of the monitoring points being measured at least once every 7 days and an appropriate record kept of all measurements so made.

A complete nondirectional proof of performance, in addition to the required proof on the directional antenna system, being submitted before program tests are authorized.

Before program tests are authorized, permittee shall submit sufficient field intensity measurement data made on the nighttime array to establish that the installation of the additional tower for daytime operation has not adversely affected the nighttime radiation pattern.

3. After the application was designated for hearing, Clarke Broadcasting Corp., licensee of station WLOF, Orlando, Fla., and the Outlet Co., licensee of station WDBO, Orlando, Fla., filed petitions to intervene. These petitions were granted and Clarke Broadcasting Corp. (WLOF) and the Outlet Co. (WDBO), were made parties to this proceeding.

4. Prehearing conferences were held on May 24 and July 6, 1965. Evidentiary hearings were held on October 1, 13, 14, and 15, 1965. The record was closed on October 15, 1965. Proposed findings of fact and conclusions of law were filed on behalf of WHOO Radio, Inc., the Outlet Co. and Chief, Broadcast Bureau, Federal Communications Commission on December 6, 1965. Reply findings were filed on behalf of WHOO Radio, Inc., on December 22, 1965.

FINDINGS OF FACT

Areas and Populations To Be Gained—Issue 1

5. Station WHOO now operates from a site approximately 5.7 miles west of the center of the city of Orlando. During the day, station WHOO operates with a power of 10 kw using a single antenna having an overall height above ground of 493 feet. At night, the station operates with a power of 5 kw using a four-element directional array with the major lobe extending to the east covering the city of Orlando. No change is proposed in the nighttime operation.

6. The application here under consideration proposes a daytime operation with power of 50 kw (10 kw during critical hours) using a directional antenna. Under the proposal, one new tower (height 493 feet) will be operated in conjunction with the 493-foot tower now used for its daytime only operation. The two towers will be separated by 386 feet on a bearing of 328 degrees true.

7. The present 5-mv/m contour of station WHOO falls approximately 14.5 miles in all directions from the transmitter. The 2-mv/m contour, also circular in shape, falls approximately 23 miles from said transmitter with the 0.5-mv/m contour constituting a somewhat irregular circle with a radius of approximately 42.5 miles from the WHOO transmitter. This 0.5-mv/m contour extends to the east and northeast to within 2 or 3 miles of the Atlantic coastline.

8. Operating as proposed with a two-element directional antenna, the 2-mv/m contour will extend in a generally northeast-southwest direction for a distance of approximately 40 miles from the WHOO transmitter whereas the 0.5-mv/m contour will extend well into the

Atlantic Ocean on the east and northeast and approximately 80 miles to the west and southwest encompassing the city of Tampa, Fla., to the southwest.

9. In locating the contours of the present and proposed operations, the value of radiation was taken from the measured nondirectional pattern included in the readjustment of the array reported to the Commission on April 26, 1961. This figure was used in conjunction with figure M–3 of the Commission's soil map in determining the location of the pertinent contours. The measured radials were not used due to the scattering of the points close to the antenna site.[1]

10. The following table shows the areas and populations served within the present nondirectional daytime operation of station WHOO as well as the areas and populations to be served with the station operating with power of 50 kw:

Contour (mv/m)	Present—10 kw		Proposed—50 kw		Gain	
	Area (square miles)	Population	Area (square miles)	Population	Area (square miles)	Population
1000	1.06	2,073	3.54	6,191	2.48	4,118
25	145	145,710	295	232,348	150	86,638
5	620	275,700	1,275	320,677	655	44,977
2	1,470	342,139	3,075	390,178	1,605	48,039
0.5	5,900	461,871	10,450	668,879	4,550	207,008

11. In the case of the 25-, 5-, 2-, and 0.5-mv/m contours, the official 1960 U.S. census figures were used. Even distribution of the rural population within the minor civil divisions was assumed. Populations within urbanized areas and communities of more than 2,500 persons which received a field intensity of less than 2 mv/m were not included in the population totals. The population within the 1000-mv/m contour reflects a house count as of June 1965. For further details concerning this blanket area, see paragraphs 15–20.

12. Station WGTO, Cypress Gardens, places a signal of 0.5 mv/m or better over all of the area to be gained. Station WDBO, Orlando, serves between 75 and 99 percent of the area to be gained. Stations WSUN and WINQ serve between 50 and 75 percent of the area to be gained. Thirteen stations serve between 25 and 49 percent of the area to be gained whereas 47 other stations serve less than 24 percent of the area to be gained.

13. A small part of the gain area receives service from as many as 21 other stations whereas several other small parts of the gain area receive service from as few as 5 stations. The gain area receiving the maximum number of services lies to the southwest of Orlando in the vicinity of Lakeland, Tampa, and Dade City.

14. Operating as proposed, station WHOO will not cause objectionable interference to any existing or proposed station within

[1] The consulting engineer testified that he did not believe that the measurements conformed to the Commission's requirements for determining the location of pertinent contours, but if they are used there would be no significant change in the location of any of the contours and further that it was highly doubtful if the use of such measurements would change in any manner the areas and populations within the pertinent contours.

the meaning of the Commission's rules. Furthermore, the station will not receive objectionable interference within its normally protected 0.5-mv/m daytime contour within the meaning of the present Commission rules.

Request for Waiver of Section 73.24(g) of the Commission's Rules—Issue 2

15. The present 1000-mv/m (blanketing) contour of station WHOO is nearly circular in shape with a radius of approximately 0.55 mile and encompasses an area of 1.06 square miles within which there is a population of 2,073 persons. Operating with the directional array as proposed herein, the 1000-mv/m (blanketing) contour will be in the shape of a peanut extending approximately 1.45 miles to the northeast 1.38 miles to the southwest, 0.6 mile to the southeast and 0.55 mile to the northwest, encompassing an area of 3.54 miles within which there is a population of 6,191 persons.

16. The populations within the present and proposed 1000-mv/m contours were made on the basis of a June 1965, aerial photograph on which the computed 1000-mv/m contours were drawn. The number of single family residences were counted, and in addition multifamily buildings were located and the number of family units in such buildings ascertained from information furnished by rental agents. By this method, it was determined that there are presently 589 households within the existing 1000-mv/m contour and 1,759 households within the proposed 1000-mv/m contour. Applying a factor of 3.52 persons per household obtained from the appropriate 1960 census, the population was computed as above indicated.

17. Section 73.24(g) of the Commission's rules provides in so far as is pertinent to this proceeding:

> That the population within the 1-v/m contour does not exceed 1 percent of the population within the 25-mv/m contour * * *

The 1-v/m contour is the same as the 1000-mv/m contour and is frequently referred to as the "blanketing" contour.

18. The population within the existing 1000-mv/m contour based on the June 1965, house count as above shown is 2,073 persons, a figure which is 1.43 percent of the 145,710 persons residing within the present 25-mv/m contour computed on the basis of the 1960 census figures. The population within the proposed 1000-mv/m contour based on the June 1965, house count as above shown is 6,191 persons, a figure which is 2.66 percent of the 232,348 persons residing within the proposed 25-mv/m contour computed on the basis of the 1960 census figures. These figures, computed as stated, show the populations within both the present and proposed 1000-mv/m contours to be in excess of the 1 percent figure specified in section 73.24(g) of the Commission's rules.[2]

[2] U.S. census figures show that during the period 1950 to 1960, the population of the city of Orlando increased by more than 40 percent whereas the population of Orange County increased by approximately 55 percent during the same decade. If it is assumed that the population within the proposed 25-mv/m contour increased at an annual rate of 5.5 percent, a 1965 population of approximately 296,243 persons will be shown. The population within the proposed 1000-mv/m contour, 6,191 persons, constitutes 2.2 percent of this population of 296,243.

106-504—66——4

19. The application here under consideration was filed in October 1959. Associated with the original application were exhibits which stated that as of that time, the total population of 2,004 persons within the proposed 1000-mv/m contour was based on a ground survey count of residential dwellings and multiplied by 3.7 persons per dwelling. This house count population of 2,004 persons in October 1959, is approximately 0.86 percent of the population within the proposed 25-mv/m contour as reflected in the 1960 census.

20. In 1950, the area adjoining the WHOO transmitter was virtually all undeveloped land.[3] It is estimated that most of the houses within the present and proposed blanketing contours of station WHOO have been built within the past 7 years. A comparison of the photograph of the WHOO transmitter site filed in October 1959 with the photographs of the same site taken in the summer of 1965 establishes that many houses and apartment buildings have been built within the close proximity of the WHOO transmitter.

21. Statistics previously shown establish that as of 1965, the populations in the immediate vicinity of the WHOO transmitter, i.e., the existing and proposed 1000-mv/m contours, were 2,073 and 6,191 persons, respectively. In March 1964, James W. Moore became chief engineer of station WHOO succeeding Charles K. Chrismon. Mr. Moore can recall only one instance of a blanketing complaint which, upon investigation, disclosed that the problem resulted from the use of an improperly wired and improperly constructed amplifier. A member of the WHOO technical staff instructed the complainant how to wire the amplifier to eliminate the problem. Mr. Charles K. Chrismon, chief engineer for station WHOO during the period 1958 to 1964, is now general manager of station WLOF, Orlando, Fla., one of the parties to the proceeding. Mr. Chrismon was not called as a witness to testify concerning blanketing problems or any complaints which may have come to his attention while chief engineer for station WHOO.

22. The 1-v/m contour, the term used in section 73.24(g) of the Commission's rules, is the same as the 1000-mv/m contour, frequently referred to as the "blanketing" contour. The term blanketing contour means any place receiving a signal intensity of 1000 mv/m or better from an AM broadcast transmitter.

23. In the presence of strong blanketing radio signals, three types of objectionable interference may result: (1) internal cross-modulation within a transmitter, (2) external cross-modulation outside a transmitter, and (3) overload of input stages of receivers lacking sufficient selectivity. Each of these effects can occur but, in particular, such interference is relatively rare and, in the main, subject to remedy by various means.

24. Internal cross-modulation may occur whenever the signal from one station illuminates the antenna of another station with sufficient intensity to enable the foreign signal to be introduced into the trans-

[3] Commission engineering files contain a statement or exhibit filed March 31, 1947, wherein the consulting engineer states that station WHOO operating nondirectional with daytime power of 10,000 watts would have within its 500-mv/m and 250-mv/m daytime contours 14 and 225 persons, respectively (fig. 14 to said engineering exhibit).

mitter. When this happens, the transmitter may then broadcast its own signal plus the foreign signal as well as the cross-modulation products.

25. In areas where there are many transmitters at close proximity, internal cross-modulation may become an important factor. One such place is known as the New Jersey "Meadows" where eight of the standard broadcast stations serving the city of New York are located. In this area, it was necessary to install suitable filters in the various stations in order to control the phenomenon of internal cross-modulation. Such equipment did eliminate internal cross-modulation difficulties in the New Jersey "Meadows" and can be used to eliminate a similar problem in another or other areas.

26. Internal cross-modulation in this instance is unlikely to occur as the nearest AM broadcast stations are approximately 3 miles distant from the WHOO transmitter and are generally in the minima of the proposed pattern so that the increase in the field received will be relatively slight.[4]

27. External cross-modulation may be caused when fields of different frequencies encounter a physical object which exhibits nonlinear electrical characteristics. In such cases, spurious emissions may result from the flow of radio-frequency currents through the object. Such occurrences are known to be associated almost entirely with old and poorly maintained power-distribution systems and old buildings in a poor state of maintenance. When this effect is encountered, the offending objects may be found and repaired.

28. An examination of the area within the blanketing contours, existing and proposed, of station WHOO discloses that most of the buildings and homes therein were recently constructed. Hence, there is little reason to assume that there will be external cross-modulation.

29. The objectionable interference caused by the overload of the receiver input stages results from the inability of the specified receiver to reject the strong undesired signal when tuned to some other frequency. The overload of the receiver input stages is seldom encountered with modern receiving equipment employing automatic gain control. The record reflects that there are many thousands of persons now living within the 1000 mv/m or blanketing contour of several specified 50-kw stations in the United States. It is a simple matter to install traps in those receivers connected to the home electrical circuits which are unable to reject the strong signal and this technique is employed successfully in such instances.

30. Nine stations placed a signal of 2 mv/m or better over all or part of the present 1000 mv/m daytime contour of station WHOO. These nine stations include the four Orlando stations, three stations assigned to nearby communities, and two other stations assigned to more distant communities. The stations referred to, the frequency, location, and the minimum signal intensity within the WHOO 1000 mv/m contour are shown in the following table:

[4] The transmitter of station WLOF is in the area which now receives a signal intensity of 195.5 mv/m from station WKIS. This intensity is greater than the field 172.7 mv/m which will be placed at the WLOF transmitter by station WHOO operating as proposed.

Station	Frequency (kc)	Location	Minimum signal intensity within WHOO 1000-mv/m contour
WDBO	580	Orlando	83.6 mv/m.
WKIS	740	Orlando	75.2 mv/m.
WLOF	950	Orlando	45.9 mv/m.
WHIY	1270	Orlando	25.6 mv/m.
WABR	1440	Winter Park	9.42 mv/m.
WXIV	1480	Windermere	1.8 mv/m.
WTLN	1520	Apopka	10.1 mv/m.
WGTO	540	Cypress Gardens	5.94 mv/m.
WFIV	1080	Kissimmee	1.62 mv/m.
WOKB	1600	Winter Garden	Does not place a signal of 2 mv/m over any of the WHOO 1000-mv/m contour.

Stations WGTO, Cypress Gardens, and WFIV, Kissimmee, were not involved in the questionnaire used in the on-the-spot survey as they were not considered to be local stations. Station WOKB was included in the on-the-spot survey as it is located in a nearby city. See paragraphs 31–34.

On-the-Spot Survey

31. During June 1965, a qualified engineer took on-the-spot measurements in front of 30 houses located within the present 1000-mv/m contour of station WHOO. These houses were selected by a random sample method. All surveys were made during the daytime. At the hearing conference on July 6, 1965, the applicant offered to remake the survey or make another or other survey so that technical personnel for the two intervenors and the Commission could be present, observe, and check all elements of the on-the-spot survey.[5] No party requested the applicant to resurvey the area.

32. For the survey, a form was prepared which, among other things, listed the four standard broadcast stations assigned to Orlando, namely, stations WDBO, WKIS, WLOF and WHIY, and the four other stations assigned to nearby communities, namely, stations WABR, Winter Park, WXIV, Windermere, WTLN, Apopka, and WOKB, Winter Garden. At each of the 30 selected sites, one of the three types of portable receivers was tuned to each of the eight stations identified.[6] Without exception, each of the three receivers picked up the signal of each of the eight stations. At all of the locations, a weak spurious response was received on 1290 kc which, upon further investigation, appeared to be the result of an emission from the WHIY transmitter.

33. The 30 listening tests mentioned above were performed by standing in front of the selected house and tuning each of the three receivers across the dial to each station listed on the form. When overhead power lines were in front of the house, the test was made

[5] The transmitters of stations WLOF and WDBO are both located within 4 miles of the WHOO transmitter. It is reasonable to assume that it would have been a simple matter for members of the technical staff of either of these stations to have made their own independent on-the-spot survey of the blanketing problems in this area.

[6] The 3 "test" receivers were: (1) An 8 transistor portable broadcast receiver made in Japan, (2) a 12 transitor AM–FM–MB portable receiver also made in Japan, and (3) a 3rd transistor portable receiver capable of receiving on the AM–FM–SW bands. These 3 types fell within the so-called cheap, medium, and expensive grade transitor receivers.

standing under these lines to check for external cross-modulation effect. None was observed at any location even near ground poles. The residents of each of the 30 homes before whom the measurements were made were also interviewed to determine whether the resident had any difficulty in receiving any of the eight stations. No resident interviewed indicated his or her inability to receive any of the eight identified stations on the radio receiver in the resident's home. The survey indicated that many of the residents were selective in the choice of stations to which they tuned with the result that some of them did not report on their ability to receive some of the eight stations mentioned.

34. Eight of the locations surveyed were in front of houses on streets immediately adjoining the WHOO property. At these locations, the field intensity of station WHOO was measured as ranging between a high of 4.7 volts per meter to a low of 2.2 volts per meter. The point at which the 4.7 volts per meter was measured was approximately 500 to 600 feet from the WHOO daytime tower which has a 470-foot ground system.

Alternate Site Survey

35. In an effort to ascertain if it were feasible or desirable to relocate station WHOO in order to comply with the requirements of section 73.24(g) of the Commission's rules, a transparent overlay of the existing nighttime 25-mv/m contour of station WHOO was made and this overlay was moved around on a full-scale map of the area locating the outer periphery of the area within which the station could be located and at the same time placed the required signal over the principal business area of the city of Orlando. Within the peripheries so located were drawn circles around the transmitters of the other Orlando stations, namely, WLOF, WDBO and WKIS. A radius of 5 wavelengths was used for the circles around the transmitters of stations WKIS and WDBO as these stations are well separated from the frequency 990 kc used by station WHOO. A radius of 10 wavelengths was drawn around the five-element antenna array of station WLOF as this station, operating on the frequency 950 kc, is but 40 kilocycles removed from the frequency used by station WHOO.

36. As previously indicated, the proposed daytime operation with 50-kw power contemplates the use of two towers each 493 feet above ground separated by a distance of 386 feet on a bearing 328 degrees true. The ground system for these two towers will consist of copper wires buried in the ground having a radius of 470 feet from the foot of the tower except for the area between the towers. In such a situation, the minimum space requirement for the antenna and ground system would be a parcel of land 1,136 feet by 1,254 feet, or 32.7 acres. Additional land would be required to house the transmitter and associated equipment.

37. At the present time, the four towers and associated ground systems are located within a track 1,615 feet by 1,443 feet containing 53.5 acres. The land now used by station WHOO for the antenna and associated buildings contains 62.5 acres.

38. A U.S. Air Force base is located adjacent to the eastern boundary of the city of Orlando. The location of this Air Force base might present an air hazard problem if a site was selected to the east of Orlando. From a site to the east of Orlando, it would be necessary to serve the city with the minor lobe of the directional array rather than the major lobe. These facts established that it is not feasible to attempt to move the transmitter to the east of the city of Orlando.

39. The existing transmitter site of station WHOO is approximately 5.7 miles to the west of Orlando. As a result of the survey mentioned above, it was ascertained that there were several areas west of the city of Orlando in which station WHOO could be relocated from which its operation would comply with the various sections of the Commission's rules.

40. Should station WHOO seek to operate from two sites (i.e., one site during the day, a second site at night), the station would have to purchase 32.7 acres for the antenna and ground system alone plus additional land to house the transmitter and associated equipment and at the same time retain the present site of 62.5 acres in order to continue with the nighttime coverage of the city of Orlando.

41. In the area within which it would be possible to relocate station WHOO from which its operation would comply with all of the provisions of the Commission's rules, the average cost of land varies from $2,500 to $6,000 per acre. Most of the land in this area, however, is in prime citrus groves, the selling price of which varies between $3,500 to $6,000 per acre if it can be bought. Part of the land which fronts along a major four-lane highway running east and west through Orlando sells for $6,000 per acre. Two tracts could be acquired for $2,500 to $3,000 per acre. One containing approximately 40 acres is partly covered by a 5- to 6-acre lake; the other has a large 4- to 5-acre depression approximately 30 feet deep which the applicant would have to fill if it were to be used.

42. A witness called for WDBO had at the hearing a contract giving him an exclusive right to sell a certain identified piece of land up to and including November 14, 1965, for the sum of $150,000 cash. In the absence of an accurate survey, the tract contains about 55 acres. This tract had been considered by WHOO, but as the Old Winter Garden Road, Route 526, cut off a substantial portion of the land, the use of the remaining acreage had been ruled out due to engineering considerations.

43. The applicant estimates that to move from its present site and to operate within an area from which to serve the city of Orlando as required by the Commission's rules, it would have to purchase a minimum of 53.5 acres which, if available, would cost between $3,000 and $6,000 per acre, dismantle or abandon its existing facilities and construct new facilities at a cost of approximately $80,000.

44. The applicant has not given any serious consideration to the possibility of operating from two sites, one during the day and the other at night. Such operation would require the applicant to maintain its existing facilities on the present 62.5-acre site, acquire a new site containing 32.7 acres or more, and install and operate a 50 kw

daytime only station from the new site. No estimate was given for the additional cost of construction and operation which would be incurred should such split operation become necessary.

45. Stations WLOF and WDBO have urged that before this application can be granted, it is necessary for the applicant to establish that it is not possible to operate daytime from some other site—the suitability and availability of which is not shown and for which the applicant has not applied. The Commission has consistently held that an applicant is not required to go into hearing against every hypothetical alternative which another party alleges might possibly result in greater coverage or improved service. See memorandum opinion and order (Review Board) in *Darrell E. Yates (KRBA)*, docket 16194 (FCC 65R–446), released November 22, 1965; memorandum opinion and order (Commission) in *Selma Television, Incorporated (WSLA–TV)*, docket 15888 (FCC 65–216), released March 22, 1965 (par. 11); and memorandum opinion and order (Commission) in *WKYR, Inc. (WKYR)*, docket 14962 (FCC 63–893), released October 7, 1963, 1 R.R. 2d 314.

CONCLUSIONS

1. In this proceeding, WHOO Radio, Inc. (WHOO), licensee of station WHOO, Orlando, Fla., which now operates on the frequency 990 kc, 10 kw-LS, 5 kw at night, using a directional antenna at night, unlimited time, class II, requests a construction permit to increase the daytime power to 50 kw-LS (10 kw-critical hours), using a directional antenna, and to continue to operate with 5 kw at night, unlimited time. Under the proposed operation, station WHOO will remain a class II station.

2. Operating as proposed, station WHOO will gain during daytime hours of operation within its 2-mv/m contour an area of 1,605 square miles within which there is a population of 48,039 persons and within its 0.5-mv/m contour an area of 4,550 square miles within which there is a population of 207,008 persons. The minimum number of services of 0.5 mv/m or better within the area to be gained is 5 whereas the maximum number of services in any part of the area is 21. Operating as proposed, station WHOO will not cause objectionable interference to any existing or proposed station within the meaning of the Commission's rules.

3. The principal issue to be resolved in this proceeding is whether the Commission should waive the requirements of section 73.24(g) of the Commission's rules which provide, in part, that the population within the 1000-mv/m contour of a standard broadcast station shall not exceed 1 percent of the population within the 25-mv/m contour of said station.

4. The population within the proposed 25-mv/m contour based on the 1960 census is 232,348 persons. The population within the 1000-mv/m contour based on the 1959 house count is 2,004 persons. Simple arithmetic shows this to be 0.86 percent of the above 232,348 persons. The population within the 1000-mv/m contour based on the June 1965 house count is 6,191 persons. Simple arithmetic shows this

to be 2.66 percent of the above 232,348 persons. Thus compliance or noncompliance with the provisions of section 73.24(g) of the rules depends on whether we use the 1-v/m house count of 1959 or the 1-v/m house count of June 1965.

5. It will be noted that the 2,073 persons (1965 house count) now residing within the present 1000-mv/m contour of station WHOO is 1.43 percent of the 145,710 persons (1960 census) found to reside within the present 25-mv/m contour. Thus when these figures are used, the present operation of station WHOO is shown to be in violation of the requirements of section 73.24(g) of the rules.

6. A major purpose of the requirements of section 73.24(g) of the Commission's rules is to prevent the construction of a standard broadcast station transmitter which would make a substantial part of the area adjacent to the transmitter a "single-station area" in which the signals of other standard broadcast stations cannot be received on the home-type AM receiver. The type of objectionable interference which can result in areas of high signal intensity and the causes of such objectionable interference are discussed and summarized in paragraphs 22–29 of the findings.

7. Station WHOO now operates during daytime hours with a power of 10 kw. The increase to 50 kw would result in increasing the signal intensity approximately 2.24 times. In 1950, the area near the WHOO transmitter site was sparsely settled. Many new residences and apartment buildings have been built within the present 1000-mv/m contour of station WHOO since 1950. The on-the-spot survey conducted by a qualified engineer, summarized in paragraphs 31–34 of the findings, indicates that within the present 1000-mv/m contour of station WHOO there is no area 500 feet or more from the transmitter within which a person using a well designed AM receiver cannot now receive all of the stations assigned to the city of Orlando and to adjoining communities. The record warrants the conclusion that no blanketing problem now exists within the 1000-mv/m daytime contour of station WHOO. There is no reason to assume that there will be any blanketing problems within the proposed 1000-mv/m contour of station WHOO operating as proposed. Furthermore, if such a problem does arise, station WHOO has stated that it is ready and willing to rectify any legitimate complaints growing out of blanketing problems as is required by section 73.88 of the Commission's rules.

8. It is reasonable to assume that the population in the area in and near Orlando will continue to grow in the future as it has in the past and that there will be an increase in the number of persons residing within the 1000-mv/m contour of the station as well as in the 25-mv/m contour of the station. Such increase in population will not increase the likelihood of a blanketing problem if good construction practices are followed and well designed AM receivers are used. There are in operation today several 50-kw stations each of which has within its 1000-mv/m contour several times the population which will be within the proposed 1000-mv/m contour of station WHOO. The situations existing in other areas are pertinent to this proceeding only in so far as they tend to establish that the blanketing

problem as known to the industry today is not influenced to any appreciable degree by the number of persons residing within the area of high signal intensity.

9. The Commission, in 1953, in a report and order in docket 10591 (9 R.R. 1576) narrowed the blanket area from the 250-mv/m and 500-mv/m contours to the 1000-mv/m contour now specified in section 73.24(g) of the Commission's rules. This narrowing was, in part, a recognition of the technical advances in the industry which have brought about the manufacture of well designed AM receivers capable of rejecting the undesired signals. Since 1953, there have been two cases in which a request for waiver of the blanketing requirements under the current rules and standards has been denied. They are *Ben Hill Broadcasting Corp. (WBHB)*, docket 12109, 16 R.R. 737 (1958) (I.D. hearing examiner), and *Dolph-Petty Broadcasting Co. (KUDE)*, docket 14518, 35 FCC 538, 1 R.R. 2d 347 (1963) (Review Board). Each of the cases can be readily distinguished from the facts in issue in this proceeding and are not considered by the hearing examiner to be controlling or even persuasive in the instant proceeding.

10. Clarke Broadcasting Corp. (WLOF) and the Outlet Co. (WDBO) contend that the instant application should be denied because of the violation of the requirements of section 73.24(g) of the Commission's rules, or that station WHOO should not be permitted to operate with 50 kw from the present site but required to select a site from which it could operate daytime without violating the Commission's rules. In substance, these parties are contending that the instant application should be denied because it might be possible for the applicant to purchase sufficient acreage upon which to build and operate a daytime only station from the new site. These parties point out that there are today six stations which have seen fit to operate from two separate transmitter sites, one during the day, the other at night.

11. The position advanced by Clarke Broadcasting Corp. and the Outlet Co. might be persuasive were it to appear from the record that station WHOO operating from the site proposed would or possibly might create blanketing problems. No such probability or possibility is warranted by any fact of record in this proceeding. On the contrary, the facts of record warrant the conclusion that the type of problem which section 73.24(g) of the Commission's rules is designed to prevent will not be present when station WHOO operates during the day with power of 50 kw. Under the circumstances here present, there is no reason to invoke the provisions of section 73.24(g) of the Commission's rules as justification for denying the instant application. Consistent with the foregoing, the conclusion is reached that the facts here present warrant a waiver of the requirements of section 73.24(g) of the Commission's rules as applied to this application, and the requirements of said rule are waived.

12. A thorough consideration of the entire record, summarized in the several foregoing paragraphs, leads to the ultimate conclusion that the public interest, convenience, and necessity will be served by

granting the application of WHOO Radio, Inc., to increase the daytime power of station WHOO as proposed herein.

It is ordered, This the 28th day of January 1966, 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 WHOO Radio, Inc., licensee of class II station WHOO, Orlando, Fla., presently operating on 990 kc, 5 kw, 10 kw-LS, DA–N, U, for a construction permit to increase its daytime power to 50 kw-LS (10 kw critical hours), using a directional antenna, and to continue to operate with 5 kw at night, unlimited time, *Be* and the same *Is hereby granted*, Subject to the following conditions:

The installation of a properly designed phase monitor 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.

Field measuring equipment being available at all times and, after commencement of operation, the field intensity at each of the monitoring points being measured at least once every 7 days and an appropriate record kept of all measurements so made.

A complete nondirectional proof of performance, in addition to the required proof on the directional antenna system, being submitted before program tests are authorized.

Before program tests are authorized, permittee shall submit sufficient field intensity measurement data made on the nighttime array to establish that the installation of the additional tower for daytime operation has not adversely affected the nighttime radiation pattern.

FCC 66-641

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of WOODWARD BROADCASTING CO., WYANDOTTE, MICH. Requests: 850 kc, 5 kw, DA-2, U STORER BROADCASTING CO. (WJW), CLEVELAND, OHIO Has: 850 kc, 5 kw, 10 kw-LS, DA-2, U Requests: Authority to increase radiation in null area of daytime radiation pattern For Construction Permits	Docket No. 8167 File No. BP-5827 Docket No. 16764 File No. BP-15776

MEMORANDUM OPINION AND ORDER

(Adopted July 13, 1966)

BY THE COMMISSION: COMMISSIONER JOHNSON ABSENT.

1. The Commission has before it for consideration the above captioned and described applications and the following pleadings:

Pleadings relating to the Wyandotte proposal which were filed prior to the filing of an amendment to the application of the Woodward Broadcasting Co. (hereinafter Woodward), on May 8, 1963:

(*a*) A petition to designate the Woodward application for hearing filed on November 13, 1962, by the Storer Broadcasting Co. (hereinafter WJW); Woodward's opposition to the petition; and WJW's reply to the opposition.

(*b*) Petition to deny the Woodward application filed on November 13, 1962, by the Metropolitan Television Co. (hereinafter KOA), licensee of standard broadcast station KOA, Denver, Colo. (850 kc, 50 kw, U, class I-B); Woodward's opposition to the petition; and KOA's reply to the opposition.

Pleadings relating to the Wyandotte proposal filed after the amendment to the Woodward application on May 8, 1963:

(*c*) Petition to designate the Woodward application for hearing filed on July 24, 1963, by WJW.

(*d*) A second petition to deny the application filed on July 24, 1963, by KOA; Woodward's opposition to the petitions of WJW and KOA; and replies to the opposition filed by WJW and KOA.

Pleadings on file which relate to the application of WJW:

(*e*) Petition to dismiss the WJW application filed on December 19, 1962, by Woodward; and opposition to the petition filed by WJW; and Woodward's reply.

(*f*) A motion to strike the petition to dismiss the WJW application filed by WJW on January 21, 1963; Woodward's opposition to the motion; and WJW's reply to the opposition.

2. The Woodward and WJW proposals are mutually exclusive in that the proposed operation of WJW would affect more than 10 percent of the population within Woodward's proposed daytime 0.5-mv/m service area in contravention of former section 73.28(d)(3) of the Commission's rules.[1] Therefore, unless the Commission grants Woodward's petition to dismiss the WJW application, both applications must be designated for hearing in a consolidated proceeding. Accordingly, the Commission will first consider Woodward's petition to dismiss the WJW proposal.

3. It is Woodward's contention that the application of WJW, accepted as an application for the authorization of a minor change, should have been considered a major change and therefore not acceptable under the *Interim Criteria To Govern Standard Broadcast Applications*, 23 R.R. 1545 (1962), in effect at the time the WJW application was tendered on October 25, 1962. Woodward urges that the acceptance of the application by action of the Commission's staff was improper because the WJW application proposes a significant increase in WJW's coverage and extensive interference to the Woodward proposal, and the WJW proposal would receive significant interference from the proposed operation of Woodward's proposal. Thus, according to Woodward, the WJW proposal should have been deemed a major change, acceptance of which was barred by the prevailing interim criteria (AM "freeze"). It is WJW's position that its proposal involves a readjustment in the daytime antenna to fill a null in the existing pattern and therefore a minor change, the acceptance of which was proper since applications for minor changes in existing station authorizations were not barred by the interim criteria. Both Woodward and WJW urge other procedural grounds in support of their respective positions.

4. The proposal contained in the WJW application is the type traditionally considered a minor change notwithstanding the increase of 1,313 square miles in the WJW service area according to the data submitted by WJW. However, whether the WJW proposal is considered a major change or minor change, the Commission is of the opinion that it is bound to retain the WJW proposal on file under the doctrine of *Kessler, et al.* v. *Federal Communications Commission*, 117 U.S. App. D.C. 130, 326 F. 2d 673, 1 R.R. 2d 2061 (1963), which held that, notwithstanding the Commission's interim criteria, applicants who tendered applications which are mutually exclusive with an application pending on May 11, 1962, are entitled to participate in a comparative hearing on that application under the *Ashbacker* case (*Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327 (1945)). The Woodward proposal was pending on May 11, 1962, and is mutually exclusive with the WJW proposal tendered for filing during the time when the interim criteria were in effect. Therefore, WJW is entitled to be considered in a consolidated proceeding with

[1] Former sec. 73.28(d)(3) and other former provisions of the rules are applicable to the Woodward application which was on file prior to the adoption of new technical standards by the Commission to become effective on Aug. 13, 1964. *Amendment of Part 73 of the Commission's rules regarding AM station assignment standards, etc.*, 2 R.R. 2d 1658. See *Charles W. Jobbins, et al.*, 2 FCC 2d 197, 6 R.R. 2d 574.

the Woodward proposal. Accordingly, Woodward's petition to dismiss the WJW application will be denied, and WJW's motion to strike that petition will be dismissed as moot.

5. With respect to the Woodward application, both WJW and KOA contend that the nine-element directional antenna array would not be stable and could not be adjusted and maintained in a manner to insure adequate protection to KOA and WJW. WJW also contends that the Woodward transmitter site is not suitable because of terrain irregularities; nearby high-voltage transmission lines; supporting towers and other structures in the area which may preclude satisfactory adjustment and maintenance of the proposed directional antenna system. WJW alleges that the Woodward proposal would cause objectionable interference to the existing and proposed operations of WJW and that the interference received by the Woodward proposal would result in Woodward's noncompliance with former sections 73.28(d)(3) ("10-percent" rules) and 73.24(b), i.e., interference would reduce service to an unsatisfactory degree.

6. Woodward opposes the contentions of KOA and WJW on the ground that the allegations are speculative and lack specific factual support. With respect to WJW's claim of mutual interference between WJW, existing and proposed operations, and the Woodward proposal, Woodward asserts that WJW's claim is foreclosed because of the action of the Commission on September 2, 1959, in authorizing an increase in daytime power of WJW from 5 to 10 kw and the subsequent action of the Commission on March 16, 1960, in dismissing Woodward's petition for reconsideration of the WJW power increase. *Storer Broadcasting Co.* (*WJW*), FCC 60–241 released March 18, 1960. The Commission declined to reconsider the WJW authorization having found that the 10-kw operation of WJW would not cause additional interference to the Woodward proposal and that the Woodward proposal would fully protect the former WJW 5-kw operation and the 10-kw operation then proposed. The Commission further found that a grant of the WJW power increase would not, on the basis of the data on file at the time, preclude a grant of the Woodward proposal.

7. It appears to be WJW's position that interference to the existing operation of WJW would result due to the alleged instability of Woodward's directional antenna system and because Woodward may never be able to adjust and maintain the radiation pattern within the restricted radiation values proposed. WJW now claims such interference notwithstanding the Commission's finding in 1960 that neither Woodward nor WJW had shown interference from the Woodward proposal to the presently authorized daytime operation of WJW and that the Commission's study of the proposal indicated no interference to the WJW 10-kw operation. Woodward claims that no interference would be caused to the present operation of WJW. There is also disagreement over the interference which would be caused by WJW (existing) to the Woodward proposal. According to information on file in the Woodward application at the time the Commission authorized the 10-kw daytime operation of WJW, the interference caused to

the Woodward proposal would affect 6.3 percent of the population within Woodward's proposed normally protected daytime service area. In May 1963, after WJW was granted a power increase to 10 kws, Woodward filed an amendment which made changes in the proposed directional antenna pattern and it is indicated in the the amendment that the population loss to Woodward's present proposal would be 9.1 percent. A study of the Woodward amendment made on behalf of WJW claims that the loss would be 11.8 percent. As indicated hereinafter, the Commission's examination of the Woodward proposal indicates there are several substantial questions which require resolution in hearing, and the Commission concludes that the disputed points on the question of alleged mutual interference between the Woodward proposal and the existing operation of WJW and whether interference from the existing operation of WJW to the Woodward proposal would preclude compliance with former section 73.28(d)(3) of the rules, should be resolved on the basis of evidence adduced in that proceeding.

8. Woodward contends not only that the WJW and KOA petitions are substantively insufficient but that neither petitioner has established its standing to object to the Woodward application. Woodward asserts that the allegations do not establish any interference to either station and that the Woodward operation as proposed would not cause any interference to the existing operation of either station. On the basis of the Commission's study of the Woodward proposal, there is a substantial question as to whether the proposed directional antenna system can be adjusted and maintained as proposed. In the operation of the Woodward nine-element directional antenna array with different radiation patterns day and night, a high degree of suppression over wide angles is proposed for both modes of operation. The proposed site is in the immediate vicinity of high-voltage transmission lines, supporting towers, and other structures which may result in reradiation. In addition, it appears that terrain irregularities exist in the immediate vicinity of the proposed site. If adequate protecton is to be afforded KOA and WJW, the proposed directional radiation patterns must be adjusted essentially to the restricted values of radiation proposed. Accordingly, a substantial question obtains as to whether the directional antenna system proposed by Woodward can be adjusted and maintained as proposed and whether, in fact, adequate protection would be afforded the service areas of stations KOA and WJW.

9. Examination of the Woodward and WJW applications indicates that the WJW proposal would cause daytime interference to the Woodward proposal involving a population loss of 23.6 percent which is excessive pursuant to the provisions of former section 73.28(d)(3) of the Commission's rules.

10. The major lobe of the daytime directional antenna pattern proposed by Woodward is oriented in the direction of Detroit, Mich., a city with a 1960 population of 1,670,144. As a result of the orientation of the major lobe, the proposed daytime 5-mv/m contour not only penetrates the boundaries of Detroit but extends a substantial distance beyond the city limits. Wyandotte, Woodward's specified

community, is a city with a 1960 population of 43,519, less than half that of Detroit. Accordingly, pursuant to the Commission's *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, adopted December 22, 1965, 2 FCC 2d 190, 6 R.R. 2d 1901, it is presumed that Woodward realistically proposes to serve Detroit rather than its specified community. In view of the long period of time this application has been on file, Woodward will be afforded an opportunity to amend its application to attempt to rebut this presumption. If Woodward successfully rebuts the presumption or otherwise changes its proposal to make specification of issue No. 8 infra unnecessary, such issue will be deleted by the Commission.

11. If issue 8 is not deleted and Woodward fails to establish that it will realistically serve Wyandotte under such issue, its proposal will be deemed to be intended to serve Detroit unless the evidence establishes that it will realistically serve a third community whose boundaries are also penetrated by its 5-mv/m daytime contour. Woodward is claiming that the former "10-percent" rule (sec. 73.28(d)(3)) is inapplicable to its nighttime proposal since it comes under one of the exceptions applicable to an application which proposes the first nighttime service to a community. However, if it is concluded that the Woodward proposal is realistically a Detroit proposal, Woodward will be required to establish compliance with the former section 73.28(d)(3) or that it is entitled to a waiver of the rule. *Policy Statement*, supra, at paragraph 11; *Charles W. Jobbins*, supra, at paragraph 4.

12. If it should be determined that the Woodward proposal would realistically provide a local transmission service for Wyandotte, there is a question as to whether service would be reduced to an unsatisfactory degree within the meaning of former section 73.24(b) of the Commission's rules, in view of the fact that, while Woodward claims that the proposed operation would be limited nighttime to 11.8 mv/m, the Commission's study indicates that the limit would be substantially greater and extensive population and area losses would be involved. An appropriate contingent issue will therefore be specified.

13. The most recent financial information in the Woodward application was filed in 1959. Therefore, the Commission is specifying a financial issue to permit a determination with respect to the current financial position of the corporation and its principals. Woodward will be afforded an opportunity to amend its application to include current financial information which will be considered by the Commission to determine whether the Woodward Broadcasting Co. is financially qualified to construct and operate its proposed station for 1 year. *Ultravision Broadcasting Co., et al.*, 1 FCC 2d 544, 5 R.R. 2d 343. If, upon consideration of the financial amendment by the Commission, it can be determined that Woodward is qualified, the financial issue (issue 13 below) will be deleted.

14. The proposed Woodward antenna system was once approved by the Federal Aviation Agency. That approval, however, has since expired. Therefore, an issue will be specified to determine whether the tower height and location proposed would constitute a menace to air navigation.

15. The Commission finds that, except as indicated by the issues specified below, the applicants are qualified to construct, own, and operate their respective stations as proposed but that, upon due consideration of the applications and the pleadings herein, a hearing is necessary and that the applications must be designated for hearing upon the issues specified below.

16. Accordingly, *It is ordered*, This 13th day of July 1966, that the petition of the Woodward Broadcasting Co. to dismiss the application of the Storer Broadcasting Co. *Is hereby denied;* and 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 operation of the Woodward Broadcasting Co., 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 WJW and the availability of other primary service to such areas and populations.

3. To determine the nature and extent of the interference, if any, that each of the proposals would cause to and receive from each other and the interference that each of the proposals would receive from all other existing standard broadcast stations, the areas and populations affected thereby, and the availability of other primary service to the areas and populations affected by interference from either of the proposals.

4. To determine whether the transmitter site proposed by the Woodward Broadcasting Co. is satisfactory with particular regard to any conditions that may exist which would distort the proposed radiation patterns.

5. To determine whether the Woodward Broadcasting Co. will 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 the foregoing issues 4 and 5, whether the Woodward Broadcasting Co. proposal would cause interference to the existing operations of stations KOA, Denver, Colo., and WJW, Cleveland, Ohio, or to any other existing standard broadcast station and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.

7. To determine whether daytime groundwave interference received by the Woodward Broadcasting Co. proposal from the existing or proposed operation of station WJW or any other existing standard broadcast stations would affect more than 10 percent of the population within the normally protected primary service area in contravention of former section 73.28(d)(3) of the Com-

mission's rules, and, if so, whether circumstances exist which would warrant a waiver of said section.

8. To determine whether the proposal of the Woodward Broadcasting Co. will realistically provide a local transmission facility for its specified station location or for another larger community, in the 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 Woodward Broadcasting Co. 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 Woodward Broadcasting Co.'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 Woodward Broadcasting Co.'s advertising revenues within its specified station location are adequate to support the proposed station as compared with the projected sources from all other areas.

9. To determine, in the event that it is concluded pursuant to the foregoing issue 8, that the proposal of the Woodward Broadcasting Co. 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.

10. To determine, in the event that it is concluded pursuant to issue 8 above, that the Woodward Broadcasting Co. will not realistically provide a local transmission service for its specified station location, whether the most populous community for which it is determined that the Woodward Broadcasting Co. will provide a realistic local transmission service has any standard broadcast nighttime facility, or whether the interference which would be received by the proposed operation would affect more than 10 percent of the population within the normally protected primary service area in contravention of former section 73.28(d)(3) of the rules, and, if so, whether circumstances exist which would warrant the waiver of that section of the rules.

11. To determine, in the event it is determined pursuant to issue 8 above, that the Woodward Broadcasting Co. will realistically provide a local transmission service for its specified station location, whether the proposed nighttime service would be reduced to an unsatisfactory degree contrary to the provisions of former section 73.24(b) of the Commission's rules.

12. To determine whether there is a reasonable possibility that the tower height and location proposed by the Woodward Broadcasting Co. would constitute a menace to air navigation.

106-504—66——5

13. To determine, with respect to the application of the Woodward Broadcasting Co.:

(*a*) The current financial position of the corporation and its principals and whether sufficient funds are available to meet the costs of construction and initial operation of the proposed station.

(*b*) 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 the applicant's estimated revenues for the first year of operation.

(*c*) Whether, in view of the evidence adduced with respect to items 13–a and 13–b, above, the Woodward Broadcasting Co. is financially qualified to construct and operate the proposed station in that it has or will have sufficient funds for the construction and operation of such station for at least 1 year.

14. 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.

15. 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 the Woodward Broadcasting Co. is hereby granted leave to amend its application within 45 days of the date of the release of this memorandum opinion and order to include all information it desires the Commission to consider in connection with its determination with respect to issues 8 and 13, above.

It is further ordered, That the Metropolitan Television Co., licensee of standard broadcast station KOA, Denver, Colo., and the Federal Aviation Agency, *Are made parties* to the proceeding.

It is further ordered, That the Storer Broadcasting Co., *Is made a party respondent*, with respect to the existing operation of WJW.

It is further ordered, That, in the event of a grant of the application of the Woodward Broadcasting Co., the following conditions shall be included in the construction permit:

A study, based upon anticipated variations in phase and magnitude of current in the individual antenna towers after initial 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 specified in the radiation pattern. Allowable deviations in phase and current determined from this study will be incorporated in the instrument of authorization.

Permittee shall assume responsibility for the elimination of interference due to external cross-modulation and for the installation and adjustment of filter circuits or other equipment in the antenna systems of the proposed operation and of station WJR, Detroit, Mich., or any other station which may be necessary, to prevent adverse effects due to internal cross-modulation and reradiation. In addition, field observations shall be made to deter-

mine whether spurious emissions exist, and any objectionable interference problems resulting therefrom shall be eliminated.

Pending a final decision in docket No. 14419 with respect to presunrise operation with daytime facilities, the present provisions of section 73.87 of the Commission's rules are not extended to this authorization, and such operation is precluded.

It is further ordered, That, in the event of a grant of the application of the Storer Broadcasting Co. (WJW), the construction permit shall include the following conditions:

Permittee shall submit new common point impedance measurements and sufficient field intensity measurement data to clearly show that the readjustment of the daytime directional antenna array has not adversely affected the operation of the nighttime directional antenna array.

Pending a final decision in docket No. 14419 with respect to presunrise operation with daytime facilities, the present provisions of section 73.87 of the Commission's rules are not extended to this authorization, and such operation is precluded.

It is further ordered, That the petitions filed by the Storer Broadcasting Co., and the Metropolitan Television Co., *Are granted* to the extent indicated above and, *Are denied* in all other respects.

It is further ordered, That, to avail themselves of the opportunity to be heard, the applicants and parties 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.

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*.

FCC 66R-282

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of THE TUSCARAWAS BROADCASTING CO., NEW PHILADELPHIA, OHIO For Construction Permit	Docket No. 15430 File No. BPH-4196

APPEARANCES

Maurice R. Barnes, for the Tuscarawas Broadcasting Co.; *Keith D. Putbrese* for Dover Broadcasting Co., Inc., and *Earl C. Walck*, for the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted July 19, 1966)

BY THE REVIEW BOARD: BERKEMEYER, NELSON, AND KESSLER.

1. Before the Board for final decision is the above-captioned application for a new FM station to be located at New Philadelphia. Although this application was designated originally for comparative hearing with the application of Dover Broadcasting Co., Inc. (Dover), subsequent events which are unrelated to resolution of the primary issue now before the Board caused the dismissal of Dover's application. Thereafter, Dover was permitted to intervene in this proceeding as a party respondent.

2. The sole issue is the standard type of financial qualification issue relating to the availability of funds, and the sufficiency of the applicant's estimates with respect to costs of construction and initial operation. The underlying basis of this issue results from the representations of James Natoli, Jr., applicant's principal stockholder, that:

> (*a*) All funds utilized for the construction of radio station WBTC, Uhrichsville, during a ten month period—October 1963 through July 1964—approximating $50,000, were his own personal funds; and
> (*b*) All funds to meet his $28,000 loan commitment to the applicant company for the proposed FM station are his own personal funds.

Accordingly, the counterparts of the financial qualification issue under the circumstances here are: (*a*) the nature of the personal funds used by Natoli for the construction of the AM station, and those proposed to be used by Natoli for the proposed FM station; and (*b*) the sufficiency of applicant's estimates regarding costs of construction and initial operation.

3. The hearing was held on June 7 and 8, 1965, before Hearing Examiner Jay A. Kyle. An initial decision (FCC 65D-35) was released by the examiner on August 19, 1965, holding that the applicant

had established its financial qualification and recommending a grant of the application. Dover filed exceptions, a supporting brief, and a request for oral argument.

4. A panel of the Review Board heard oral argument on March 8, 1966. At the oral argument, the Commission's Broadcast Bureau appeared and presented oral argument in support of the examiner's initial decision, and Dover opposed it. Dover challenges, among other matters, the examiner's findings of fact and conclusions with respect to both counterparts of the financial qualification issue, viz.: (*a*) the prior availability of Natoli's own personal funds for the AM station, as well as the present availability of his own personal funds for the FM station, and (*b*) the sufficiency of applicant's estimates regarding cost of construction and initial operation. In addition, Dover excepts to a number of rulings by the hearing examiner relating, among other matters, to its procedural rights as a party respondent, and claims that the examiner's procedural errors affected Dover's right to a full and fair hearing. In substance, the Board agrees with Dover's position as shown by paragraph 6 of the conclusions of this decision, and by the rulings on Dover's exceptions set forth in the appendix.

5. In light of the exceptions of Dover and the Board's review of the entire record of this proceeding, the Board views the findings of fact of the examiner with respect to the availability of Natoli's own personal funds for the construction of the AM station and the proposed FM station, as lacking in several significant aspects because the examiner used as his sole touchstone of decision, record facts relating primarily to Natoli's June 1965 balance sheet, and disregarded almost in toto other relevant record evidence under this issue. We, therefore, feel it is desirable, rather than endeavor to supplement the examiner's findings on the, so to speak, "availability" question, merely to revise them so that we may present a clear statement of facts on this primary question for decision. Accordingly, the findings of fact set forth in paragraphs 10–36 infra, are substituted for those of the initial decision. The Board further views its revised findings of fact on all relevant evidence in this record bearing on the availability of funds issue to require substantially different conclusions and a different result, as set forth infra at paragraphs 1–6 of the Board's conclusions. Briefly stated, we have determined that the applicant has failed to establish the availability of Natoli's own personal funds for the AM station and the proposed FM station, and thus has not met its burden of proof with respect to this major aspect of the financial qualification issue.

6. With respect to the question of the sufficiency of applicant's estimates for costs of construction and initial operation, the Board's findings of fact set forth at paragraphs 37–39, infra, are, likewise, substituted for those of the hearing examiner. Based upon these findings the Board has concluded that the applicant's cash requirement for construction and initial operation would be somewhat in excess of $15,427.51. Thus, using the cash requirement figure of approximately $16,000 which is the most advantageous figure to Tuscarawas, the applicant would have in excess of the amount required if the applicant had met its burden of proof with respect to the availability question.

7. Prior to detailing below our findings of fact, it may be helpful to delineate the basic policy considerations which have led the Board to the determination that the applicant has failed to establish its financial qualifications. The Commission requires an applicant prosecuting two or more applications at or about the same time to establish the availability of liquid assets to meet all of these commitments. *Boardman Broadcasting Co., Inc.*, FCC 63–921, released October 14, 1963, and *James L. Hutchens*, FCC 66–238, released March 16, 1966. Similarly, the Commission has required an applicant which, for example, has been granted a construction permit for one station, prior to or during the pendency of another application by the same applicant for another station, to establish that the construction costs incident to the grant of the first station will not impair its financial qualifications to effectuate its proposal with respect to the second pending application. *Sawnee Broadcasting Co.* (*WSNE*), 3 FCC 2d 561, 7 R.R. 2d 405 (1966). This, in these instances, the Commission has considered these situations as constituting overlapping and interrelated financial arrangements, requiring that the financial arrangements for all of an applicant's broadcast stations be considered together to determine whether the applicant is financially qualified to construct any of the proposed facilities.

8. As will be shown below by the chronological sequence of events relating to the licensing of WBTC, Uhrichsville, and to the subject FM application, this case presents substantially the same type of overlapping financial arrangement. Accordingly, the aforementioned basic policy considerations are applicable to the subject case, and are inconsistent with the examiner's narrow construction of the financial qualification issue here which he resolved by ignoring, in most part, (i) record evidence concerning the funds Natoli claimed to have used for the AM station, and (ii) the preamble recitations of the Board's memorandum opinion and order adding the financial qualification issue which make clear that the funds Natoli claimed to use for the AM station were in issue in this proceeding.

9. Moreover, the vitality of the Commission's requirement that an applicant make true, complete, and accurate representations to the Commission in its dealings with it, is so well established that a lengthy citation for the proposition is unnecessary. *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946); *Calumet Broadcasting Corporation*, 3 R.R. 115 (1946), affirmed 82 U.S. App. D.C. 59, 160 F. 2d 285 (1947); and *Salem Television Co.*, 38 FCC 253, 4 R.R. 2d 281 (1965). The necessity of true, complete, and accurate representations has not been limited in its application solely to misrepresentation cases, but has included cases where an applicant has exhibited gross carelessness. *American Southern Broadcasters* (*WPWR*), 23 FCC 631, 649, 13 R.R. 927, 945 (1957). As stated by the Commission in *Howard W. Davis, tr/as The Walmac Co.*, 36 FCC 507, 2 R.R. 2d 145 (1964):

> • • • an applicant's financial qualifications are one of the most important facets of his qualifications to become a licensee. We must be able to rely unequivocally on the financial showing submitted by applicants, and unfamiliarity with accounting and bookkeeping procedure cannot mitigate an applicant's high responsibility for accuracy and disclosure in the sensitive area of his financial qualifications.

FINDINGS OF FACT

Availability of Natoli's Personal Funds

10. There follows a chronological sequence of events relating to WBTC, Uhrichsville, Ohio,[1] and to the subject application for a proposed FM station at New Philadelphia. On April 11, 1963, an initial decision, mooting a section 307(b) issue, became effective pursuant to section 1.153, granting the application for construction permit for the AM station (now WBTC). The application for the AM construction permit reveals that the corporation at that time was composed of four stockholders, officers, and directors, owning the following proposed stock interests:[2] Theodore Austin (35%), president; James Natoli, Jr. (25%), vice president; Margaret Austin (15%), treasurer; and Mrs. Mary C. Natoli (25%), secretary. Mrs. Natoli is the mother of James Natoli and Mrs. Austin is the wife of Theodore Austin. By the application, construction costs for the proposed AM station total $14,159.21.

11. In order to finance the construction of the AM station, the applicant contemplated an approximate 50-percent contribution from the Austins and a like amount from the Natolis, to be derived from their stock subscription agreements (Tr. 154, see also footnote 1). This application was signed by James Natoli, Jr. on January 4, 1960, and annexed thereto there are separate stock subscription agreements signed by each of the four stockholders, including the agreement of Mary C. Natoli, mother of James, which evidence their intention to purchase their subscribed stock upon issuance of a construction permit. In this connection, it is of significance to note that the construction permit was issued on April 11, 1963; and that during the course of the hearing of the subject FM proceeding, Natoli testified: (*a*) The Austins withdrew from Tuscarawas in 1962; (*b*) they did not make their proposed 50-percent contribution, furnishing only $1,508 which Natoli repaid subsequent to their withdrawal from the company[3]; (*c*) his mother did not purchase her stock and instead he gave her this stock as a gift; (*d*) during the period October 15, 1963–July 10, 1964, he contributed from his own personal funds $48,500 to the corporation for the construction of the AM station. It is of further significance to note, as shown below, that the Austin withdrawal was not reported to the Commission until December 24, 1963—after WBTC had commenced operation on a program test authorization. It is also of significance to note that section 1.615 of the Commission's

[1] Official notice has been taken of the ownership and financial proposal set forth in the original AM application for a construction permit, although some of these facts relating to the proposal were elicited in cross-examination of Natoli in the subject FM proceeding.

[2] The original application for construction permit for the AM station reveals that at that time there were 200 shares of authorized common stock ($100 par value). 5 shares were issued, and 195 subscribed by the Natolis and Austins, resulting in the stock interests set forth above. By amendment, the stock issued was increased from 5 to 27 shares, with James Natoli owning 10 shares, Mary Natoli, 9½ shares, and the Austins 7½ shares. The stockholders retained their respective proposed stock ownership interests set forth above. Based upon Natoli's testimony and the applicant's exhibit 5, p. 3, Natoli's original investment was in the amount of $1,950.00 representing payment for his 10 shares and for his mother's 9½ shares.

[3] This testimony is inconsistent with Tuscarawas exhibit 5, p. 3, which reflects a $1,959.10 payment to the corporation by Natoli "to purchase Austin stock."

rules requires a permittee to file an ownership report (FCC Form 323) within 30 days of grant by the Commission of the original construction permit. As indicated above, the AM construction permit was granted on April 11, 1963. Pursuant to the requirements of section 1.615—but after the lapse of several months—the applicant filed an ownership report [4] on October 1, 1963, signed by James Natoli. This ownership report is silent with respect to the withdrawal of the Austins, and instead reflects the same equal 50 percent Austin-Natoli aggregate proposed stock ownership as shown by paragraph 10 above, and the same voting stock interests (based upon issued stock) as shown by footnote 2, supra; namely, 72.2 percent by the Natolis and 27.8 percent by the Austins, with Mary Natoli owning 35.18 percent and James Natoli owning 37.03 percent of the issued stock.

12. On October 30, 1963, Tuscarawas filed the subject application [5] for an FM station specifying the same equal 50 percent Austin-Natoli ownership, despite the fact as indicated above by Natoli's testimony, that the Austins had actually withdrawn from the company in 1962. This application is also signed by James Natoli, Jr., as vice president. By this application, Natoli made a commitment to lend $28,000 to the applicant company for the construction and initial operation of the proposed FM station, submitting in support of this loan commitment an undated balance sheet (hereinafter referred to as the October 1963 balance sheet). This balance sheet lists assets of $28,328.30 and no liabilities. The assets which Natoli listed were: cash on hand ($11,500.30); negotiable securities ($14,303); and U.S. Government bonds series E ($2,525). Again, it is of significance to note that, according to his testimony in this proceeding, during the period October 15, 1963–July 10, 1964, Natoli contributed from his own personal funds at least $48,500 to the corporation for the construction of the AM station.

13. On December 5, 1963, Tuscarawas filed its application for license,[6] signed by James Natoli, to cover its AM construction permit; however, this application is silent with respect to the withdrawal of the Austins, or changes in the plan for financing of the construction of the AM station. Question 4 of the application requires "actual costs of making installation for which construction was authorized" to be specified. In reply to that question, the figures therein specified by the applicant total $29,833.52, and not $48,500 as developed at the hearing in this proceeding. As shown by paragraph 10, supra, the original application for CP estimated construction costs at $14,159.21. Question 5 of the application for license further states that "if the actual cost of construction materially exceeds the original estimated cost of construction attach as an exhibit a detailed statement showing the plan used to finance construction." Applicant submitted no information whatsoever in response to question 5; however, analysis of

[4] Official notice has been taken of the facts set forth in this ownership report.
[5] The Tuscarawas application and its attached exhibits were in the hearing room, were shown to Natoli during his testimony, and were made the subject of extensive cross-examination.
[6] Official notice has been taken of the facts set forth above as stated in the application for license to cover construction permit.

the items comprising costs as specified in the application for license, as compared with those in the application for CP, indicates that the difference in total costs of $29,833.52 specified in the license application and $14,159.21 estimated in the application for CP results, in most part, from applicant's acquisition of buildings costing $15,895.11, whereas applicant had initially proposed to lease its buildings.

14. On December 13, 1963, a program-test authorization was granted, and WBTC thereafter commenced operation.

15. On December 24, 1963, Tuscarawas filed an application (BTC–4458) for Commission approval of the acquisition of positive control of WBTC (AM) by James Natoli, Jr.[7] This application for the first time reported the withdrawal of Theodore and Margaret Austin.[8] With the acquisition of the Austins' stock, the respective proposed stock interests of the Natolis were as follows: James Natoli, Jr. (75%), president; Mary C. Natoli (25%), vice president and secretary; Pete Natoli (with no stock interest), treasurer. This application is signed by James Natoli, Jr., as then vice president and also as transferee. On January 29, 1964, the Commission granted this application.

16. By order (FCC 64–358, released Apr. 27, 1964), the Commission designated the subject FM application for comparative hearing with the application of Dover. Due to a conflict with the Commission's "duopoly" rules, Dover's application was subsequently dismissed. Later, Dover was permitted to intervene in this proceeding as a party respondent. (See FCC 65M–745, released June 9, 1965.)

17. By an ownership report, signed by James Natoli, Jr., dated August 3, 1964, the Commission was notified of a recapitalization of the Tuscarawas company. This report indicates that the recapitalization of the company increased authorized common stock to 1,000 shares, at a stated value of $500 per share. 106 shares were issued, with James Natoli owning 99 shares (93.4%), and Mary C. Natoli owning 7 shares (6.6%). The report further indicates that James Natoli paid $49,500 in cash for his stock interest, and Mary Natoli paid in cash $3,500.[9] The instructions on the Commission's owner-

[7] Official notice requested and granted (Tr. 192).

[8] At this time, there were 27 shares ($100 par value) of issued stock. The Austins were reported to have held 7½ shares, and the Natolis, 19½ shares (James, 10 shares and Mary, 9½ shares). With the acquisition of the Austins' 7½ shares of stock, table I of the transfer application indicates that James Natoli would acquire the Austins' 7½ shares, increasing his actual stock ownership to 17½ shares. (See par. 34, infra, where it appears that these 7½ shares may have been subsequently traded in for recapitalized stock. However, there is a conflict of evidence in this regard which the Board cannot resolve on the basis of this record.

[9] Official notice has been taken of the facts set forth in the Aug. 3, 1964, ownership report. At the hearing herein, Natoli testified that he paid $500 for each of the 99 shares of stock which he owned, and that he paid for his mother's 7 shares. Tuscarawas' July 10, 1964, balance sheet (see exhibit A, Tuscarawas reply to motion to enlarge issues) reflects shareholder contributions in the amount of $53,000, and lists James and Mary Natoli as the only shareholders. Since Natoli purchased his mother's shares for her, the entire $53,000 contribution is attributable to him for the purchase of the 106 shares of the recapitalized stock. Although Tuscarawas exhibit 5, p. 3, lists the specific dates of Natoli's advances to the corporation for his own 99 shares of stock ($49,500), it does not take into account his purchase of his mother's stock, which would make his total $53,000, less $1,950 for his original acquisition of the 19½ shares ($100 par value) of stock then owned by James Natoli and Mary Natoli. Thus, on this basis Natoli's total contribution for the 106 shares of stock totaled $51,050, and not $48,500 (after deducting the original investment for purchase of initial stock in the amount of $1,950) shown by Tuscarawas exhibit 5, p. 3.

ship report specifically require precise information relating to "total consideration paid," and further prescribe that "if other than cash, describe fully." Again, it is therefore significant to note that this report does not indicate that Natoli gave his mother her stock interest as a "gift" which is what he stated in this proceeding; nor does this report indicate, in accordance with his testimony in this proceeding that his own consideration of $49,500, represented advances to the company covering payment of costs incident to the construction of the AM station, including stock traded for services and "surplus" in that corporation. Moreover, it is to be noted that according to Natoli's testimony at the hearing, this recapitalization was necessary because the cost of construction of WBTC (AM) was substantially in excess of the amount originally estimated. As indicated above in paragraph 13, the application for license to cover CP: (*a*) reported increased costs approximating $30,000 and not approximately $50,000 as developed at the hearing in this proceeding, and (*b*) is silent with respect to the detailed plan of refinancing to meet such increased costs despite the specific question in this application which requires this information.

18. On August 5, 1964, Tuscarawas filed a petition to amend the subject FM application to show the withdrawal of the Austins, the recapitalization of the company, and the changes in the stock ownership of the Natolis set forth above in paragraph 17. This amendment: (*a*) Is signed by James Natoli, Jr., as president; (*b*) relates solely to these ownership changes; and (*c*) proposes no changes in the original financial proposal for the FM station set forth in paragraph 12 above, despite the outlay of approximately $50,000 by Natoli for construction of the AM station. On November 3, 1964, the examiner granted this amendment (FCC 64M–1096).

19. By a memorandum opinion and order released on November 27, 1964 (FCC 64R–539), the Review Board, based upon information brought to the attention of the Board by Dover, added a financial qualification issue, and stated:

> In October 1963, when Natoli drew his balance sheet, he was credited with 10 shares of Tuscarawas stock at $100, and his balance sheet showed no liabilities and liquid assets of $28,328.30, consisting wholly of cash and marketable stocks and bonds. While he has received 89 more shares at $500 since that time, and Tuscarawas' present corporate balance sheet reflects receipt of the $44,500, *the source of the funds expended by Natoli for this acquisition is unexplained.* Tuscarawas merely asserts that: "Natoli's net worth as reflected on the FM application is intact and he is in a position to lend the corporation $28,000 for the purpose of constructing and operating the FM station." In view of the fact that Natoli represented his assets as $28,328.30 in 1963, and now alleges that, after intervening expenditure of $44,500, he still retains a balance of $28,328.30, the Board is of the view that his financial position is sufficiently unclear that addition of the requested issue is required. See *Burlington Broadcasting Company* v. *FCC*, Case No. 17988, 2 R.R. 2d 2005 (decided Mar. 19, 1964).[10] [Emphasis added.]

[10] The $44,500 figure used in the Board's memorandum opinion and order, supra, included only the 89 shares of Tuscarawas stock purchased after Oct. 30, 1963; it did not include the additional $4,000 contribution which was made for the original 10 shares received before that date. The $3,500 contributed for Mary C. Natoli's 7 shares of stock is also not included in the Board's previous figure. Natoli's actual contribution, during the Oct. 30, 1963–July 10, 1964, period was $51,050. (See also footnote 9, supra.)

20. At the hearing in this proceeding and in an effort to demonstrate his ability to meet his loan commitment for the FM station and to substantiate his assertion that the liquid assets set forth in his October 1963 balance sheet remain intact, despite the intervening expenditure for the AM station, Natoli submitted three balance sheets, viz.: (1) A revised October 1963 balance sheet; (2) a balance sheet as of January 18, 1965; and (3) a balance sheet as of June 1, 1965.

21. Initially, Natoli testified that his original October 1963 balance sheet did list all assets he held at that time (Tr. 143). Subsequently, however, he testified that the original balance sheet did not disclose all of the assets he had at that time, and that none of the $28,328.50 listed thereon as liquid assets was used to finance the intervening expenditures incident to the construction of the AM station. Because of Natoli's inability to explain the additional assets disclosed by his testimony which were not originally set forth in his October 1963 balance sheet, the Broadcast Bureau requested that Tuscarawas make an additional presentation to explain these additional assets. Thus, the applicant, pursuant to this request, submitted an additional exhibit, identified as Tuscarawas exhibit 5, which included the following: A letter signed by Dr. Samuel Natoli; a letter signed by Mrs. Marjorie McBeth [11]; a letter signed by Duane R. Yant, Natoli's accountant, listing the dates and amounts of Natoli's financial contributions to Tuscarawas for the AM station; and "Reconciliation of Net Worth of James Natoli, Jr., October 30, 1963 [as revised], and June 1, 1965." The "reconciliation sheet" includes the revised October 30, 1963, balance sheet.

22. Tuscarawas exhibit 5, page 3, is the letter from Duane R. Yant, Natoli's accountant, which states that the money advanced in connection with the AM station "came from *savings accounts* in Cleveland and Uhrichsville, Ohio" [emphasis supplied], and was advanced on the following dates:

1963

October 15	Cash	$2,000.00	
November 26	--do	2,000.00	
December 17	--do	3,000.00	
December 31	Permit	9,617.28	Cash advanced for permit FCC.
Do	Building	12,921.90	Bills paid cash on building.
Do	Equipment	4,749.62	Bills paid on equipment (RCA).

[11] The letters from Dr. Samuel Natoli and Mrs. Marjorie McBeth, Natoli's brother and sister, were ruled inadmissible and stricken from the record as those documents did not contain the dates of execution. No exception was taken to the examiner's ruling on this matter.

1964

January 2	Cash	1,500.00	Savings.
February 28	do	4,900.00	Do.
March 31	do	1,959.10	Savings to purchase Austin stock.
April 30	do	500.00	Do.
May 31	do	1,780.00	Do.
July 10	Surplus	4,494.89	Corporation surplus at time of increase in capitalization.
		49,422.79	Total advanced.
	Less	1,950.00	Purchase of initial stock.
		47,472.79	Balance advanced.
		1,750.00	Traded in stock July 10, 1964.
		49,222.79	
	Cash	277.21	
		49,500.00	Total stock acquired July 10, 1964.

23. On the basis of this record, the Board is unable to resolve the conflict between Yant's statement that the money was derived from "savings accounts," and Natoli's testimony that approximately $21,000 was derived from accounts receivable from his brother and sister. (See pars. 27–30, infra.) In this connection, it is to be noted that at page 229 of the record, Natoli testified with respect to his brother's repayment of an alleged $17,050 loan, as follows:

> I immediately use[d] it in the corporation. As he gave it to me, I just turned it right into the corporation immediately.

At page 253 of the transcript, Natoli modified his testimony in this respect, and stated that his brother forwarded the money directly "to the corporation for construction purpose," but on redirect, he again changed his testimony reverting to his former statement that his brother sent the money to him, and he, in turn, paid it to the corporation. (Tr. 253–54.) Irrespective of these changes in Natoli's testimony, it is evident from his testimony that the money from his brother was used immediately for construction costs of the AM station. Under this circumstance, it would be contrary to normal business practice for Natoli, first, to deposit in his own savings account, the sum paid by his brother and, then withdraw it immediately to turn over to the corporation. Conversely, if Yant's statement is intended to imply that the money from Natoli's brother and sister, totaling $21,000, was derived from their respective savings accounts, even more difficulty is experienced in any attempt to reconcile Yant's statement with Natoli's claim that the sums of money paid by his brother and sister constituted "accounts receivable" owed to him, and, in fact, were not loans, advances, or payment for a prospective, if not an undisclosed, interest in the applicant company. Accordingly, the Board finds that this conflict of evidence diminishes the reliability of the representations in Natoli's June 1965 balance sheet that he has "no liabilities," and that he owns stock, with a stated value of $49,500, in the applicant company.

24. Each of the balance sheets submitted by Natoli represents that he has no liabilities. A comparative recapitulation follows of Natoli's liquid and nonliquid assets as set forth in the applicant's own reconciliation sheet.

	Revised, October 1963	June 1965
Liquid assets:		
Cash in banks	[1] $11,500.30	[1] $12,801.36
Negotiable securities (stocks)	14,303.00	21,117.53
Cash surrender value, life insurance	[2] 2,400.00	3,500.00
U.S. bonds	2,525.00	2,525.00
Total	30,728.30	39,943.89
Nonliquid assets:		
Account or note receivable from Dr. Samuel Natoli, applicant's brother	[2] 17,050.00	
Account or note receivable from Mrs. Marjorie McBeth, applicant's sister	[2] 4,000.00	
Automobile, valued at	[2] 800.00	600.00
Land (68.45 acres, at $400/acre) valued at	[2] 27,380.00	27,380.00
Tuscarawas stock	1,000.00	49,500.00

[1] There are bank letters of record evidencing that these funds were on deposit in October 1963 and June 1965.
[2] These assets were not set forth in the original October 1963 balance sheet.

25. Prior to detailing the applicant's "reconciliation" of the purported personal funds used by Natoli for the AM station, as compared with those proposed to be used for the FM station, several prior basic observations are again restated and emphasized. *First*, as indicated above (par. 17), Natoli represented in the August 1964 ownership report that he paid $49,500, in cash, for his stock interest, without indicating that his consideration was not an actual cash contribution to the company, but instead constituted advances to the company for the AM station construction for which he subsequently, after recapitalization, received his stock. *Second*, the ownership report specifically requires a statement as to "Total consideration paid (if other than cash, describe fully)." *Third*, it is evident from the testimony in this proceeding that the consideration was not cash, but instead constituted stock traded for prior—already expended—cash advances. *Fourth*, question 5 of the AM application for license which the applicant filed on December 5, 1963, specifically states that if the actual cost of construction exceeds the original estimate a detailed showing of the plan used to finance such construction is required. As shown by paragraph 10, supra, the application for CP for the AM station estimated construction costs at $14,159.21. As further shown by paragraph 13, supra, the application for license to cover CP indicates that actual costs totaled $29,833.52, resulting, in most part, from applicant's acquisition of buildings which cost $15,895.11, whereas applicant initially had proposed to lease such buildings. Applicant, however, did not disclose in the application for license to cover CP that actual costs of construction amounted to $48,500, as developed at the hearing in the subject proceeding. Nor did the applicant reply to question 5 of the application requiring a detailed statement of the plan used to finance the AM station construction.

26. With these observations in mind, we turn now to the applicant's "reconciliation" which purports to demonstrate the nature of the personal funds used by Natoli in connection with his advances of $48,500 for the AM station during the period October 30, 1963–July 10, 1964. These are the personal funds Natoli claimed to have used:

(1) Cash from accounts receivable	$21,050.00
(2) Gift from Mr. and Mrs. Natoli	10,000.00
(3) Surplus in corporation	4,495.89
(4) Stock traded for services	1,750.00
(5) Savings in salary	11,204.11
Total	48,500.00

There follows a seriatim examination of the record evidence with respect to each of the above-described items claimed by Natoli as constituting his own personal funds.

27. Item 1 ($21,050 cash from accounts receivable) is composed of the two separate accounts discussed above at paragraph 23, allegedly owed to Natoli by his brother and sister, and which are shown as a nonliquid asset in Natoli's revised October 30, 1963, balance sheet. (See par. 24 above.) Despite the fact that Natoli's revised October 30, 1963, balance sheet carries these accounts as a nonliquid asset as of that time, Natoli, nevertheless, testified that his brother's account of $17,050 was repaid prior to October 14, 1963, and that he contributed the proceeds to the corporation. Because of this contradiction in the applicant's presentation, the examiner agreed to hold the matter in abeyance until Natoli could contact Duane R. Yant, his accountant, in Uhrichsville, Ohio,[12] by telephone, to clarify the matter. After the noon recess, upon further questioning about the repayment of his brother's loan, Natoli reported that Yant "didn't exactly know either" (Tr. 259), and that Yant had indicated that some of the $17,050 was received prior to October 15, 1963, and some was received after that date, although Yant, according to Natoli, had no specific knowledge of the amounts. At the same time Natoli admitted that he didn't know when the money was repaid.[13] At page 251 of the transcript, Natoli also testified that a letter from his brother recites that the payment was made on December 31, 1963.

28. As shown above, Natoli's testimony is vague, uncertain, and inconsistent with respect to the date of payment by his brother of this sum of $17,050, and, in fact, the record as it now stands is barren of evidence of the date when this sum of money was actually paid by his brother and turned over to the corporation for use in connection with the construction costs of the AM station. Likewise, Natoli's testimony is vague as to the dates he made these loans to his brother and sister. According to his testimony, the loan to his sister was made in 1960, and to his brother in 1961, but he was not sure of these dates.

[12] Dover shortly thereafter requested that Mr. Yant be made available for cross-examination. This and other such requests were denied.

[13] The confusion on this question alone suggests that the examiner should have ordered the production of Natoli's accountant, as he was requested to do by Dover. At Tr. 249 the examiner, ruling on such requests, "decline[d] to call any other witnesses * * *." (See also, par. 23 above, for further examples of the lack of clarity of Natoli's testimony on this $17,050 note.)

29. As stated at paragraph 23, the Board cannot reconcile the conflict of evidence concerning Yant's statement that Natoli's moneys for the construction of the AM station were derived from savings accounts, and Natoli's testimony that the sum of $21,000 paid by his sister and brother stemmed out of loans or accounts due him. We further cannot reconcile the inclusion of the $17,050 loan to his brother as an account receivable in Natoli's revised October 1963 balance sheet, with Natoli's vague and inconsistent testimony as to the date of payment. Nevertheless, the Board finds with respect to this $17,050 payment by Natoli's brother, that the record despite Natoli's own inconsistent and vague statements, establishes with reasonable certainty that $17,050 was paid by Natoli's brother prior to July 14, 1964, and that this sum was used in connection with the construction costs of the AM station. However, the Board, on the basis of this record, cannot find that there is reasonable certainty that this $17,050 payment constituted a "receivable" to Natoli, as claimed, or in actuality was a loan or an advance by his brother for a prospective, if not an undisclosed, interest in the corporation. As previously stated at paragraph 23, the Board finds that these conflicts of evidence diminish the reliability of the representations in Natoli's June 1965 balance sheet concerning his stated value of stock ownership in the applicant company and his "no liability" statement.

30. Similarly, because of the same conflicts of evidence (par. 23) and the same vague testimony by Natoli, the Board cannot determine whether the $4,000 receivable of Natoli's sister was, in fact, a receivable as claimed by Natoli, or whether, in actuality, it was a loan or an advance to Natoli by his sister. With respect to these alleged accounts receivable, this record is devoid of any evidence other than Yant's and Natoli's conflicting statements (par. 23 above). Despite this apparent conflict of evidence no documentary or corroborating evidence was offered to resolve this conflict. Natoli did not offer to produce his brother or sister as a corroborating witness. In any event, with respect to the actual date of payment of $4,000 by Natoli's sister, the record does establish that based upon Natoli's own testimony, his sister did not make this payment until August 1964. (Tr. 233.) By letter dated March 11, 1966, in response to a question propounded during oral argument, applicant's counsel attempted to clarify this question of the date of payment by Natoli's sister; however, all facts presented are outside of the record. In any event and irrespective of whether payment was made prior to or after July 1964, there is no persuasive evidence that this payment constituted repayment of a loan, as claimed. Again, as already stated by the Board at paragraphs 23 and 29, these conflicts of evidence diminish the reliability of the representations in Natoli's June 1965 balance sheet concerning his stated value of stock ownership in the applicant company and his "no liability" statement.

31. Item 2 (the $10,000 gift from Mr. and Mrs. Natoli) : Natoli was unable to recall the date of the $10,000 gift and could only approximate it as "sometime in the summer of 1964." In view of the fact that Tuscarawas' "reconciliation" lists this $10,000 as part of the funds expended by Natoli for the intervening expenditures connected with

the AM station which were made prior to July 10, 1964, the precise date of this $10,000 gift becomes significant. In addition, it is to be noted that a joint balance sheet of Mr. and Mrs. Natoli [14] indicates only $2,000 in liquid assets and a farm and related nonliquid assets of almost $93,000. The examiner sustained Tuscarawas' objections to virtually all of Dover's attempts to ascertain the circumstances surrounding the making of the gift and the general nature of Mr. and Mrs. Natoli's financial ability to make such a gift.[15]

32. In view of the nature of Natoli's vague recollections concerning the date of this gift, this record falls far short of establishing with reasonable certainty that Natoli received this $10,000 from his parents prior to July 10, 1964. Moreover, there is even less persuasive evidence in the record to support a finding that if Natoli did receive the sum of $10,000 from his parents for the construction of the AM station, this sum was a gift, as claimed, or in actuality was a loan, an advance, or a payment for stock, or a combination of these items. As indicated at paragraph 11, Mrs. Natoli originally proposed to purchase her own 25 percent interest in the applicant company. As further shown at paragraph 17, the ownership report filed by Natoli in August 1964, indicates specifically that Mrs. Natoli paid $3,500, in cash, for her shares of stock. And it was not until the hearing of this proceeding that Natoli for the first time represented that his mother did not pay for her stock, and that instead he gave her this stock as a gift. Thus, as the record stands there is a conflict of evidence on the question whether Natoli gave his mother her stock, or whether she paid for it in accordance with the representations in the original AM application (par. 11) and in the August 1964 ownership report (par. 17).

33. In sum, the Board is constrained to find that this hearing record concerning these alleged exchanges of gifts is beyond reasonable comprehension, particularly when consideration is given to: (*a*) The significantly silent aspects of Tuscarawas' application for license to cover its AM construction permit, and (*b*) the representations in the original AM application, as well as the August 1964 ownership report that Mrs. Natoli paid for her own shares of stock. As indicated above, the instructions to the Commission's application for license, specifically state that "if the actual cost of construction materially exceeds the original estimated cost of construction, attach as an exhibit a detailed statement showing the plan used to finance such construction." Similarly, the instructions to the ownership report are clear: Question 8 of form 323, the ownership report, states "list transactions concerning the ownership of stock," and in connection with line 7 thereof specifically requires a statement of "Total consideration paid (if other than cash, describe fully)." While the Board is mindful that trier of facts may make reasonable favorable deductions from basic evidence and facts in

[14] Submitted in October 1963 as part of the subject FM application.

[15] Of further possible significance is the fact that the subject FM application reflects Mrs. Natoli's net income for 1961 and 1962 as "in excess of $4,000." However, it is unclear as to whether this figure represents the net income of Mrs. Natoli alone or Mr. and Mrs. Natoli jointly. At one point Dover asked Natoli if "it was necessary for your parents to sell any land or dispose of any assets or take similar action in order to do that [give Natoli $10,000]?" (Tr. 292.) This line of questioning was not permitted by the examiner in response to Tuscarawas' objection.

a record, particularly under the circumstances of a parent-son relationship, the unresolved conflicts of evidence in this proceeding relating to "gifts" leave this record barren of such basic evidence or facts. Accordingly, the Board finds that there is no persuasive evidence in this record establishing that this sum of $10,000 constituted a gift to Natoli by his parents, and that the conflicts of evidence detailed above all relating to this alleged gift detract substantially from the reliability of the representations in Natoli's June 1965 balance sheet concerning his stated value of stock ownership in the applicant company, and his "no liability" statement.

34. The third and fourth items for which Natoli claims credit as a "personal resource" are: "corporate surplus," in the amount of $4,495.89, and "stock traded for services," in the amount of $1,750. Again, it is to be noted that both of these claimed items conflict with the representations of Natoli in the August 1964 ownership report (par. 17), and are internally inconsistent with other portions of Natoli's testimony in this proceeding. At page 246 of the transcript, Natoli testified that he paid cash for all his stock and never exchanged "property or fiscal assets" for such stock. Moreover, Natoli's claim of $1,750 for stock traded for services is also inconsistent with Yant's letter (Tuscarawas exhibit 5, p. 3), which reflects a $1,750 item as "traded in stock July 10, 1964". Yant's characterization would indicate that on the date of recapitalization some of the stock held by Natoli was traded in, rather than indicating that Natoli performed services for the corporation for which he was repaid in stock. Under the circumstances of these conflicts of evidence, there is no evidence whatsoever upon which to sustain Natoli's claim for credit on these items as constituting a quid-pro-quo for his personal funds.

35. The last item (5) relied upon in Tuscarawas' showing of funds used by Natoli for the AM station is $11,204.11 representing allegedly Natoli's savings in salary for an approximate 10-month period from October 1963 to July 1964.[16] The original October 1963 "balance sheet" lists Natoli's 1961 and 1962 net income as "in excess of $7,500." [17] Natoli has been employed as a television engineer for the past 9 years and works from 2:45 to 11:45 p.m. 5 days a week. Dover was precluded from asking Natoli what his salary was at the time of the hearing. However, Natoli testified that in 1965, aside from his salary, his only other income was approximately $600 a year in stock dividends plus interest on his savings. How Natoli could have saved the substantial sum of over $11,000 from his salary in this limited 10-month period is beyond reasonable comprehension based upon the record of this proceeding. In fact, it would appear that his savings of over $11,000 in this approximate 10-month period (October 1963 to July 1964) is equivalent to or may exceed his salary "in excess of $7,500 annually." If Natoli had other sources of income, other than dividends from his stocks and interest from banks, this record is barren of such evidence. Indeed, the state of the record of this pro-

[16] This $11,204.11 is in addition to the $11,500.30 shown by Natoli's original October 30, 1963, balance sheet. The $11,500.30 is claimed to be part of the $28,000 segregated to effectuate Natoli's $28,000 loan commitment to the corporation.

[17] This figure is purported to be Natoli's net income (after taxes); consequently, it includes any income earned from dividends, interest or other sources during 1961 and 1962.

106-504—66——6

ceeding with respect to Natoli's alleged savings during a 10-month period is best described by the Court's statement in the *Burlington* case, supra: "[it] * * * is unique if not bizarre." Accordingly, the Board finds that the improbability that Natoli could have saved $11,000 from his salary during this 10-month period casts serious doubt upon the reliability of the representations in Natoli's June 1965 balance sheet that he has "no liabilities" and that he owns stock, with a stated value of $49,500, in the applicant company.

36. As shown by paragraph 24 above, Natoli's June 1965 balance sheet shows $39,943.89 in liquid assets which, according to his testimony, are available to meet his loan commitment to the applicant company, in the amount of $28,000, for the construction of the proposed FM station. There are bank letters of record evidencing that Natoli has approximately $12,801 in cash in banks. In addition, at the oral argument of this proceeding, counsel for Natoli offered to exhibit to the Board, Natoli's negotiable securities, in the amount of $21,117.53. As stated at paragraph 5, infra, of the Board's conclusions, this record affords no reasonable certainty that legal title to the bank accounts and negotiable securities comports with actualities. (See pars. 11, 12, 13, 17, and 25, supra.)

Tuscarawas' Estimates—Relating to Costs of Construction and Initial Operation

37. Tuscarawas proposes to locate the FM station in buildings and on land which Natoli presently owns. The original Tuscarawas FM proposal, which appears in its application and at Tuscarawas exhibit 1, page 2, estimated the total cost of construction to be $18,073.95. This figure represented $1,000 for professional fees and $17,073.95 for the purchase of equipment, for which the applicant had obtained a standard deferred credit agreement from the manufacturer (25 percent down and 75 percent in 36 equal installments plus prevailing rate of interest).[18] Based on these figures the cash requirement for construction was estimated to be $5,268.49. To cover initial operating expenses Tuscarawas originally allocated $4,162.02 for the following expenses: $1,067.12 (3 monthly payments on equipment); $1,139 (salaries for additional employees); $250 (interest on equipment payments); and $1,702.90 (all other operating expenses).[19] In total, Tuscarawas estimated a cash requirement of $9,427.51 for construction and initial operating expenses of the proposed FM station.

38. Tuscarawas did not amend its presentation regarding the costs of construction and initial operating expenses at any time during or after the hearing. However, at the hearing questions pertaining to this estimate were raised. For example, Tuscarawas presented a composite figure which it claimed represented all operating expenses, excluding only salaries for new employees, equipment payments and

[18] A description of the equipment to be purchased appears in par. 10 of the initial decision.

[19] The $1,702.90 item represents "other expenses for additional power and light, recordings, telephone charges, sales costs, maintenance and repair of technical equipment, music license fees, advertising and promotion, insurance, taxes, and miscellaneous expenses." (Tuscarawas exhibit 1, p. 2.)

interest on equipment payments (see footnote 20, supra); when asked for a specific breakdown of this composite figure Natoli replied that he had no "itemization on that," but that he had used workpapers (which were no longer available) to compute the allotment for each of the items included.[20] On the basis of the evidence adduced at the hearing the examiner found Tuscarawas' cash requirement to be $12,925.99, as opposed to Tuscarawas' original estimate of $9,427.51. The examiner's finding here includes the following items which were not included in Tuscarawas' original estimate of construction costs: Erection of tower extension ($1,800); additional professional fees ($1,000); proof of performance ($500); anchors for tower extension ($100); and freight charges ($100). In addition, Tuscarawas did not allocate funds for the following items of expense which it will incur in the construction of the proposed FM station: 3 percent Ohio sales tax;[21] installation of a temporary antenna;[22] and cost of equipment installation.[23]

39. On the basis of the above figures, the Board finds that Tuscarawas' cash requirement for construction and initial operation would be in excess of $15,427.51,[24] plus the cost and installation of a temporary antenna.

CONCLUSIONS

1. By paragraphs 7–9 above, the Board has discussed the Commission's basic policy requirements with respect to interrelated or overlapping financial arrangements. These basic policy considerations will not therefore be repeated here. By paragraphs 10–18, the Board has also detailed a chronological sequence of events with respect to applicant's AM station and its proposed FM station which establishes that this case presents an interrelated or overlapping financial arrangement. In short, it is this interrelated financial arrangement as shown by paragraph 19, supra, which motivated the Board's inclusion of a financial issue in the subject proceeding, as well as our ultimate conclusion here that the applicant has failed to establish its financial qualifications.

2. Analysis of our findings of fact detailed in paragraphs 20–36 further shows that the record of this proceeding:

---

[20] Natoli was unable to give any indication of how much money was allocated to advertising and promotion ("we haven't gone into that yet" (Tr. 284)), maintenance and repair of equipment, and the added cost of music license fees. The closest to a specific figure which Natoli was able to give was for light and power (AM cost plus 40 percent).

[21] The Board will take official notice of the 3 percent Ohio sales tax. This tax applied to the equipment purchase would amount to approximately $500. Natoli testified that such tax was not included in Tuscarawas' estimate and did not dispute its applicability (Tr. 287).

[22] Natoli testified that a temporary antenna would be necessary to keep WBTC(AM) on the air during the FM construction and that Tuscarawas intends to use such an antenna. However, no monetary estimate for this antenna was included in Tuscarawas' presentation.

[23] Tuscarawas states that this item is not expected to exceed $2,000. (Tuscarawas exhibit 1.)

[24] This $15,427.51 is composed of: $4,268.49 (downpayment on equipment); $1,067.12 (equipment payments); $250 (interest on equipment payments); $1,139 (salaries for new employees); $1,702.90 (operating expenses); $2,000 (professional fees) (Tr. 133–135); $1,800 (tower extension); $500 (Ohio sales tax); and $2,000 (equipment installation; Tuscarawas exhibit 1).

(*a*) Leaves unanswered essentially the same major questions which were the basis of our inclusion of the financial qualification issue here (see par. 19 of our findings of fact) ; and

(*b*) Compounds, rather than clarifies, these major questions.

For these reasons, the present record is inadequate, to say the least, for anyone to make favorable conclusions with respect to the funds Natoli represented to be his own personal funds used for the construction of WBTC. Moreover, in reaching these conclusions, the Board is mindful of the fact that there may be implications stemming from our findings of fact which may extend beyond the financial qualification issue in this proceeding. But we need not, and do not, reach these coincident implications in our resolution of the limited issue in this proceeding.

3. Turning our attention now to Natoli's June 1965 balance sheet which was the touchstone of the examiner's favorable resolution of the financial qualification issue here—without regard to the other evidence of record bearing upon its reliability—the Board cannot, as did the examiner, accept this balance sheet at face value. Indeed, considering all of the conflicts of evidence in this proceeding which have been detailed in paragraphs 20–36 of our findings of fact, the examiner's conclusion stated at paragraph 7 of his initial decision that "Natoli candidly detailed his personal finances" in his June 1965 balance sheet, insofar as it reflects favorably on Natoli's demeanor as a witness, is overcome by the circumstances relating to the financing of the AM station and the overall inconsistency of Natoli's testimony in this respect. *Allentown Broadcasting Corp.* v. *FCC*, 222 F. 2d 781, 10 R.R. 2086 (1954) ; cf. *Lorain Journal Company* v. *FCC*, 351 F. 2d 824, 5 R.R. 2d 2111 (1965). In the Board's view the resolution of the applicant's financial qualification issue in this proceeding, of necessity, resolves itself into a question of the weight, if any, to be accorded the representations in Natoli's June 1965 balance sheet, with due consideration—not disregard—of the totality of this hearing record and the totality of the circumstances concerning this interrelated and overlapping financial arrangement. If this is not so here where Natoli maintained that all funds utilized for the AM station and proposed for the FM station are his own personal resources, it would mean that:

(*a*) The question of whether the funds used for the AM station were, in fact, his own personal funds, is of no consequence ; and

(*b*) Under the circumstances of an overlapping and interrelated financial arrangement, an applicant need not explain, by persuasive evidence and within bounds of reasonable comprehension, the nature of his personal funds used for the AM station ; and

(*c*) A current 1965 balance sheet must be accepted at face value, irrespective: (i) Of the lack of persuasive evidence reflected by the hearing record concerning the source and nature of funds used for the AM station, (ii) of the patent conflicts of evidence in this proceeding, and (iii) of the paucity of evidence on the basis of the present record, to reconcile the substantial AM station expenditure with the applicant's alleged current financial resources.

4. In sum, the Board concludes that the totality of the record of this proceeding affects adversely the reliability of the representations in Natoli's June 1965 balance sheet, and particularly those relating to his

"no liability" statement and to the $49,500 stated value of his stock in the applicant company. As shown by our findings of fact at paragraph 23, and paragraphs 27–35, supra, we cannot accept Natoli's testimony as persuasive evidence that the $48,500 in funds used for the AM station were, in fact, his own personal funds. Each of the items constituting Natoli's alleged personal funds for the AM station has been examined in seriatim manner in paragraphs 26–35, supra, and with respect to each the Board has found that this record lacks persuasive evidence establishing that such item, as claimed, was Natoli's own personal resource. The Board has further found at paragraph 35, supra, that it is improbable that Natoli could have saved approximately $11,000 from his salary in a 10-month period which he claimed to have used for the AM station construction. Thus, even when consideration is given the lack of persuasive evidence with respect to each separate item which Natoli claimed to be his own, there is little question that based upon generally accepted accounting principles, if any one of the items comprising the $48,500 in funds, is not Natoli's own personal resource, his net worth would be different than that represented by his June 1965 balance sheet. Similarly, his assets over liabilities would necessarily be different. And if any one of these items constituted payment for a prospective, if not an undisclosed, stock interest in Tuscarawas, Natoli's own stated value of his stock interest may be different.

5. Thus, when consideration is given to the paucity of persuasive evidence with respect to the totality of the $48,500 in funds as constituting Natoli's own personal funds, no significant weight can be attached to the representations in Natoli's June 1965 balance sheet. Moreover, even recognizing that Natoli has legal title to the cash which is represented to be in banks in his June 1965 balance sheet, and to the negotiable securities, there is no reasonable certainty, under the circumstances of Natoli's past conduct with respect to the filing of other applications and reports with the Commission, that legal title comports with actualities (see, pars. 11, 12, 13, 17, and 25, supra). Indeed, the Board finds the record of this proceeding beyond reasonable comprehension concerning the role of Natoli's family with respect to the financing of the AM station, and Natoli's prior reports to the Commission complicate, rather than clarify, the nature of the family participation. In short, while the Board is mindful that trier of facts may make reasonable deductions from basic evidence and facts set forth in a record, proof of financial qualifications in the instant case rests ultimately on the hard facts of proven personal resources for the AM station, as well as the proposed FM station, and the basic facts revealed by the totality of this record dispel rather than support a favorable result. As stated by the court, in *WLOX Broadcasting Co.* v. *FCC*, 260 F. 2d 712, 17 R.R. 2120 (D.C. Cir., 1958):

> Serious doubt on that score [financial qualifications] should have resulted * * * from a consideration of the transcript of the hearings * * *. We should not have to comb the record, as we have done here, to attempt to learn the basic facts * * *.

6. Finally, taking into account Natoli's obligation herein, in light of the interrelated AM–FM financial arrangement, to make a clear and

positive showing with respect to the personal resources which were available to him for the AM station, it is to be noted that this record is replete with the opportunities: (*a*) Accorded him during the course of this proceeding, and (*b*) accorded to him prior thereto and commencing in 1963 where full and accurate reports concerning the financing of these stations would have avoided not only the controversy in this proceeding, it would have obviated completely the coincident implications which may now extend beyond the financial qualification issue in this proceeding. Thus, while the Board has considered a remand of this proceeding to resolve such implications, Natoli's host of unused opportunities to clarify these AM matters, affords no justification for a remand of the subject FM proceeding, and, instead, compels the conclusions that: (*a*) The subject FM application must stand on the record as it now exists, and (*b*) the record affords no alternative but to deny the FM application. It is to be further noted that a grant of Tuscarawas' application would be precluded not only by the nature of the evidence in this proceeding but also by the fact that the examiner's procedural errors deprived Dover of its right to a full and fair hearing. (See attached rulings on exceptions.)

Accordingly, *It is ordered*, This 19th day of July 1966, that the application of the Tuscarawas Broadcasting Co. (BPH–4196), to construct and operate an FM broadcast station on the frequency 101.7 mc/s (channel 269), at New Philadelphia, Ohio, *Is denied.*

SYLVIA D. KESSLER, *Member.*

APPENDIX

RULINGS ON EXCEPTIONS TO INITIAL DECISION

Exceptions of Dover Broadcasting Company, Inc.

Exception No.	*Ruling*
1	Granted to the extent indicated in pars. 31–33 of the decision.
2	Denied. See Tr. 145.
3	Denied. The document was admitted into evidence consistent with Commission policy.
4	Denied. The applicant's estimate of professional fees was not impeached and is supported by the record. See Tr. 133–135.
5	Denied. Tuscarawas exhibit 6, p. 4 supports the examiner's finding.
6–11	Granted to the extent indicated in pars. 38 and 39 of the decision and denied in all other respects.
12	Granted to the extent that Tuscarawas' Apr. 30, 1965, balance sheet reflects only $243.97 in cash on hand or on deposit and denied in all other respects.
13	Granted. The portion of the last sentence of par. 16 of the examiner's findings excepted to is deleted. See par. 19 of this decision.
14, 15, 16, 17	Granted to the extent indicated in pars. 20–36 of the decision and denied in all other respects.
18, 19	Granted to the extent indicated in pars. 2 and 3 (conclusions) of the decision.
20	Granted. See par. 2 (conclusions) of the decision.
21, 22	Granted to the extent indicated in pars. 2–5 (conclusions) of the decision and denied in all other respects.
23	Granted. See ordering clause of the decision.
24, 25, 26	Granted. See pars. 30, 31, and footnote 14 of the decision. The failure of the examiner to allow a continuance for good cause resulted in failure to accord Dover its right to a full and fair hearing under sec. 5(b) of the Administrative Procedure Act.
27, 28, 34, 37, 39	Denied as not of decisional significance.
29	Granted to the extent reflected by pars. 17 and 34 of the decision.
30, 31	Granted to the extent reflected by pars. 31 and 32 of the decision.
32	Granted. See par. 35 of the decision.
33	Granted. See footnote 1 of the decision.
35, 38, 40	Denied. Dover's objections pertain to the weight accorded the exhibit in question, not to its admissibility.
36	Granted to the extent indicated in par. 34 of the decision.
41	Denied. Admission of Tuscarawas exhibit 6 was not error; however, the examiner's failure to provide for cross-examination was improper. In view of the Board's decision further hearing as a result of this ruling is not required.

FCC 65D–35

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of THE TUSCARAWAS BROADCASTING CO., NEW PHILADELPHIA, OHIO For Construction Permit	Docket No. 15430 File No. BPH–4196

APPEARANCES

Maurice R. Barnes, Esq., for the Tuscarawas Broadcasting Co.; *Keith D. Putbrese, Esq.*, for Dover Broadcasting Co., Inc., and *Earl C. Walck, Esq.*, for the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER JAY A. KYLE

(Adopted August 19, 1965)

PRELIMINARY STATEMENT

1. This proceeding involves the application of the Tuscarawas Broadcasting Co. (Tuscarawas) for a construction permit for a new FM station to operate on channel No. 269 (101.7 mc; 3 kw; 229.6 feet), at New Philadelphia, Ohio.

2. Originally, Dover Broadcasting Co., Inc. (Dover), was an applicant in this proceeding for a similar facility on the same channel at Dover-New Philadelphia, Ohio. The two applications were designated for hearing in a consolidated proceeding by Commission order (FCC 64–358) released April 27, 1964. In the order of designation the Commission specified certain issues.

3. The Dover application was dismissed for reasons stated in the hearing examiner's memorandum opinion and order (FCC 64M–1096) released November 4, 1964.[1] With the dismissal of Dover's application, all the issues in the designation order became moot.

4. In a memorandum opinion and order (FCC 64R–539) released November 27, 1964, the Review Board added the following issue:

> To determine whether the Tuscarawas Broadcasting Co. is financially qualified to construct and operate the proposed facility at New Philadephia, Ohio.

Subsequent thereto, Dover was permitted to intervene.[2]

[1] The hearing examiner's action was affirmed by the Review Board (FCC 65R–22), released Jan. 22, 1965, and review was denied by the Commission (FCC 65–404), released May 13, 1965. In an endeavor to remain in this proceeding, Dover also filed a "Petition for Waiver, or, in the Alternative, for Modification of Issue" which was denied by the Review Board (FCC 64R–564) (corrected), released Dec. 23, 1964, and the Commission, while modifying the Board's memorandum opinion and order, concurred in the result (FCC 65–404). On June 14, 1965, Dover filed "Petition for Reconsideration or, Alternatively, for Nullification of Hearing and Receipt of New or Amended Applications for Dover-New Philadelphia (channel 269)." This petition and responsive pleadings are currently pending before the Commission.

[2] See order (FCC 65M–745) released June 9, 1965.

5. Prehearing conferences were held on June 17, 1964, October 28, 1964, and January 13, 1965. The evidentiary hearing was held on June 7 and 8, 1965, but the record was held open pending receipt of Tuscarawas exhibit No. 6. On July 2, 1965, the record was closed by memorandum opinion and order (FCC 65M–867), released that date. Proposed findings of fact and conclusions of law were filed August 4, 1965, by the Broadcast Bureau, and on behalf of Tuscarawas and Dover, August 10, 1965.

FINDINGS OF FACT

6. The Tuscarawas Broadcasting Co. here seeks authority to construct and operate a new FM station on channel 269 in New Philadelphia, Ohio.

The Applicant

7. The applicant is the licensee of standard broadcast station WBTC, Urichsville, Ohio, a daytime only station, and the proposed new station would simulcast all of the programs of the Tuscarawas AM station.

8. Tuscarawas is an Ohio corporation. Its president and principal stockholder is James Natoli, Jr., who owns 99 shares or 93.4 percent of the stock issued by the corporation. The remaining 6.6 percent of a total of 106 shares outstanding, or 7 in number is held by Natoli's mother, Mrs. Mary C. Natoli, James Natoli, Jr., who is unmarried, paid for all of the stock in the corporation for both himself and his mother and presented his mother's stock to her as a gift. Sometime after October 30, 1963, but prior to June 1, 1965, James Natoli, Jr., was given an outright gift of $10,000 by his parents, which will be referred to in paragraph 17, infra. Mrs Mary C. Natoli has never loaned money to the corporation. James Natoli, Jr., is an employee of Westinghouse Broadcasting Co. at its Cleveland, Ohio, station. His address is general delivery, Urichsville, Ohio.

The Tuscarawas Proposal

9. The proposed FM station will be located and operated in conjunction with the applicant's present standard broadcast station at Urichsville, Ohio. The buildings and land upon which the new station will be located are presently the property of Natoli, free of any encumbrances.

10. The Tuscarawas proposal embodies the purchase of technical equipment from Radio Corp. of America in an estimated amount of $17,073.95. The major items of equipment broken down are as follows:

Transmitter proper, including tubes	$6,587.70
Antenna system, etc	4,469.60
Frequency and modulation monitors	1,995.00
Studio technical equipment, etc	621.65
Tower extension	3,400.00
	17,073.95

11. The latest RCA quotation under date of June 10, 1965, provides for the purchase of the equipment with the following terms:

> Twenty-five percent of the total price prior to shipment;
> Seventy-five percent deferred balance to be payable in 36 successive monthly installments, equal in principal amount beginning 30 days after shipment, with each installment to bear interest from date of shipment until the date on which it is paid. Interest will be at our then current rate and for your information our present rate is 6 percent per annum.

There are additional expenses contemplated incident to the construction and early cost of operation. The cost of erecting the tower extension on the existing AM tower is $1,800. In connection therewith, three anchors will be required and Natoli will pour them at a cost of $60 to $100 for the three. Freight charges on the technical equipment, excluding the tower extension, is estimated at $100. It is estimated that professional fees will total between $3,000 and $4,000 of which approximately $2,000 will become due and payable by the end of this proceeding. Upon completion of the installation of the FM on top of the AM tower, Tuscarawas will have an expense of $500 to make the necessary measurements to establish that the radiation of the AM facility has not increased, measure the antenna impedance, and to perform the necessary proof measurements on the FM transmitting equipment. The foregoing miscellaneous items total approximately $4,500.

12. Natoli estimated the cost of the FM operation for the first year as $16,630, which is computed in the following manner:

Salaries for three new part-time employees	$4,550.00
Equipment payments to RCA	4,268.50
Interest on equipment payments	1,000.00
Other expenses for additional power and light, recordings, telephone charges, sales costs, maintenance and repair of technical equipment, music license fees, advertising and promotion, insurance, taxes, and miscellaneous expenses	6,811.50
	16,630.00

In determining the item of "other expenses," Natoli testified that he took the actual cost of the AM operation and projected the estimated cost necessary to operate the FM facility. The added cost then is what the witness regarded as the other expenses necessary to operate the FM proposal, which totals $6,811.50.

13. The cash required to put the proposed station on the air and operate it for 3 months, without benefit of income, is estimated by Natoli to be:

Downpayment on RCA equipment contract 25 percent of estimated cost of $17,073.95	$4,268.49
Miscellaneous expenses	4,500.00
3 months' working capital	4,157.50
	12,925.99

14. To finance the construction costs and the cost of operation during the initial period, the Tuscarawas application reflects that it has funds on deposit in the amount of $2,000 in the United Bank, Urichsville, Ohio; the equipment credit as set out above in paragraph 11, and

a loan commitment of up to $28,000 from James Natoli, Jr., the principal stockholder. The loan commitment is to run for a period of 6 years and to bear interest at the rate of 6 percent per annum. Attached to the application marked exhibit A is a purported balance sheet of James Natoli, Jr., as of October 1, 1963, which reflects assets of only $28,328.30 with no liabilities. The purported balance sheet reads as follows:

EXHIBIT A

Assets:	
Cash on hand	$11,500.30
Stocks:	
182 shares Westinghouse (common)	7,280.00
11 shares RCA (common)	1,023.00
25 shares General Electric (common)	2,000.00
50 shares General Motors (common)	4,000.00
	14,303.00
Series E U.S. Government bonds	2,525.00
	28,328.30
Liabilities	0
Net worth	28,328.30

My net income after taxes for 1961—in excess of $7,500; 1962—in excess of $7,500.

James Natoli, Jr.—Net Worth

15. As indicated above, the sole issue in this proceeding is directed to the financial qualifications of the applicant. Tuscarawas must rely on the loan commitment of its principal stockholder, Natoli, in order to carry out the proposal here under consideration. The purported balance sheet submitted with the application gives rise to the question as to whether Natoli will be able to fulfill his commitment to the corporation and most undoubtedly is the basis for the financial issue being added.

16. Natoli testified that he had not made a full disclosure of his assets as reflected in the purported balance sheet set out in his application and referred to in paragraph 14, supra. The witness testified that the reason he did not make a full disclosure was upon advice of counsel not to do so.[3] At the evidentiary hearing, Natoli presented a balance sheet as of June 1, 1965, showing net worth of $117,423.89. The evidence is clear that Natoli had assets as of October 30, 1963, which were not included in the balance sheet referred to in paragraph 14, supra. These additional assets consist of an account receivable from his sister, Mrs. Marjorie McBeth, in the amount of $4,000; cash surrender value of life insurance of $2,400; automobile, $800; 68.45 acres of farmland (6–10 acres comprise the Tuscarawas transmitter site location) the value of which is $27,380, and $1,000 investment in the Tuscarawas corporation, which make a total of $35,580. The latter figure coupled with the $28,328.30 referred to discloses that Natoli's assets at the time the application was filed were $63,908.30. In addi-

[3] The reason why this advice was given to the witness is unexplained on the record.

tion to the assets of $63,908.30, Natoli had an account receivable from his brother, Dr. Samuel Natoli, in the amount of $17,050, which was incurred in 1961 but paid prior to June 1, 1965. However, the record is not clear as to whether Dr. Natoli had repaid the obligation to his brother in whole or in part before or after October 30, 1963. Therefore, in determining Natoli's assets as of October 30, 1963, the account receivable from his brother, Dr. Samuel Natoli, is here entirely disregarded. Natoli had no liabilities on October 30, 1963.

17. As of June 1, 1965, Natoli's assets totaled $117,423.89, which consisted of the following:

Cash	$12,801.36
U.S. Government bonds	2,525.00
Shares of stock in certain companies[1] with market value as of June 1, 1965	21,117.53
Cash surrender value life insurance	3,500.00
Automobile	600.00
68.45 acres of farmland	27,380.00
Tuscarawas Broadcasting Co. interest	49,500.00

[1] Stocks included common stocks in Westinghouse Electric, General Electric, RCA, and General Motors.

Natoli detailed the net gain of his assets from October 30, 1963, to June 1, 1965. The increment to Natoli's net worth is attributed principally to the gift of $10,000 heretofore referred to in paragraph 8, supra, savings through his salary from Westinghouse Broadcasting Co., appreciation in common stock holdings and increase in the Tuscarawas corporate surplus. There were no liabilities as of June 1, 1965.

18. Natoli unequivocally testified that he was willing to loan the applicant $28,000 or any sum that is necessary in order to enable the corporation to have sufficient funds to construct the FM station. Additionally, the witness testified that in the event Tuscarawas could not obtain the line of credit from RCA referred to above, he would cash his bonds and pay for the equipment personally. It is to be observed that Natoli has quick assets in the amount of $36,443.89 which may be realized from cashing his Government bonds and liquidating the shares of corporate stock, plus cash on hand. The finding is made that Natoli does possess ample resources to permit him to loan Tuscarawas $28,000 which he has pledged to do.

CONCLUSIONS

1. Tuscarawas Broadcasting Co. is here seeking a construction permit for a new FM station to operate on channel No. 269 at New Philadelphia, Ohio. Tuscarawas is an Ohio corporation which is the licensee of a standard broadcast station at Urichsville, Ohio.

2. At the start of this proceeding there were two applicants—the present one and Dover Broadcasting Co., Inc. The latter's application was dismissed, thereby rendering moot all of the specified issues embodied in the designation order (FCC 64–358) released April 27, 1964.

3. There remains only one issue which was added by the Review Board (FCC 64R–539) to be resolved. That issue is simply whether Tuscarawas is financially qualified to construct and operate its proposed FM station at New Philadelphia, Ohio.

4. James Natoli, Jr., is president and principal stockholder in Tuscarawas. He owns 93.4 percent of the outstanding stock of the corporation. The balance of 6.6 percent is held by Natoli's mother, Mrs. Mary C. Natoli, the stock having been a gift to his mother by Natoli.

5. Natoli is committed to loan the corporation up to $28,000 to carry out the instant proposal. Whether Tuscarawas can carry out its proposal here hinges on Natoli's ability to fulfill his obligation to loan the applicant this sum of money.

6. For some unexplained reason, upon advice of counsel, a full disclosure of Natoli's net worth was not made by Natoli when the Tuscarawas application was originally filed. The application reflected Natoli's net worth as $28,328.30, while in reality the evidence shows that Natoli's net worth in October 1963 was at least $63,908.30. This is completely disregarding an account receivable in the amount of $17,050 which was paid sometime prior to June 1, 1965. This account receivable represented an obligation of Dr. Samuel Natoli due James Natoli, Jr., which was incurred in 1961. Exactly when this debt was paid to Natoli by his brother cannot be conclusively drawn from the record. Therefore, in considering the net worth of James Natoli, Jr., as of October 30, 1963, the account receivable from his brother is completely disregarded and not taken into account of Natoli's net worth as of that date.

7. At the time of the evidentiary hearing, Natoli's net worth under date of June 1, 1965, was $117,423.89. Natoli candidly detailed his personal finances, which included testimony to the effect that he had no outstanding obligations as of June 1, 1965. Further, Natoli expressed a complete willingness to loan Tuscarawas $28,000 to carry out the proposal here under consideration. He quite frankly testified that should it be necessary to obtain credit and financing for Tuscarawas he would convert his quick assets to cash, which now include cash, Government bonds, and shares of common stock in Westinghouse Electric, General Electric, RCA, and General Motors. Thus, Natoli could immediately raise $36,443.89 for the venture.

8. The only conclusion that can be drawn from the evidence is that Tuscarawas has met the burden of proof respecting the added issue and is financially qualified to construct and operate its proposed facility at New Philadelphia, Ohio. See memorandum opinion and order (FCC 65R-280) released July 27, 1965.

9. 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 the Tuscarawas Broadcasting Co. for a construction permit for a new FM station to operate on channel No. 269 (101.7 mc; 3 kw; 229.6 feet) at New Philadelphia, Ohio, will serve the public interest, convenience, and necessity.

Accordingly, *It is ordered*, This 19th day of August 1965, 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 the Tuscarawas Broadcasting Co. for a construction permit for a new FM station to operate on channel No. 269 (101.7 mc; 3 kw; 229.6 feet) at New Philadelphia, Ohio, *Is granted.*

FCC 66R-277

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of FREDERICK B. LIVINGSTON AND THOMAS L. DAVIS, D/B AS CHICAGOLAND TV CO., CHICAGO, ILL.	Docket No. 15668 File No. BPCT-3116
CHICAGO FEDERATION OF LABOR AND INDUSTRIAL UNION COUNCIL, CHICAGO, ILL.	Docket No. 15708 File No. BPCT-3439
For Construction Permits for New Television Broadcast Station	

MEMORANDUM OPINION AND ORDER

(Adopted July 19, 1966)

BY THE REVIEW BOARD: BOARD MEMBER SLONE ABSTAINING.

1. The Review Board has before it a petition for enlargement of issues, filed May 9, 1966, by Chicagoland TV Co. (Chicagoland),[1] seeking to add the following issues against Chicago Federation of Labor and Industrial Union Council (Federation):

> (*a*) To determine whether Federation has violated section 1.65 of the Commission rules by failing to advise the Commission and opposing parties of a change in the programing of station WCFL within 30 days, as required;
>
> (*b*) To determine whether Federation was lacking in candor in this proceeding in failing to properly notify the Commission of change in the programing of station WCFL as evidenced in the hearing record;
>
> (*c*) To determine whether Federation, as the licensee of station WCFL, has complied with the policy of the Commission regarding its obligations to ascertain the needs of the area before making a substantial change in the programing of its station; and
>
> (*d*) To determine whether Federation has complied with the Commission's directive to licensees to advise the Commission whenever substantial changes in programing occur in the operation of an existing station.

2. Chicagoland and Federation are mutually exclusive applicants for a construction permit for a new UHF television broadcast station to operate on channel 38 in Chicago, Ill. The applications were designated for hearing by order, FCC 64-1076, released November 20, 1964, under a standard comparative issue.[2] On March 2, 1965, exhibits were exchanged, including various exhibits of Federation dealing with the past operation and programing of WCFL, Chicago, a standard broadcast station owned by Federation. These exhibits were admitted into evidence on March 11, 1965. On May 2, 1966, Federation filed a peti-

[1] Also before the Board are: (*a*) comments, filed May 24, 1966, by the Broadcast Bureau; (*b*) opposition, filed May 27, 1966, by Federation; and (*c*) reply, filed June 9, 1966, by Chicagoland.

[2] Other issues were specified against two other applicants, but these applicants subsequently dismissed their applications.

tion for leave to amend to reflect certain changes in WCFL's programming, allegedly occurring since the introduction of its exhibits. In its petition, Federation stated that the amendment was being offered, in accordance with section 1.65 of the rules, for informational purposes only, and not for any comparative advantage. The examiner, by memorandum opinion and order, FCC 66M–659, released May 10, 1966, denied the petition to amend in view of the fact that Federation was not attempting to amend its application or the exhibits thereto, but allowed the amendment to be associated with Federation's docket file.

3. Chicagoland's subject request for enlargement of issues is based mainly on the information contained in Federation's proposed amendment.[3] Chicagoland alleges that the rendered amendment indicates that "WCFL has changed formats rather radically, abandoning a policy of adult music with large blocks of talk, discussion, and interview programing for a new format consisting in the main of what is euphemistically known as 'contemporary music.'" Chicagoland asserts that the amendment submitted by Federation does not indicate that Federation made a proper survey prior to making the programing changes; therefore, Chicagoland contends that a question exists as to whether Federation has complied with the Commission's policy regarding a licensee's obligation to determine and attempt to satisfy the needs and interests of its audience. This failure, Chicagoland alleges, may reflect an unusually poor past broadcast record and therefore be of decisional significance in this proceeding. Chicagoland further points out that Federation's proposed amendment indicates that the decision to change the program format of WCFL was made "in the Spring of 1965." Since the tendered amendment was not filed until May 1966, Chicagoland contends that Federation has failed to comply with: (*a*) the requirement of section 1.65 of the rules, which requires an applicant to notify the Commission within 30 days of any information which may be of decisional significance, and (*b*) the Commission's policy requiring licensees to notify the Commission of substantial programing changes in the operation of their existing stations. Finally, Chicagoland alleges that since Federation, in this proceeding, introduced into evidence and relied upon certain programing of station WCFL with "no hint" that the programing was "about to be discontinued," and since "the information now on file with the Commission" is not an accurate portrayal of WCFL's programing, a question concerning Federation's candor has been raised. The Broadcast Bureau supports all but the requested candor issue, urging, however, that the Board add an additional issue relating the information adduced to Federation's comparative qualifications.

4. In its opposition, Federation contends that no "radical" change in WCFL's programing has in fact taken place; that no showing has been made that WCFL is not operating within the programing percentages in its renewal application of August 1964; and that WCFL's renewal application never spoke in terms of "adult" music, but rather entertainment only. Federation points out that the subject amend-

[3] Chicagoland also relies, to a limited extent, on an article appearing in the Chicago Daily News of January 15, 1966, which discusses the changed programing.

ment was not filed to amend the pending television application, but rather to update the record information with respect to the operation of WCFL. Federation avers that at the time the exhibits were exchanged in this proceeding, WCFL's programing was accurately reflected therein; that the actual program changes occurred gradually "over a period of more than 1 year"; that no single change in itself warranted submitting additional data to the Commission; and that "[c]umulatively and over the considerable time span * * * it was considered advisable in the interests of accuracy and completeness to report [the changes] to the Commission." Finally, Chicagoland asserts that its officers have considerable experience and knowledge of the area served by WCFL, and, with this background, "the licensee * * * is capable of making incidental program changes to reflect their judgment of the needs and interests of the area."

5. Chicagoland claims "good cause" for the filing of its petition on May 9, 1966, in that the alleged changes in WCFL's programing were brought to Chicagoland's attention by Federation's petition for leave to amend, filed May 2, 1966. However, the Board is of the opinion that if in fact substantial changes in WCFL's programing did occur in the spring of 1965, they could and should have been discovered by Chicagoland, through the exercise of due diligence, at a much earlier date. In the foregoing connection, Chicagoland's principals are residents of Chicago, and must be presumed to have been aware that its opponent was operating a broadcast station there. Moreover, Chicagoland relies (in part) upon an article appearing in a Chicago newspaper on January 15, 1966; any reasonable diligence and inquiry thereafter by Chicagoland would have revealed the "substantial changes" if in fact there had been any. Under these circumstances we cannot find good cause for Chicagoland's late filed petition. Moreover, even were Chicagoland's petition regarded as timely filed, it would not warrant the requested enlargement of issues.

6. Federation's proposed amendment indicates that it decided to change the program format of WCFL in the spring of 1965. However, there is no indication in the proposed amendment, and Chicagoland has made no showing supported by affidavits of persons with knowledge, that this decision or any actual changes were made prior to the time that the programing exhibits were exchanged and introduced into evidence. Nor has there been a showing that the changes in WCFL's programing took place other than gradually, over a period of more than 1 year from April 1965, as alleged by Federation; or that any particular changes were so substantial as to require that they be reported to the Commission prior to the time that Federation filed its petition for leave to amend. Thus, Chicagoland's contentions in this regard are based merely on speculation and surmise, and provide no basis for the addition of failure-to-disclose and lack-of-candor issues.[4] Moreover, with regard to the requested issue concerning Federation's alleged failure to comply with the Commission's policy requiring that

[4] It is noteworthy that Federation did in fact report the changed programing of WCFL to the Commission of its own volition even though an amendment to its application was not required, and that any attempt to gain a comparative advantage from these changes was specifically disavowed.

licensees report substantial programing changes, Chicagoland's petition is deficient in that no showing whatever has been made as to WCFL's past programing representations to the Commission, or in what respects (if any) those representations are now inaccurate. With regard to the requested issue concerning Federation's candor in this proceeding, Chicagoland's petition is deficient in that while the basic thrust of the allegations is that Federation changed the type of music played on WCFL, no showing is made that WCFL's music programing is relied upon by Federation for past broadcast record or in any other respect in this proceeding. Chicagoland makes no assertion that Federation has not adequately ascertained the needs and interests of the persons to be served by its subject television proposal. Thus, the only relevance the requested ascertainment issue could have in this proceeding would be in relation to an evaluation of Federation's past broadcast record. But, the examiner has already permitted evidence of Federation's past broadcast record to be adduced. Moreover, from record citations in Chicagoland's reply, it appears that evidence has already been taken as to why WCFL changed some of its programs. In any event, the question of whether further evidentiary inquiry is warranted under the past record criterion is one which should more properly be addressed to the examiner in the first instance.

Accordingly, *It is ordered*, This 19th day of July 1966, that the petition for enlargement of issues, filed on May 9, 1966, by Chicagoland TV Co., *Is denied.*

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

FCC 66R-281

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
D. H. OVERMYER COMMUNICATIONS CO., DALLAS, TEX.	Docket No. 16388 File No. BPCT-3463
MAXWELL ELECTRONICS CORP., DALLAS, TEX.	Docket No. 16389
For Construction Permits	File No. BPCT-3489

MEMORANDUM OPINION AND ORDER

(Adopted July 20, 1966)

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSENT. BOARD MEMBER BERKEMEYER DISSENTING IN PART WITH A STATEMENT.

1. This proceeding involves the applications of D. H. Overmyer Communications Co. (Overmyer) and Maxwell Electronics Corp. (Maxwell) for a new television broadcast station to operate on channel 29, Dallas, Tex. These mutually exclusive applications were designated for hearing by the Commission order, FCC 65-1151, released December 30, 1965.[1] The designated issues include a financial qualifications issue as to Overmyer's proposal and a standard comparative issue.[2] Now before the Review Board for consideration is a petition for enlargement of issues against Maxwell Electronics Corp. filed by Overmyer on January 20, 1966, and associated pleadings.[3]

2. The issues requested by Overmyer fall into five general categories: financial qualifications of Maxwell; the real party in interest in Maxwell's proposal; a suburban issue to determine whether Maxwell has made an effort to ascertain the programing needs and interests of the Dallas area; a comparative coverage issue; and an issue to determine the reliability of Maxwell's representations, particularly with respect to its proposal for integration of ownership with management.

FINANCIAL QUALIFICATIONS

3. Maxwell Electronics Corp. is engaged in the business of manufacturing electronic equipment under contracts with the U.S. Government. Maxwell proposes to construct the transmitter which it will use.[4] James T. Maxwell is president and a 36.9-percent stockholder; his father, Carroll H. Maxwell, is vice president and a 20.5-percent

[1] A 3d application for channel 29, Dallas, Tex., that of Grandview Broadcasting Co., was designated for hearing with the applications of Overmyer and Maxwell. The Grandview application was dismissed with prejudice by the hearing examiner (FCC 66M-169, released Feb. 2, 1966).

[2] Included in the designation order was an issue to determine whether the tower height and location proposed by Maxwell would constitute a hazard to air navigation. That issue was deleted by the Review Board (FCC 66R-54, released Feb. 8, 1966).

[3] The pleadings before the Board are listed in the appendix.

[4] A grant of Maxwell's application would be made subject to the condition that, prior to licensing, permittee shall submit acceptable data for type-acceptance of its transmitter in accordance with section 73.640 of the Commission's rules.

stockholder; and his brother, Carroll H. Maxwell, Jr., is treasurer and an 8.8-percent stockholder. The three Maxwells are also the directors of Maxwell Electronics Corp.

4. The Sailer Co. is an investment company. Carroll H. Maxwell, Jr., is married to the former Patricia Sailer and is a vice president and director of the Sailer Co. Neither Carroll H. Maxwell, Jr., nor Patricia Maxwell has any ownership interest in the Sailer Co. However, the balance sheet of the Sailer Co. submitted with the Maxwell application lists a "noncurrent" liability of $413,286.17 as an "annuity payable—Patricia Sailer."

5. In an October 15, 1965, amendment to its application,[5] Maxwell specifies total construction costs of $350,855; of this, $86,150 is listed for the "transmitter proper, including tubes." Cost of operation is estimated at $288,000 for the first year; revenues for the first year are estimated at $300,000. Thus, according to Maxwell, the total cost of construction and initial (first-year) operation will be $638,855. Maxwell originally proposed that this cost would be met by an equipment credit from the General Electric Co. of $238,855 and by a loan from the Sailer Co. of $400,000. However, by an amendment accepted by the examiner (FCC 66M–772, released June 1, 1966), Maxwell has substituted for the Sailer loan a commitment from the First National Bank of Dallas to lend Maxwell $400,000. The Sailer loan would continue to be made available to Maxwell as a backup, but Sailer has deleted a requirement that the Maxwells pledge their stock to Sailer. A further statement of Maxwell's financial plans appears as exhibit No. 4 to its application. In addition to the above-described equipment credit from General Electric and the loans from the bank and from Sailer, Maxwell has indicated that it will "invest additional capital from present capital and profits from existing operations if needed"; the transmitter building will be leased (from Carroll H. Maxwell) for $150 a month; and land for the transmitter will be leased for "in the neighborhood of $350 per month on a 10-year term renewable for 10 years at $400, per month."

6. In the petition for enlargement of issues, Overmyer questions: (*a*) The availability of the Sailer loan to Maxwell and the ability of Sailer to make the loan; (*b*) the validity of Maxwell's estimate of construction costs; (*c*) the validity of Maxwell's estimate of operating costs; and (*d*) whether other substantial cash expenditures required before the end of the first year have been ignored by Maxwell. In its supplement to the petition to enlarge issues, Overmyer questions the adequacy of the loan commitment letters from the First National Bank of Dallas. Because the bank loan and the Sailer loan would suffice to meet Maxwell's estimated costs of construction and first-year's operation and would cover all the deficiencies alleged by Overmyer, the Board will limit its consideration of Overmyer's petitions to the Sailer

[5] Overmyer's petition for enlargement (p. 1) erroneously lists Oct. 10, 1965, as the date of Maxwell's amended application.

Co. loan question and the First National Bank of Dallas loan question.[6]

7. *The Sailer Company loan question.* Overmyer first contends that Sailer does not have $400,000 cash; that Sailer has not shown the manner in which it proposes to provide funds to Maxwell; and that it is not to be assumed that Sailer will liquidate part of its principal asset (capital stock in the Southland Corp.).[7] These contentions are answered in an amendment to Maxwell's application filed by Maxwell on February 9, 1966, and accepted by the examiner (FCC 66M–308, released Mar. 2, 1966). In a February 1, 1966, letter to the Commission from Sailer, the terms and conditions of the loan are clarified and Sailer specifically states its intention to either liquidate a portion of its fixed assets or obtain a bank loan using its assets as collateral. Sailer states that it now owns 261,400 shares of Southland with a market value of $6,992,450. In its reply to Maxwell's opposition, Overmyer argues that it has not been shown that the stockholders of Sailer would approve liquidation by Sailer of part of its Southland stock holdings nor has it been shown that the Southland stock asset is "unencumbered by other security interests." These latter arguments are wholly without merit: the Sailer loan commitment is evidenced by letters of its president, whose authority to speak for the corporation must be assumed under these circumstances, and the Sailer balance sheet shows liabilities of less than $950,000, which could hardly substantially "encumber" the almost $7 million worth of Southland stock. The Board concludes that there is no question raised concerning the ability of Sailer to make a $400,000 loan to Maxwell. This conclusion is not affected by Overmyer's contentions that Sailer is not in the practice of making commercial loans and that the present commitment is made as a matter of accommodation.

8. Overmyer next questions whether certain stated conditions precedent to the availability of loan funds from Sailer prevent the Sailer commitment from being considered unconditional. The Sailer letter of October 6, 1965, attached to exhibit No. 4 of Maxwell's application as amended October 15, 1965, conditions the willingness of Sailer to make the loan on: (*a*) an examination of then current information and projections (financial and operating) of Maxwell, the results of which must be satisfactory to the Sailer board of directors; and (*b*) financial statements of each of the Maxwells, which also must be satisfactory to the Sailer board.[8] Overmyer suggests that conditions (*a*) and (*b*) must be considered as making the Sailer loan commitment conditional, because the Commission questioned the avail-

[6] The Board has examined Maxwell's estimates of construction and operating expenses in light of the challenges made by Overmyer. While there are some questions concerning the accuracy of certain of Maxwell's estimates as to the costs of transmitter construction, of the studio-transmitter link, and of 1st-year operation, even using a cost figure suggested by Overmyer's petition, the $1,038,855 available to Maxwell by virtue of the bank and Sailer loans and manufacturer's equipment credit, is substantially in excess of Maxwell's requirements.

[7] Sailer's Nov. 30, 1964, balance sheet, attached to exhibit No. 4 of Maxwell's application as amended Oct. 15, 1965, shows common stock in the Southland Corp., at cost, to be $852,093.10 (256,274 shares). As of Oct. 4, 1965, the bid price was 26; thus, the Southland stock owned by Sailer had a market value of $6,663,124.

[8] Sailer's original requirement that the Maxwells pledge their shares in the corporation to Sailer has been deleted.

ability of Overmyer's bank loan on the ground that it is subject to the condition that an appropriate loan agreement be executed between the parties at the time the loan is to be made. In its February 1, 1966, letter to the Commission clarifying the terms and conditions of the proposed loan, Sailer states its present willingness to lend $400,000 to Maxwell and emphasizes that conditions (*a*) and (*b*) questioned by Overmyer are intended to apply to a situation where the financial picture changes adversely in the future. In its reply to Maxwell's opposition, Overmyer contends that Maxwell's financial position is so deteriorating that there is little likelihood that Sailer will in fact make the loan.

9. The Board concludes that Overmyer has not raised a substantial question concerning the availability of the $400,000 loan from Sailer. Any question that the Sailer loan commitment is conditional has been resolved by the subsequent clarification of Sailer's position in its letter of February 1, 1966. There is no similar clarification of Overmyer's loan commitment letter in its case. No useful purpose would be served by examining in detail Overmyer's assertions that Maxwell Electronics Corp. is now insolvent or is on the verge of insolvency and that there is no real likelihood that Sailer would go through with the loan. Overmyer's analysis is replete with speculation, surmise, and conjecture and in some instances mischaracterizes statements made by Maxwell in its opposition. The fact remains that Sailer is presently satisfied with Maxwell's financial and operating posture. Specific factual allegations are required to warrant inquiry into the financial prospects of the applicant to determine whether a loan agreement is likely to be consummated at the time the application is granted.

10. *The First National Bank of Dallas loan question.* In a substantial amendment to its financial proposal, Maxwell has secured a loan commitment from the First National Bank of Dallas for $400,000. This is to be Maxwell's primary source of funds for construction and operation of the proposed television broadcast station. The Sailer Co. loan discussed above, also for $400,000, will be a secondary source of funds. The bank, by letters dated April 14 and May 11, 1966, would lend Maxwell $400,000 at 7 percent per annum; the commitment is effective until January 1, 1967 (with a ½-percent commitment fee payable each 90 days); the guarantors, the Maxwells and Robert Faulkner, are to pledge marketable securities with a 20-percent margin; repayment must be made within 5 years of the initial date of borrowing (commencement of repayment may be deferred for 1 year); the Sailer Co. loan is to be subordinated to the bank loan; a loan agreement between Maxwell and the bank is to be executed; there is to be no adverse change in the financial conditions of Maxwell Electronics Corp. or of the guarantors; immediate repayment in full is to be required on default; the bank must consent to Maxwell's investments in other companies or disposal of its properties or merger; compliance by Maxwell with applicable laws and regulations is to be assured; and Maxwell is not to pledge or encumber its assets except equipment purchased from General Electric Co. or another manufacturer finally chosen by Maxwell.

11. In its supplement to the petition to enlarge issues, Overmyer contends that Maxwell has not accepted the bank loan; other terms and conditions may be involved; "the trend of Maxwell's finances" is down; the guarantors (especially Faulkner) have not evidenced their willingness to comply with the security provisions; the ability of the guarantors to supply the required collateral is also questionable; and the loan commitment is effective only to January 1, 1967, with no provision for renewal.

12. Overmyer's challenges to the First National Bank of Dallas loan commitment to Maxwell are wholly without merit. Its first contention, that Maxwell has not expressly accepted the bank's proposal, is rebutted by Maxwell's submission of the bank's letters to the Commission and the absence of any allegation of fact to establish that despite Maxwell's efforts to obtain the loan commitment, it would not ultimately use it. As the Bureau points out, the loan is available to Maxwell and that is the "critical point." Likewise, the bank loan commitment letters supply sufficient, detailed terms which render speculative only Overmyer's argument that other conditions may be involved.

13. As was the case with the Sailer Co. loan, the bank loan commitment is conditioned on the financial condition of Maxwell remaining satisfactory to the lender. According to Overmyer, Maxwell's financial condition is so deteriorating that it is unlikely that the loan agreements involved will ever be consummated. As with the Sailer loan, the Board is convinced that under the circumstances here, in the absence of allegations of fact supported by affidavits reflecting personal knowledge, the controlling factor is that the prospective lender is satisfied with the applicant's present financial posture. The requirement that the borrower's financial condition not change adversely, whether express or implied, does not make the loan commitment unreliable. *Tri-Cities Broadcasting Co.*, FCC 65R–48, 4 R.R. 2d 516. Nor is there any reasonable basis for Overmyer's claim that the bank loan is defective in the absence of express undertakings by the Maxwells and Faulkner to guarantee the loan as required by the bank and without a showing of the securities which will be pledged as collateral. Where, as here, the principals of an applicant must guarantee a loan which that applicant has submitted to the Commission as a part of its financial proposal, it is reasonable to infer that such principals are, in effect, representing to the Commission that they will ultimately guarantee the loan. Any other construction of an applicant's submission would be unreasonable. In addition, it is clear that the bank has examined the financial statements of the proposed guarantors, has found them acceptable and is assured that its collateral requirements can be met. Under these circumstances, no useful purpose would be served by requiring submission of a list of securities, intended for use as collateral, to the Commission. *Tri-Cities Broadcasting Co.*, supra.

14. Overmyer's final challenge to the bank-loan commitment is that it is effective only until January 1, 1967. This argument overlooks the possibility of an extension or renewal of the commitment and it is reasonable to assume that in the ordinary course of business the bank would renew its offer. CF. *Flathead Valley Broadcasters* (*KOFI*), FCC 65R–161, 5 R.R. 2d 74. In the absence of a showing that a renewal

would not be forthcoming, the existence of an expiration date on a loan commitment letter does not render the commitment unreliable during its term.

15. For the foregoing reasons, the Board has concluded that Maxwell has adequately established the availability of the First National Bank of Dallas loan as a primary source of funds and the Sailer Co. loan as a secondary source. These two loans amount to $800,000 and, when considered with the manufacturer's equipment credit proposed by Maxwell, amply support the conclusion that Maxwell is financially qualified.

REAL PARTY IN INTEREST

16. In support of its request for a real party in interest issue, Overmyer originally contended that Maxwell will make no significant financial contribution to the proposed television venture and that the only investment (aside from the usual equipment credit from the manufacturer) will be made by the Sailer Co. Despite Maxwell's amended proposal to obtain a bank loan, Overmyer pursues its request for this issue. Sailer's potential for control of Maxwell is reflected, according to Overmyer, by the requirement of a pledge of stock by the Maxwells for the Sailer loan and by the marital tie between Carroll H. Maxwell, Jr., and Patricia Sailer.[9] In further support of its request, Overmyer cites *WLOX Broadcasting Co.* v. *FCC*, 260 F. 2d 712, 17 R.R. 2120 (D.C. Cir. 1958); *Massillon Broadcasting Co.*, FCC 61–1164, 22 R.R. 218; and *Publix Television Corp.*, FCC 59–643, 18 R.R. 762.

17. In opposition to Overmyer's petition on this issue, Maxwell states that Sailer is aware that it could not assume control of Maxwell (through default after pledge of stock) without prior Commission consent. Maxwell asserts that it has merely obtained an arm's-length credit commitment from a noncommercial lending source. The fact that Carroll H. Maxwell, Jr., is married to Patricia Sailer Maxwell is discounted by Maxwell on the ground that neither has any ownership interest in the Sailer Co. Cited as support for Maxwell's opposition to this issue is *Theodore Granik*, FCC 66R–38, 2 FCC 2d 515, released February 1, 1966. Maxwell does not address itself to the fact that Carroll H. Maxwell is a vice president and director of the Sailer Co.

18. The Broadcast Bureau, taking note of the specific language of the Sailer loan commitment letter of October 6, 1965, that the Sailer Co. "shall in no way have the power or right to direct or influence the operation or programing of said proposed station," nevertheless originally supported inclusion of a real party in interest issue. However, in view of Maxwell's proposal to obtain a bank loan, the Bureau now opposes inclusion of a real party in interest issue. In reply to Maxwell's opposition, Overmyer asserts that the Sailer Co.'s right to approve Maxwell's financial and operating projections as a condition to the loan and the interlocking directorship and connection by marriage of Maxwell and Sailer require that Sailer be considered a principal in this application and that its ability to dictate the manner of station operation must be considered at the hearing.

[9] The marriage of Carroll H. Maxwell, Jr., and Patricia Sailer is reported by Overmyer on information and belief, but is admitted as a fact by Maxwell. Also alleged on the basis of information and belief, not on the basis of personal knowledge of the facts as required by rule 1.229, is that Carroll H. Maxwell, Jr., is "trustee under a certain trust of Sailer stock."

19. Overmyer's request for a real party in interest issue will be denied. The entire factual basis of Overmyer's petition has been substantially altered; the Sailer loan is no longer Maxwell's primary source of funds and Sailer has deleted the requirement that the Maxwells pledge their stock as security for the loan. Under these circumstances, the arguments made and the cases cited by Overmyer are inapplicable. As for Overmyer's unsupported and general claim that a real party in interest issue should be added concerning the participation of the First National Bank of Dallas, suffice it to say that no extraordinary provision of the proposed bank loan agreement supports any suspicion that the bank will exercise any greater control over Maxwell's affairs than would any creditor in a comparable position. Cf. *Flathead Valley Broadcasters* (*KOFI*), FCC 65R–161, 5 R.R. 2d 74.

SUBURBAN ISSUES

20. In an attempt to discover whether Maxwell had made an effort to ascertain the programing needs and interests of the Dallas area, Overmyer retained Marketing and Research Counselors (MARC), which had conducted Overmyer's survey, to determine whether community leaders who would logically have been interviewed by Maxwell had in fact been contacted.[10] The affidavit of the vice president of MARC states that not one of the 34 local leaders contacted by MARC had been interviewed by any party other than Overmyer concerning programing needs.

21. In its opposition, Maxwell asserts that it sent a letter to the 14 school districts in Dallas County; hired a programing consultant who conducted a survey; had an employee interview the superintendent of the Richardson Independent School District; and had James T. Maxwell personally interview the same superintendent. A letter from the superintendent of the Dallas Independent School District was received; a Maxwell employee interviewed "several religious leaders"; and the chairman of the Radio and TV Committee of the Greater Dallas Council of Churches was interviewed, according to Maxwell. Maxwell states that a full exposition of its surveys will be presented at the hearing as "this is already part of the hearing issues as outlined in the comparative criteria policy statement release" of the Commission.

22. The Broadcast Bureau states that Overmyer's showing is sufficient to support addition of a suburban issue with respect to Maxwell unless Maxwell's responsive pleading gives assurance that adequate contacts of leaders other than those interviewed by MARC

[10] MARC's inquiries were keyed to specific proposals in Maxwell's application. For example, Maxwell lists a "school principal's report," but MARC's checks with the Dallas superintendent of schools and principals of major Dallas elementary and high schools indictate that they had not been interviewed by Maxwell. Similar specific deficiencies are indicated with respect to agricultural and religious programing proposals made in Maxwell's application.

were made by Maxwell in the preparation of its proposal. In its reply, Overmyer suggests that the showing made by Maxwell in its opposition is insufficient in that it specifically identifies only three interviewees: One is the superintendent of the Dallas Independent School District, who, according to Overmyer, will not speak on television matters; the second is the superintendent of the Richardson Independent School District, wherein James T. Maxwell and Carroll H. Maxwell, Jr., reside and where James T. Maxwell's children attend school; [11] the third is the chairman of the Radio and TV Committee of the Greater Dallas Council of Churches, whose statement to MARC was that he was unaware of any Maxwell interview on the date specified by Maxwell.

23. The questions raised by Overmyer as a result of its survey of local leaders are sufficient to warrant the addition of a suburban issue. Maxwell is in error in assuming that such evidence can be adduced under the new standard comparative issue. The policy statement specifically states that "no comparative issue will ordinarily be designated on program plans and policies * * * or *other program planning elements*, and *evidence on these matters will not be taken under the standard issues.*" 1 FCC 2d 393, 397, 5 R.R. 2d 1901, 1912 (1965). (Emphasis added.) Because its opposition fails to provide assurance that meaningful steps were taken by Maxwell to ascertain the programing needs and interests of the Dallas area, Maxwell will be given an opportunity to make such a showing at hearing.

COMPARATIVE COVERAGE

24. As reflected in the two applications and in an affidavit submitted by a consulting engineer on behalf of Overmyer, the grade A and grade B contours to be covered by Overmyer and Maxwell include the following areas and populations:

Contour	Overmyer	Maxwell
Grade A, area	8,958	5,385.
Grade A, population	Not shown	Not shown.
Grade B, area	15,176	10,342.
Grade B, population	1,904,040	1,794,331.

On the basis of its greater area coverage, particularly the 47 percent greater grade B area coverage, Overmyer requests addition of a comparative coverage issue.

25. Maxwell contends that the difference in grade B area coverage is minimized by the fact that there is only a small difference between the two proposals with respect to grade B population coverage. Nevertheless, Maxwell's opposition concludes with the concession that "comparative coverage should be considered under the standard comparative issues." The Broadcast Bureau suggests that a specific issue

[11] Overmyer states that because of these facts "it is doubtful without further proof that these so-called 'personal interviews' actually involved any significant discussions regarding the program needs and interests of the Dallas community." Presumably, because the interview was cited by Maxwell in response to Overmyer's request for a suburban issue, it involved a discussion of Dallas area programing needs. More than Overmyer's conjecture is required to impeach Maxwell's sworn statement. If the interview were casual and unrelated to Dallas television matters, however, a serious question respecting Maxwell's representations would be raised.

is not necessary but that it should be indicated that because of the disparity in coverage, evidence of coverage may be adduced under the comparative issue. Such a statement was included in the Commission's designation order in *Harriscope, Inc.*, FCC 65–1165, 2 FCC 2d 223, cited by the Bureau.

26. The difference in grade B area coverage is sufficient to warrant consideration of the relative efficiency of the respective proposals in the comparative hearing. *Chicagoland TV Company*, FCC 65R–28, 4 R.R. 2d 339; *Roswell Television*, FCC 64R–374, 3 R.R. 2d 569. Whether a specific issue is necessary or a directive in this opinion will suffice is a matter of form. The Board will in this instance proceed as was indicated in *Harriscope, Inc.*, supra, and merely state that the disparity in coverage is such that evidence with respect thereto may be adduced under the comparative issue in this proceeding.

RELIABILITY OF REPRESENTATIONS

27. Overmyer contends that the proposal of Maxwell's principals to devote substantial time to the proposed television broadcast operation, in view of the representations in the brochure of Maxwell Electronics Corp. that its manufacture of electronics equipment operation requires the close supervision of top management, is questionable or incredible. Thus, according to Overmyer, Maxwell's reliability as an applicant is called into question. Beyond this general assertion, Overmyer offers no specific allegations of fact in support of its request for a specific issue on the matter. As both Maxwell and the Bureau point out, whether Maxwell can show meaningful participation in station operation consistent with its present obligations to the electronics manufacturing business is a matter which can be fully explored under the issues as framed. Accordingly, Overmyer's request for a specific issue will be denied.

SUPPLEMENTAL PLEADINGS

28. Based on its contention that Overmyer's reply to its opposition contains new matter not responsive to the opposition, Maxwell has filed: (*a*) A motion to strike portions of D. H. Overmyer's reply to opposition to petition to enlarge issues; (*b*) a statement on reply to opposition to petition to enlarge issues; and (*c*) a petition to accept special pleading (statement (*b*), *supra*).[12] The Board has reviewed the pleadings carefully to determine whether there is any substantial foundation for Maxwell's concern. As is apparent from an examination of the nature of the issues raised by Overmyer, the questions are such that opposition, reply, and counterreply could continue ad infinitum. It is true, as Maxwell contends, that there are facts and arguments in Overmyer's reply which could have been presented in the first instance in its petition. From Maxwell's point of view, it would be desirable to permit it to further respond to these "new" facts

[12] These three pleadings were filed by Maxwell on April 4, 1966. These and responsive pleadings are also listed in the appendix.

and arguments. Such an approach, however, would lead to limitless pleadings or to a requirement that a petitioner anticipate the opposition and make all its conceivable arguments and factual allegations in its original pleading. The difficulties inherent in such an approach to administrative pleading should be obvious. Consistent with these views, the Board finds no instance wherein Overmyer's reply exceeds the bounds of propriety in terms of responsiveness to Maxwell's opposition. The Board will take this opportunity to observe, however, that 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.

Accordingly, *It is ordered*, This 20th day of July 1966, that the petition for enlargement of issues against Maxwell Electronics Corp., filed by D. H. Overmyer Communications Co. on January 20, 1966, *Is granted* to the extent indicated herein and *Is denied* in all other respects; that the motion to strike portions of D. H. Overmyer's reply to opposition to petition to enlarge issues, and the petition to accept special pleading, both filed by Maxwell Electronics Corp. on April 4, 1966, *Are denied;* that the statement of Maxwell Electronics Corp. on reply to opposition to petition to enlarge issues, filed on April 4, 1966, *Is not accepted;* and that the supplement to petition to enlarge issues, filed by D. H. Overmyer Communications Co. on June 7, 1966, *Is denied;*

It is further ordered, That the issues in this proceeding *Are enlarged* by addition of the following issue:

To determine the efforts, if any, made by Maxwell to ascertain the needs and interests of the area proposed to be served

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

APPENDIX

(1) Petition for enlargement of issues against Maxwell Electronics Corp., filed on January 20, 1966, by D. H. Overmyer Communications Co.
(2) Opposition to petition for enlargement of issues, filed on February 9, 1966, by Maxwell.
(3) Statement of Broadcast Bureau, filed on February 9, 1966.
(4) Reply to opposition, filed on March 10, 1966, by Overmyer.
(5) Motion to strike portions of D. H. Overmyer reply, filed on April 4, 1966, by Maxwell.
(6) Statement of Maxwell Electronics Corp. on reply, filed on April 4, 1966.
(7) Petition to accept special pleading, filed on April 4, 1966, by Maxwell.
(8) Opposition of Broadcast Bureau to motion to strike, filed on April 12, 1966.
(9) Opposition of Broadcast Bureau to petition to accept special pleading, filed on April 12, 1966.
(10) Opposition to motion to strike, filed on April 21, 1966, by Overmyer.
(11) Opposition to petition to accept special pleading, filed on April 21, 1966, by Overmyer.
(12) Reply to oppositions to motion to strike portions of D. H. Overmyer reply to opposition to petition to enlarge issues, filed on April 26, 1966, by Maxwell.
(13) Reply to oppositions to motion to accept special pleading, filed on April 26, 1966, by Maxwell.
(14) Supplement to petition to enlarge issues, filed on June 7, 1966, by Overmyer.
(15) Opposition to supplement to petition to enlarge issues, filed on June 21, 1966, by Maxwell.

(16) Opposition of Broadcast Bureau to supplement to petition to enlarge issues, filed on June 21, 1966.
(17) Reply to opposition, filed on June 27, 1966, by Overmyer.

PARTIAL DISSENT OF BOARD MEMBER BERKEMEYER

The Commission's recent opinion in *Saul M. Miller*, —— FCC 2d — (FCC 66–551, released June 23, 1966) makes it reasonably clear to me that there is no real likelihood that the efforts expended by Maxwell to ascertain the programing needs of the community, meager as they are, would be found inadequate under the standards now in effect. Therefore, I dissent to addition of the suburban issue.

FCC 66-673

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF FM BROADCASTING INC., LICENSEE OF RADIO STATION KCMK(FM), KANSAS CITY, MO., FOR FORFEITURE.

MEMORANDUM OPINION AND ORDER

(Adopted July 20, 1966)

BY THE COMMISSION: COMMISSIONER JOHNSON NOT PARTICIPATING.

1. The Commission has under consideration (1) its notice of apparent liability, dated May 11, 1966, addressed to FM Broadcasting Inc., licensee of radio station KCMK(FM), Kansas City, Mo.

2. The notice of apparent liability in the amount of $500 was issued because the station when inspected on July 16, 1965, was found in violation of sections 73.265(b) (operation without a properly licensed operator on duty), 73.265(b) (operation with improperly operating remote control equipment), 73.284 (failure to keep a maintenance log), and 73.275(a)(1) (failure to protect the transmitter from unauthorized persons). Further, the licensee violated section 1.611 by not filing a financial report for 1964.

3. The notice of apparent liability was mailed to the licensee on May 11, 1966, by certified mail—return receipt requested. Although the return receipt shows that the licensee received the notice on May 16, 1966, the licensee failed to reply to the notice within the prescribed 30-day period set forth in section 1.621 of Commission rules. Nor has it 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 above notice of apparent liability, we find that the licensee willfully failed to observe the provisions of sections 73.265(b) and 73.275(a)(1) and willfully and repeatedly violated sections 73.284 and 1.611 of the rules. See *In the Matter of Paul A. Stewart*, 25 Pike & Fischer, R.R. 375; *In the Matter of Fay Neel Eggleston*, 1 FCC 2d 1006.

5. In accordance with the provisions of section 503(b) of the Communications Act of 1934, as amended, and section 1.621(b) of Commission rules,[1] *It is ordered*, This 20th day of July 1966, that FM Broadcasting Inc., licensee of radio station KCMK(FM), *Forfeit* to the United States the sum of $500 for willful and repeated failure

[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 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."

to observe sections 73.284 and 1.611 of Commission rules and for willful violations of sections 73.265(b) and 73.275(a)(1) 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'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 FM Broadcasting Inc., licensee of radio station KCMK(FM), Kansas City, Mo.

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

FCC 66–625

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of CEASE AND DESIST ORDER TO BE DIRECTED AGAINST BOOTH AMERICAN CO., OWNER AND OPERATOR OF COMMUNITY ANTENNA TELEVISION SYSTEMS AT NORTH MUSKEGON AND MUSKEGON, MICH.[1]	Docket No. 16635

APPEARANCES

Paul Dobin, *Stanley Neustadt* and *Ronald A. Siegel* (Cohn & Marks) on behalf of Booth American Co.; and *Joseph Chachkin*, on behalf of the Broadcast Bureau.

DECISION

(Adopted July 13, 1966)

COMMISSIONER WADSWORTH FOR THE COMMISSION: CHAIRMAN HYDE CONCURRING AND ISSUING A STATEMENT; COMMISSIONER BARTLEY DISSENTING AND ISSUING A STATEMENT IN WHICH COMMISSIONER LOEVINGER JOINS; COMMISSIONER JOHNSON ABSENT.

1. By an order to show cause, FCC 66–419, 3 F.C.C. 2d 713, released May 13, 1966, the Commission directed that Muskegon Television System and Booth Communications Co., operating divisions of Booth American Co. (hereinafter Booth or respondent), show cause why they should not be ordered to cease and desist from further operation of community antenna television systems (CATV) in North Muskegon and Muskegon, Mich., in violation of section 74.1107 of the Commission's rules. Inasmuch as the Commission found that expeditious action in this matter was necessary, it directed that immediately after closing the record it be certified to the Commission for final decision. The Commission further ordered that, within 7-calendar days after the date that the record is closed, the parties file their proposed findings of fact and conclusions of law.

[1] The order to show cause was issued to Muskegon Television System and Booth Communications Co. However, at the hearing, respondent's attorney advised the Commission that Booth American Co. is the only corporate entity, and the only respondent, and that the named parties in the order to show cause are merely operating divisions of Booth American Co. Although a written appearance was filed on behalf of the companies named in the order to show cause, appearances at the prehearing conference and at the hearing were made on behalf of Booth American Co. Also, the order to show cause was directed to alleged CATV operations in Muskegon Township, Muskegon Heights, Norton Township, or Roosevelt Park, Mich.; but since CATV service is not now being provided and it is not contemplated in the immediate future by the respondent to these communities, the question of issuing a cease and desist order directed to operations in any of them is rendered moot.

2. A prehearing conference was held before Hearing Examiner Walther W. Guenther on June 6, 1966, the evidentiary hearing was held on June 16 and 17, 1966, and the record was closed on the latter date. As directed by the order to show cause, the hearing examiner certified the record to the Commission by order, FCC 66M–879, released June 21, 1966. Proposed findings of fact and conclusions of law were filed on June 24, 1966, by the respondent, and by the Broadcast Bureau.

3. Rules governing the regulation of all CATV systems[2] were adopted by the Commission's second report and order in dockets Nos. 14895, 15233, and 15971, 2 F.C.C. 2d 725, released March 8, 1966; and these rules were published in the Federal Register on March 17, 1966 (31 F.R. 4540). Section 74.1107, which is the basis for the charges in the order to show cause issued in this proceeding, was made effective immediately upon publication. The portions of that section pertinent to this proceeding provide as follows:

> (*a*) No CATV system operating 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. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.
>
> (*b*) A request under paragraph (*a*) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their grade B contours, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within 30 days after such public notice. A reply to such responses or statement may be filed within a 20-day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.
>
> * * * * * * *
>
> (*d*) The provisions of paragraphs (*a*) and (*b*) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date; * * *.

4. The basic facts in this case going to the violation of section 74.1107 of the rules have been stipulated by the parties. Booth has

[2] Sec. 74.1101(a) defines a CATV system as "any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include: (1) Any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house." Booth concedes that its operations in North Muskegon and Muskegon are CATV systems as defined by this rule.

received authorization from each of six communities, which are located in what is known as the Greater Muskegon area, to construct and operate a CATV system. At present, however, Booth is rendering service to only two of these communities: North Muskegon, for which it received a 25-year franchise on August 23, 1965, and Muskegon, for which it was granted an indefinite license on September 7, 1965. Agreements with the General Telephone Co. of Michigan to supply distribution cable for North Muskegon and for Muskegon were signed on August 25, 1965. The installation of trunk and distribution cable was completed in North Muskegon by January 14, 1966, and in a portion of Muskegon by March 3, 1966. CATV service to North Muskegon did not begin until March 4, 1966, and by March 17 there were 124 subscribers receiving service. CATV operations in Muskegon were begun on April 15, 1966. As of May 26, 1966, Booth was serving 250 subscribers in North Muskegon and 107 subscribers in Muskegon.

5. Each CATV system distributes to its subscribers the signals of the following nine television stations:

WKZO–TV (channel 3), Kalamazoo, Mich.
WOOD–TV (channel 8), Grand Rapids, Mich.
WZZM–TV (channel 13), Grand Rapids, Mich.
WWTV (channel 9), Cadillac, Mich.
WMAQ–TV (channel 5), Chicago, Ill.
WTMJ–TV (channel 4), Milwaukee, Wis.
WITI–TV (channel 6), Milwaukee, Wis.
WMVS (channel 10), Milwaukee, Wis.
WISM–TV (channel 12), Milwaukee, Wis.

6. All of the above-television stations have been carried by the North Muskegon and Muskegon CATV systems since the commencement of service to their respective communities, and both communities are within the predicted grade A contour of the Grand Rapids channel 13 station, WZZM–TV. Grand Rapids-Kalamazoo is rated by the American Research Bureau as the 38th largest television market based on net weekly circulation figures for 1965.[3] Each CATV system therefore comes within the provisions of section 74.1107 as one "operating within the predicted grade A contour of a television broadcast station in the 100 largest markets" and which may not extend the signal of a television station beyond that station's grade B contour without Commission approval. No violation of the rules results from the distribution on either CATV system of the signals of any of the Michigan television stations. The predicted grade A contour of WZZM–TV and the predicted grade B contours of WOOD–TV and WKZO–TV include all of North Muskegon and Muskegon, and the predicted grade B contour of WWTV penetrates a portion of each community. Under the rules, carriage of all of the foregoing Michigan television stations by the CATV systems is permissible. *Buckeye Cablevision, Inc.*, FCC 66–449, 3 F.C.C. 2d 798, released May 27, 1966; *Mission Cable TV, Inc. and Trans-Video Corp.*, FCC 66–548, released June 22, 1966.

7. North Muskegon and Muskegon lie beyond the grade B contours of the one Chicago and four Milwaukee stations listed above. The

[3] ARB treats the Grand Rapids-Kalamazoo area as a single television market.

predicted grade B contours of these stations fall short of reaching North Muskegon and Muskegon by the following distances:

WITI–TV, 9 miles.
WTMJ–TV, 10 miles.
WISN–TV, 18 miles.
WMVS, 22 miles.
WMAQ–TV, 49 miles.

8. Before commencing operation in the two communities, Booth at no time requested permission to extend the signals of the Chicago and Milwaukee stations nor has such permission been granted by the Commission. Since service was instituted after February 15, 1966, such permission was required under section 74.1107. Thus, the record establishes that the signals of five television stations are being extended beyond their grade B contours in violation of the provisions of section 74.1107 of the rules. The only issue presented here is whether the foregoing facts require the issuance of an order directing Booth to cease and desist from further operation of its CATV systems in violation of the rules.

9. Booth questions the validity of this proceeding, claiming that the Commission has no jurisdiction over CATV systems, that our rules pertaining thereto are invalid, and that the expedited hearing procedure is contrary to the Administrative Procedure Act. As to jurisdiction, and the validity of our rules, our position was set forth in the second report and order (2 F.C.C. 2d at 729–734, 793–797). We adhere to our previous position and no amplification is necessary. Similarly, with respect to the expedited hearing procedure, our reasons therefor and the basis of our authority are detailed in *Buckeye Cablevision, Inc.*, 3 F.C.C. 2d at 801–803.[4] Moreover, the necessity for such procedure is further supported by the rapid growth of Booth's North Muskegon system from 124 subscribers on March 17, 1966, to 250 subscribers on May 26, 1966,[5] and by Booth's conduct in commencing a new CATV service at Muskegon on April 15, 1966, more than a month after the release of the second report and order. Thus, as stated in *Buckeye Cablevision, Inc.*, supra., art par. 10:

> * * *. We * * * [cannot] permit this case to go through the regular hearing process of initial decision and exceptions prior to Commission review and accomplish our objective of preventing a cable system carrying distant signals from becoming "established or well entrenched" before taking effective action. * * *

10. It is further argued by Booth that, even assuming the validity of the rules, section 74.1107 may not be validly applied to its North Muskegon and Muskegon CATV operations because it was misled by the Commission into believing that prior Commission approval for carriage of the distant stations was unnecessary. The basis for this contention lies in that portion of our public notice of February 15, 1966 (mimeo No. 79927), announcing plans for the regulation of all CATV systems, wherein we stated:

[4] The 30-day period provided by 47 U.S.C. 312(c) for preparation for hearing was waived by Booth (Tr. 66). In view of the foregoing, its belated claim, advanced for the first time in its proposed findings and conclusions, that it had insufficient time to prepare for hearing may not be entertained.

[5] We also note that by May 26, 1966, Booth had accepted 222 applications for service in North Muskegon and 501 applications for service in Muskegon.

> The hearing requirement will apply to all CATV operations proposed to communities lying within the predicted grade A service contour of *all existing television stations* in that market. [Emphasis supplied.]

Since the two communities involved herein are not within the grade A contours of all Grand Rapids-Kalamazoo stations, but of only one such station (WZZM–TV), Booth states that it concluded that it was not subject to the hearing requirements of section 74.1107, and thus CATV service in North Muskegon was instituted on March 4, 1966. Booth asserts that it did not become aware of the difference between the wording of the hearing requirement in the public notice and that in section 74.1107(a) [6] until after the release on March 8, 1966, of the second report and order.[7] In view of the foregoing, Booth claims that it is entitled to continue carriage of the distant stations on both CATV systems.

11. Initially, we note that since North Muskegon and Muskegon are incorporated municipalities with legally defined boundaries, the CATV system in each municipality must be regarded as a separate and distinct operation even though both systems are served from the same headend. *Telerama, Inc.*, 3 F.C.C. 2d 585, dated April 29, 1966. Consequently, the permissible extension of a station's signal beyond that station's grade B contour into one community would not justify the extension of that station's signal into the other.[8] In this connection, we note that operations were not commenced in Muskegon until April 15, 1966, more than a month after Booth had learned that the hearing requirement of section 74.1107 applied to its CATV operations. Therefore, whatever the merit to Booth's contention on the ground of mistake, that contention cannot be used with respect to the Muskegon operation.

12. We must also reject as without merit Booth's contention that it is entitled to continue carrying the distant stations on its North Muskegon cable system, where operations were commenced on March 4, 1966. The purpose and effect of our February 15, 1966, public notice were discussed and explained in our memorandum opinion and order in dockets Nos. 14895, 15233, and 15971, FCC 66–456, 3 F.C.C. 2d 816 at 819–823 (pars. 12–20), released May 27, 1966, denying petitions for stay of our second report and order. In pertinent part we therein stated the following (par. 19):

> * * * That notice did not constitute Commission action and did not require any action or course of conduct by CATV systems. It simply announced, inter alia, the grandfathering date that had

[6] The rule refers to CATV systems "operating within the predicted grade A contour of a television broadcast station in the 100 largest television markets."

[7] A copy of the Commission's public notice of Mar. 8, 1966 (mimeo No. 80850), summarizing the CATV rules was mailed on Mar. 9, 1966, by Booth's Washington counsel to Mr. Clark, Booth's vice president.

[8] Respondent further argues that the Greater Muskegon area should be considered as a single geographical area for the purpose of sec. 74.1107 so that if carriage of the distant stations is found to be permissible in North Muskegon, a community with a population of 3,855, such carriage must be permitted in all 6 governmental entities of the Greater Muskegon area in which it has received authorization to operate CATV systems with a total population of 107,823. The construction of sec. 74.1107 urged by respondent would tend to defeat the important public interest objectives sought to be accomplished thereby, and must, therefore, be rejected. *Mission Cable TV, Inc. and Trans-Video Corp.*, FCC 66–548, released June 22, 1966.

been decided upon in the Commission deliberations and which was to be incorporated in the regulations which were still to be issued. * * *

13. In any event we find no equities in favor of Booth which merit special consideration. Since April 23, 1965, when we released our notice of inquiry and notice of proposed rulemaking in docket No. 15971 (1 F.C.C. 2d 453), Booth has been on notice that the Commission had under consideration the assertion of jurisdiction over nonmicrowave, as well as microwave, CATV systems and the imposition of restrictions upon the distance that television signals could lawfully be extended by such cable systems. In fact, the Commission had before it a more far-reaching proposal than that which was finally adopted. Booth concedes that it was aware of the contents of this notice, but it nevertheless proceeded with its plans to construct and operate the CATV systems here in question. (See memorandum opinion and order in dockets Nos. 14895, 15233, and 15971, supra, 3 F.C.C. 2d at 823–826.) According to the evidence submitted by Booth, the bulk of its expenditures and its principal contractual obligations in connection with the construction of the North Muskegon and Muskegon cable systems were incurred prior to February 15, 1966, and with respect to such expenditures it is in the same position as any other CATV owner who was proceeding with his plans and construction as of February 15, 1966. Certainly, these commitments were not made in reliance upon any notice issued by the Commission. Insofar as the February 15, 1966, public notice is concerned, the announcement was intended to emphasize the all-inclusive application of the proposed rule, i.e., to each and every CATV system operating within the grade A contour of each and every television station located in 1 of the 100 highest ranked television markets. Although respondent could hardly have failed to realize that this was a possible, if not probable, construction to be placed on the words used in the notice, it nevertheless made no effort to ascertain from either the Commission or from the experienced communications counsel by which it was then represented whether it could legally proceed with its plans to carry the distant stations before obtaining Commission approval. Furthermore, the respondent has continued to expand its system after the rule itself was adopted, at which time it could no longer rely upon any ambiguity or mistake in the notice. It has done so without coming to the Commission until June 10, 1966, with any request for a waiver based upon a claim of misunderstanding or being misled by the Commission. Finally, respondent was not required under the rules to cease all operations but only to remove, on and after March 17, 1966, those signals which come within the interdiction of section 74.1107.

14. Relying upon *C. J. Community Services, Inc.* v. *Federal Communications Commission*, 100 U.S. App. D.C. 379, 246 F. 2d 660 (1957) and section 1.91(e) of the rules,[9] respondent argues that even

[9] Sec. 1.91(e) provides as follows: "Correction of or promise to correct the conditions or matters complained of in a show cause order shall not preclude the issuance of a cease and desist order. Corrections or promises to correct the conditions or matters complained of, and the past record of the licensee, may, however, be considered in determining whether a revocation and/or a cease and desist order should be issued."

though a violation of the rules is established, the Commission must determine on the basis of the facts and circumstances of this case whether it should, in the exercise of its discretion, issue a cease and desist order. In support of this contention respondent introduced into evidence, over the objections of the Broadcast Bureau, information concerning: (1) The past record of performance of Booth as a licensee of the Commission; (2) its expenditures and commitments in connection with the construction and operation of the CATV systems; (3) its commitments to the people of North Muskegon and Muskegon, and the need for CATV service; and (4) the situation with respect to present and prospective UHF operations in the area. To a large extent, the same data were submitted in support of Booth's application for a waiver of section 74.1107(a) [10] and Booth concedes that the Commission is not required to dispose of that application in this show cause proceeding. Booth insists, however, that the Commission must consider this evidence in order to determine whether a cease and desist order should be withheld until disposition is made of the pending application for waiver. For the reasons set forth below, we conclude that such evidence is irrelevant in this proceeding and should have been excluded.

15. The decision of the U.S. court of appeals in *C. J. Community* is inapposite here. In that case, it appeared that there was no "administrative mechanism through which a license may be procured" for the operation of the booster which was the subject of that proceeding, and the court held that the "Commission acted mistakenly in its belief that it lacked discretion to withhold the issuance of a cease and desist order" once the Commission found a violation to exist. However, no comparable situation is present here since section 74.1107 specifies the procedure to be followed in order to obtain Commission approval for the extension of television signals beyond their grade B contours. Booth could either have requested the evidentiary hearing required by section 74.1107 or it could have applied for a waiver of the rule to permit carriage without an evidentiary hearing, and prompt consideration would have been accorded such an application. The CATV rules have special waiver provisions (sec. 74.1109) going beyond the general waiver rules to provide expeditious consideration of waiver requests. Booth did neither but chose, instead, to proceed in violation of the rule and now seeks special consideration while it persists in flouting our rules.

16. Secondly, our determination that a cable system operating in 1 of the top 100 television markets be in compliance with the rules before consideration will be given to authorizing the extension of television signals beyond their grade B contours is not predicated upon the lack of discretion to do otherwise. Rather, our decision is predicated upon the conclusion, reached after thorough and careful consideration of the extensive comments filed in the rulemaking pro-

[10] On June 10, 1966, Booth filed a request (CATV 100–45) pursuant to sec. 74.1107(a) for permission to carry the distant stations. See public notice of June 16, 1966 (mimeo No. 85422), Rept. No. 15.

ceeding, that the public interest would be affected adversely by the favorable exercise of discretion which would permit carriage of distant signals before all relevant facts in the particular case have been ascertained. Important questions, such as the economic impact upon the establishment or maintenance of UHF stations and the relationship of CATV operations to the development of pay-TV (2 F.C.C. 2d at 781, par. 139), are presented by the importation of distant signals into the major markets, and unless the status quo is maintained until all public interest considerations bearing on those questions have been fully explored and resolved, we run the risk of a CATV operation which will have serious adverse consequences. As we pointed out in the second report and order (2 F.C.C. 2d at 782, par. 140), our examination of CATV operations must be completed "before they become established or well entrenched" since otherwise "it is difficult, if not wholly impracticable in the light of the disruption which would result, to take effective action or to attempt to roll back the situation, if it should develop or be shown that the CATV operation is inconsistent with the public interest." We recognized that some delay in the commencement of CATV service might occur because of the necessity for evidentiary hearings, but we found that the significance of such delay "is mitigated by the consideration that these markets generally have a considerable amount of presently available and prospective new service" (2 F.C.C. 2d at 783, par. 144).[11] Therefore, we concluded that, on balance, the likelihood of adverse consequences from the proscribed CATV operations outweighed the possible benefits of immediate CATV service. We find no sufficient basis in any of the arguments advanced on behalf of Booth to depart in this case from the policy determinations enunciated in the rulemaking proceeding. It may be to Booth's private financial advantage to distribute the signals of the distant television stations to its subscribers without awaiting Commission approval, but we cannot permit such private considerations to override the substantial public interest reasons for requiring compliance by the CATV until action on a waiver application is completed.

17. Section 1.91(e) of the rules, upon which respondent also relies, provides only that the Commission may consider promises of compliance and other mitigating circumstances in deciding whether a cease and desist order should issue; it does not provide that in every instance the Commission must consider such promises or mitigating factors. Where, as here, immediate compliance with the rules is essential, the Commission is not precluded from taking whatever action is required in the public interest because of respondent's promises. Furthermore, Booth has made no unconditional commitment to comply, but instead it

[11] In *C. J. Community*, no off-the-air television reception was available except from the unauthorized booster, whereas North Muskegon and Muskegon are within the predicted grade A contour of 1 station, within the predicted grade B contours of 2 others, and a portion of each community is within the predicted grade B contour of a third station. Thus a significant factual distinction exists between *C. J. Community* and the case under consideration.

has agreed to suspend carriage of the distant stations only if the Commission's rule "is held to be lawfully applicable to its operation and if its request for waiver is lawfully rejected." This qualified promise of compliance makes obvious the need for the issuance of a cease and desist order if we are to prevent these CATV systems from becoming entrenched while Booth prosecutes its waiver application before the Commission and, if the decision is adverse, its appeal to the court.

18. We do not believe that we can grant Booth's request that the Commission withhold the issuance of a cease and desist order until disposition is made of the application for waiver. In a similar situation in *Buckeye Cablevision, Inc.*, 3 F.C.C. 2d 808, released May 27, 1966, we rejected a request for consolidation of the show cause proceeding with action on the waiver application.

19. A request for oral argument before the Commission, en banc, has been submitted by Booth which asserts that the clarification of the issues involved in this proceeding is necessary.[12] The pertinent facts herein have been stipulated by the parties and, insofar as the legal issues are concerned, Booth's views have been presented at the evidentiary hearing and in its proposed findings and conclusions of law herein which consist of over 70 pages. Therefore, we conclude that oral argument will serve no useful purpose, and Booth's request will be denied.

20. The record herein establishes that Booth owns and operates CATV systems, as defined by section 74.1101(a) of the rules, in North Muskegon and Muskegon, Mich.; and that each system is a separate and distinct operation within the contemplation of section 74.1107 and subject to the provisions thereof. The record further establishes that both CATV systems operate within the grade A contour of a television station in the Grand Rapids-Kalamazoo market, which is the 38th largest television market; that said systems commenced operation after February 15, 1966; that since March 4, 1966, the North Muskegon system, and since April 15, 1966, the Muskegon system have distributed to its subscribers the signals of 9 television stations including the signals of 1 Chicago and 4 Milwaukee stations; and that the CATV systems have extended the signals of the Chicago and Milwaukee stations beyond their grade B contours without requesting and obtaining Commission approval. On the basis of the foregoing, we conclude that Booth is operating its CATV systems in North Muskegon and Muskegon, Mich., in violation of section 74.1107 of the rules and section 312(b) of the Communications Act of 1934, as amended (47 U.S.C. 312(b)). We further conclude that the public interest requires the

[12] An opposition to the request for oral argument was filed by the Broadcast Bureau on July 7, 1966.

issuance of an order requiring Booth to cease and desist promptly from such unlawful operations.[13]

21. The timetable for compliance which was adopted in *Buckeye Cablevision, Inc.*, FCC 66-449, 3 F.C.C. 2d at 806, released May 27, 1966, will be utilized in this proceeding. The respondent must comply with this cease and desist order within 2 days [14] after release, unless it notifies the Commission during that 2-day period that it intends to seek judicial review of our order; in that event, respondent is afforded an additional 14-day period in which to file its appeal and seek a stay of this order.

22. Accordingly, *It is ordered*, This 13th day of July 1966, that within 2 days after the release of this decision, Booth American Co. *Cease and desist* from the operation of its community antenna television systems at North Muskegon and Muskegon, Mich., in such a way as to extend the signals of any television broadcast station beyond its grade B contour in violation of section 74.1107 of the Commission's rules, and specifically to cease and desist from supplying to its subscribers the signals of television stations WTMJ-TV, WITI-TV, WMVS, and WISN-TV, Milwaukee, Wis.; and WMAQ-TV, Chicago, Ill.: *Provided, however*, That if respondent notifies the Commission during the said 2-day period that it intends to seek judicial review of this order, respondent is afforded an additonal 14-day period in which to file an appeal and to seek a stay of the order.

23. *It is further ordered*, That the request for oral argument, filed on June 28, 1966, by Booth American Co. *Is denied.*

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

---

[13] Sec. 502 of the Communications Act provides as follows: "Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs."

[14] The term "2 days" as used herein excludes Saturdays, Sundays, and holidays, if any.

CONCURRING STATEMENT OF CHAIRMAN ROSEL H. HYDE

I concur in the Commission's decision issuing the cease and desist order against the North Muskegon-Muskegon CATV systems so as to call a halt to that part of their operations which violates rule 74.1107 of our CATV regulatory program. Such action is necessary to assure that CATV systems in the top 100 markets which commenced operations after the effective date of our CATV rules, be brought into full compliance with that program as soon as administratively feasible. In so concluding, however, it should be made clear that the Commission is not here and now reaching any determination as to what decision on CATV carriage of these signals would be in the public interest when we later consider the full factual record supporting the pending request for waiver, or upon an evidentiary hearing if waiver is not deemed to be the appropriate procedure. Thus, while a cease and desist order to eliminate the violation is the only appropriate procedure at the present time and in the present posture of the matter, it is being issued without prejudice to whatever action on the merits of this or similar situations the Commission may take when such questions are properly before it.

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY IN WHICH COMMISSIONER LEE LOEVINGER JOINS

I dissent. In the absence of congressional action, I agree with the respondent's contention that the Commission does not have jurisdiction over CATV systems and that, consequently, the rules adopted in the second report and order are invalid. Even assuming, arguendo, that the Commission does have jurisdiction, I believe that section 74.1107 of the rules is invalid because it contravenes section 4(c) of the Administrative Procedure Act, which provides that a substantive rule not be made effective in less than 30 days after required publication except as otherwise provided by the agency upon good cause found and published with the rule.

Section 74.1107 was made effective immediately upon the required publication. A recitation of good cause found was made on the basis of injury to the public from continued implementation of service extending grade B signals.

In my opinion, injury to the public was not supported with any factual indication or showing and was purely unfounded speculation. There appeared to be more indication of benefit, rather than injury, to the public from the extended service in question. Consequently, the recitation of good cause found was, I believe, a nullity under section 4(c) of the Administrative Procedure Act, and the immediate effective date of the rule rendered it invalid.

The February 15 cutoff date of section 74.1107(d) appears in practical operation to be a retroactively applied effective date of the rule itself and, accordingly, a further ground for invalidity of the rule.

Moreover, I believe that section 74.1107 is not valid because adequate notice was not given on the substantive provisions imposed on

implementation of service in the top 100 markets. Also, the mandatory hearing requirement seems extremely arbitrary and excessively burdensome on a CATV applicant. A serious question exists as to what kind of possible showing a CATV applicant could make to prevail against the fears expressed by the majority in the second report and order.

A basic fallacy of the CATV rules is the rationale which the Commission used to justify its assertion of jurisdiction in order to effectuate their promulgation. The rationale is on a basis so broad as to appear to encompass any kind of interstate communication, and thus go beyond delegable powers of Congress. Congress can, of course, delegate certain of its powers to the Commission, but inherent in such delegation is specification of adequate guidelines. The CATV rulemaking without congressional delegation of power but under jurisdiction asserted by the Commission was, I believe, so lacking in requisite guidelines as to make it unconstitutional.

FCC 66-705

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202, TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS (CARROLLTON, KY.; COLUMBIA, TENN.; SAN CLEMENTE AND LANCASTER, CALIF.; PROVIDENCE, R.I.; SALT LAKE CITY AND TOOELE, UTAH; CARROLL, CHEROKEE, AND ALGONA, IOWA; NACOGDOCHES AND LUFKIN, TEX.; CHARLEROI AND UNIONTOWN, PA.; CLARKSBURG, FAIRMONT, MORGANTOWN, AND NEW MARTINSVILLE, W. VA.; DENISON, IOWA; IMMOKALEE, FLA.; NEW LONDON, NEENAH-MENASHA, AND GREEN BAY, WIS.; AND SOUTHBRIDGE, MASS., MASON CITY, IOWA, AND AUSTIN, MINN.)	Docket No. 16212 RM-818, RM-819, RM-816, RM-830, RM-822, RM-808, RM-817, RM-837, RM-825, RM-838, RM-841, RM-844, RM-860, RM-918

MEMORANDUM OPINION AND ORDER

(Adopted July 27, 1966)

BY THE COMMISSION: COMMISSIONER COX DISSENTING TO THE ASSIGNMENT AT NACOGDOCHES, TEX.; COMMISSIONER JOHNSON NOT PARTICIPATING.

1. The Commission has before it for consideration three petitions for reconsideration of actions taken in the first report and order herein, released February 25, 1966 (2 F.C.C. 2d 647, 6 R.R. 1821, FCC 62-190). These relate to FM assignments or possible assignments at Nacogdoches and Lufkin, Tex., and Southbridge and Fall River, Mass., and Providence, R.I.

2. *Nacogdoches and Lufkin, Tex.*—In the first report and order, we assigned channel 221A as a second class A channel at Nacogdoches, Tex. In so acting we denied the request of petitioner J. C. Stallings that instead of a second class A channel, Nacogdoches be assigned class C channel 277, which would be withdrawn from Lufkin, Tex. Stallings is the licensee of standard broadcast station KEEE (full-time class IV) at Nacogdoches; he and the licensee of the other AM station there, Texan Broadcasting Co., Inc. (Texan, KFSA, daytime only), have competing applications in hearing for the only FM channel previously assigned to that city, channel 252A. The report and order also denied other proposals advanced by Stallings and another party. By timely petition for reconsideration (which has not been opposed) Stallings again urges assignment of channel 277 in Nacogdoches, deleting its assignment at Lufkin.

106-505—66——1

3. Lufkin and Nacogdoches had 1960 census populations of 17,641 and 12,674, respectively; both are the county seats and largest communities in their counties, respectively, Angelina and Nacogdoches, with populations of 39,841 and 20,846. The AM stations and FM assignments mentioned are the only ones in Nacogdoches County; Lufkin has two class C FM assignments (including channel 277), neither applied for nor occupied; and two full-time AM stations (one class IV, one class III). In addition, the town of Diboll, in Angelina County some 10 miles from Lufkin, has a class C FM channel and station and a daytime-only AM station. The two counties mentioned are adjacent, and Lufkin and Nacogdoches are about 20 miles apart (Diboll is about 30 miles from Nacogdoches). With respect to service from FM stations further removed, it appears that Nacogdoches and the area immediately around it receive, or have the potential of receiving, slightly more service than Lufkin and its immediate area; there are no FM assignments other than those mentioned within 30 miles of either city, the closest being class A assignments at Henderson (in operation) and Rusk (unoccupied), about 32 miles from Nacogdoches and 50 and 41 miles, respectively, from Lufkin. The nearest class C assignments are at Tyler (60 miles from Nacogdoches, 75 miles from Lufkin, in operation) and Jacksonville (43 miles from Nacogdoches, 55 miles from Lufkin, unoccupied).

4. In support of his reconsideration request, Stallings refers to data advanced in his comments concerning the importance and recent growth of Nacogdoches, including a letter from the city manager, stating that the 1964 population was 18,076 and referring to recent industrial growth and likely future development because of a large new lake in the area, and a letter from an official of the college located there, stating that enrollment (1,948 in 1960) is 5,744, a figure not included in current population figures.[1] Since no parties interested in Lufkin assignments participated in this proceeding, we have no similar data for that city.

5. As expressed in the report and order herein, our decision to drop a class A channel into Nacogdoches instead of moving in channel 277 was based on the following considerations: (1) The mixture of class C and A channels in that city would mean competitive inequality between the stations thereon; (2) since in all probability both applicants now competing for channel 252A would amend to seek the new class C channel, the hearing problem would not be resolved as it would if another class A channel were assigned; (3) the removal of channel 277 from Lufkin would leave that city with only one channel assigned, or, if a class A channel is assigned to replace 277 as a second assignment (no other class C channel could be so used), the same sort of competitive inequality would result in Lufkin. Therefore we assigned channel 221A to Nacogdoches as that city's second channel, concluding that it would meet the needs of the city, which did not appear to have a widespread population or to be of particular significance to a large region.

6. In his reconsideration request, Stallings advances various matters

[1] According to the Rand-McNally "Commercial Atlas and Marketing Guide" (1962), the college enrollment was included in the 1960 census figure. This was the practice generally used in preparing the 1960 population census.

as answers to these objections to his proposal. First, as to the question of resolving the hearing conflict, he and Texan, the two competing applicants for channel 252A, have entered into an agreement (filed with the examiner in the hearing proceeding) whereby Stallings agrees not to compete for any class A channel for which Texan applies by amending its application;[2] and Texan agrees not to compete for any class C channel which may be assigned to Nacogdoches. Thus, it is claimed, assignment of class C channel 277 would speed up final action on the applications just as would a class A assignment. Second, it is urged that the consideration of competitive imbalance should not be held determinative here, since: (1) As far as Nacogdoches is concerned, the parties themselves are willing to proceed under such conditions, and (2) there will be actual or potential competitive imbalance in the area in any event, since Lufkin and Nacogdoches are close together, and Diboll not far removed, so that class C stations will necessarily compete with class A stations. It is claimed that this situation is similar to others in which class B/C and class A channels have been assigned in the same place: *Appleton-Neenah-Menasha, Wisconsin*, 4 R.R. 2d 1411, and *Fairmont, West Virginia*, 6 R.R. 2d 1585. Third, it is stated that assignment of channel 277 to Nacogdoches will make for a much more equitable distribution of facilities, since it will give Lufkin and Nacogdoches each one class C and one class A channel, and their counties respectively two class C—one class A and one C—one class A, compared to the three class C versus two class A pattern resulting from our action assigning only an additional class A frequency to Nacogdoches. It is urged that the relative size and importance of the two communities warrant the proposed pattern of assignments in each rather than the alleged discrimination against Nacogdoches and its county, especially since no interest has been expressed in either of the Lufkin assignments.

7. The decision to be made is whether to assign channel 277 at Nacogdoches, deleting it from Lufkin and substituting a class A channel there (channel 257A could be assigned consistent with applicable rules), or to leave that channel in Lufkin and assign a second class A channel to Nacogdoches. The former course would tend to equalize assignments as between the two cities and their counties—one class C and one class A in each city, two class C's and one class A in Lufkin's county, and one class C and one class A in that of Nacogdoches—but it would also create a situation of technical disparity between competing facilities, not only in Nacogdoches but in Lufkin also. The latter consideration might not prove to be of substantial significance in Nacogdoches—where both of the parties are AM licensees, and have expressed willingness to live with the situation—but in the case of Lufkin it might well mean that that community would be limited indefinitely to only one FM outlet, since a class A station would have to compete not only with a class C station there but also with a class C station at nearby Diboll (and also, perhaps, the class C station at Nacogdoches). On the other hand, assigning a class A channel at Nacogdoches would avoid these possible results, but it would mean a substantial disparity

[2] As we indicated in docket No. 16535, amendment will be necessary for both applicants in any event, since channel 252A is short spaced and will be replaced by another class A channel.

between the two cities and counties in the number of wide-coverage class C assignments, whereas the difference in city and county population is not very large.

8. On balance, we believe that the Stallings petition should be granted, and channel 277 should be assigned to Nacogdoches. While generally it is our view that class B/C and class A channels should not be assigned in the same community, to avoid conditions of technical disparity, we do not believe that consideration should be determinative here, in view of the fact that the party which would be most immediately affected (Texan, which would become the class A permittee at Nacogdoches) is willing to accept the situation, and the fact that there is or will be some degree of mixture of classes of channels in the area anyhow, taking into account Nacogdoches, Lufkin, and Diboll assignments. As to potential technical disparity at Lufkin, we believe this is a consideration too speculative at this time to warrant attaching decisional significance to it, since no interest has so far been shown in any FM assignment there. Under these circumstances, in our judgment the class C assignment at Nacogdoches—which would tend to equalize assignments as between the two communities and counties, more in line with their relative populations—is warranted and in the public interest. We agree with Stallings that this case falls within the *Appleton-Neenah-Menasha* and *Fairmont* cases cited. One factor leading us to this result is that assignment of the class C channel to Nacogdoches likely will result in its quick use, bringing a wide-coverage FM service to the whole area including Lufkin, whereas at Lufkin it might go unused for some time.

9. Therefore we are assigning channel 277 to Nacogdoches. Since channel 252A, now assigned there, must be removed because it is short spaced (see footnote 2, above), we are retaining channel 221A there, as assigned in the first report and order herein. Channel 257A—which we would have assigned to Nacogdoches to replace 252A had we reached a contrary result herein—may be assigned to Lufkin consistent with applicable rules, and is so assigned, as a second channel to replace 277. Since in effect channel 221A at Nacogdoches thus replaces channel 252A as the class A assignment there, it is appropriate to retain the status quo with respect to that channel. Therefore, either Stallings or Texan, or both, may amend their applications to specify channel 221A and if they do so will remain in hearing status; either may amend to specify class C channel 277 and if so will be removed from hearing.

10. *Southbridge and Fall River, Mass., and Providence, R.I.*—In the notice of proposed rulemaking herein, in response to the petition of Radio Rhode Island, Inc., it was proposed to assign channel 261A to Providence. Comments in the proceeding requested other uses of the channel, assignment at Southbridge, Mass., or Fall River, Mass., and in the first report and order it was decided that assignment of the channel at Southbridge would best serve the public interest and fulfill the mandate of section 307(b) of the act. Petitions for reconsideration were filed by the parties seeking the other possible uses—Radio

Rhode Island, Inc. (Providence), and Quality Radio Corp. (Fall River). No timely oppositions to the petitions were filed.[3]

11. *Radio Rhode Island.*—Two of Radio Rhode Island's contentions are procedural in nature: (1) That the notice having proposed only use of the channel at Providence, we could not properly without further notice assign it elsewhere, such as Southbridge; and (2) under the circumstances, Radio Rhode Island did not have due notice and an opportunity to express its views with respect to the Southbridge counterproposal. These contentions are without merit. The purpose of a notice of proposed rulemaking is to give general notice of the subject matter involved in the proceeding—here, the assignment of this FM channel in the southern New England area—so that parties may furnish relevant views and data which will be of assistance to the Commission in reaching an appropriate resolution of the matter. It has been and is our practice to take note of counterproposals, such as other uses of the channel involved, advanced in timely comments, since other parties have an opportunity to comment thereon in reply comments. See, for example, second report and order in docket 15935 (Oxford, Miss.), 1 F.C.C. 2d 639, 6 R.R. 1510 (1965). In the present proceeding the comments filed in response to the notice presented information not before the Commission when the notice was issued; i.e., the need and demand for a first FM channel at Southbridge. To issue a further notice whenever an alternative proposal is advanced in timely comments—when parties have an opportunity to comment thereon on reply comments—would obviously impose a substantial and unwarranted delay in resolution of the matter involved and, in FM assignment matters, in the prompt provision of FM service. When a counterproposal is advanced for the first time in reply comments—and therefore interested parties do not generally have a chance to express themselves with respect to it—the counterproposal is not considered unless a further notice is issued or other opportunity for further comment is afforded. See report and order in docket 15716, 5 R.R. 2d 1530, FCC 65–326 (Ebensburg, Pa.). Here, Radio Rhode Island had an opportunity to address itself to the Southbridge counterproposal in reply comments, and in fact did so. Thus it had adequate notice of an alternative use of the channel and a chance to express its views, which it did.

12. This petitioner's third argument is that it made a showing of the technical feasibility of the Providence assignment and established a need for it, and that its extensive showing of need was ignored. This is also without substance. The technical feasibility of an FM assignment is a condition precedent to making it, not a requirement that it be made. Whether or not there is a need for an additional FM assignment at Providence, we held that the need of Southbridge is greater—a conclusion clearly correct in view of Southbridge's substantial population (15,889), with only a daytime-only AM station to serve as a local broadcast outlet unless the proposed 1st FM assign-

[3] On Apr. 12, 1966, WESO Broadcasting Corp., the Southbridge proponent, filed an opposition to the Quality Radio Corp. petition filed Mar. 28. Under sec. 1.106(g) of the rules this opposition was not timely filed and is not considered herein. We must observe the rules limited periods for filing pleading if matters are to be handled expeditiously.

ment is made, compared to Providence's 7 AM stations (4 full time) and 5 class B FM channels, to which the Providence FM assignment requested would add a 13th service. Petitioner's final contention is that we could not refuse to make the assignment because of the problem of mixing class B and class A channels in the same city, when in the notice we said such mixture may be warranted. This argument, too, is without substance. While we mentioned this problem in the first report and order, this was not the basis for our decision, which was the greater need of Southbridge.

13. *Quality Radio Corp.*—Quality Radio, the Fall River proponent, claims that we should reverse our decision because of the greater need of that community. It is said that Southbridge receives more service from outside communities than does Fall River, and that a Fall River assignment would serve more people. These contentions are without merit. As we have said many times, and as section 307(b) of the Communications Act clearly indicates, a matter of high importance is the provision for a local broadcasting outlet to serve local needs and interests. The assignment of channel 261A to Southbridge will provide a first full-time local outlet, whereas Fall River has two full-time AM stations (one class IV, one class III) even though it has no FM channel. Moreover, Southbridge receives less outside service, and from more distant communities, than is the case with Fall River.[4] We recognized in the first report and order herein (par. 20) that the Southbridge-Fall River decision involved a close question; we adhere to the conclusion therein reached, for the reasons stated.

14. In view of the foregoing, and pursuant to authority contained in sections 4(i), 303(r), and 307(b) of the Communications Act of 1934, as amended, *It is ordered*. That:

(*a*) Effective September 5, 1966, the Table of FM Channel Assignments, section 73.202(b) of the Commission's rules, *Is amended* to read, with respect to the cities named, as follows:

City	Channel No.
Lufkin, Tex	257A, 286
Nacogdoches, Tex	221A, 277

(*b*) J. C. Stallings and Texan Broadcasting Co., Inc., applicants for channel 252A at Nacogdoches, Tex., *May amend* their applications (BPH–4709 and BPH–4730) [5] to specify channel 221A or channel 277

[4] Southbridge is about 19 miles from Worcester, with four full-time AM stations (one class IV, three class III) and two class B FM stations, and 28 miles from Springfield, with three full-time AM (one class IV) and three class B FM stations; there is a full-time station at Ware, some 12 miles away, and daytime-only stations at Putnam and Rockville, Conn., some 15 and 20 miles away. Fall River is about 12 miles from New Bedford, with two full-time AM stations (one class IV) and two class B FM stations, and about 16 miles from Providence, with the numerous stations mentioned. Fall River is somewhat closer than Southbridge (about 56 and 43 miles, respectively) to Boston and class I–A clear channel station WBZ. Class I–B station WTIC, Hartford, about 45 miles from Southbridge, provides the area around that city with primary (0.5 mv/m) service full time (a signal of 2 mv/m is required for primary service to places of 2,500 or more population, under sec. 73.182(g) of the rules). Quality's argument concerning the absence of an FM channel in the Fall River Standard Statistical Metropolitan Area (unlike nearly all other SMSA's of anything like comparable size) is simply a restatement of the greater population of that city compared to Southbridge.

[5] Dockets Nos. 16381 and 16382, respectively.

in lieu of channel 252A; the application(s) specifying channel 221A *Will be retained in hearing status* and the application(s) specifying channel 277 *Will be removed from hearing status.*

(*c*) The petition for reconsideration filed in this proceeding by J. C. Stallings *Is granted* to the extent indicated herein and in all other respects *Is denied;* the petitions for reconsideration filed in this proceeding by Radio Rhode Island, Inc., and Quality Radio Corp. *Are denied;* and this proceeding *Is terminated.*

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

FCC 66-707

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202, TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS, (MOUNT STERLING, KY., LITCHFIELD, MINN., OCONTO, WIS., DODGEVILLE, WIS., CLARE, MICH., TIOGA, N. DAK., PRENTISS, MISS., CROSSETT, ARK., BRISTOW, OKLA., BOONE, IOWA, OXFORD AND CLARKSDALE, MISS., WARSAW, VA., KINGSPORT, TENN., NORTON, VA., AND NEON, KY.)	Docket No. 16601 RM-921, RM-922, RM-923, RM-925, RM-931, RM-932, RM-935, RM-938, RM-929, RM-933, RM-934, RM-939

FIRST REPORT AND ORDER

(Adopted July 27, 1966)

BY THE COMMISSION: COMMISSIONER JOHNSON NOT PARTICIPATING.

1. The Commission has before it for consideration its notice of proposed rulemaking, adopted April 20, 1966, and released April 22, 1966 (FCC 66-367), and printed in the Federal Register on April 28, 1966 (31 F.R. 6429), proposing a number of changes in the FM Table of Assignments. A number of formal and informal statements were filed in response to the proposals set out in the notice. All duly filed documents were considered in making the following determinations. Each of the proposals below discussed was unopposed except as otherwise specified. This decision disposes of all the cases except RM-933.

2. RM-921, Mount Sterling, Ky. (Mount Sterling Broadcasting Co.); RM-922, Litchfield, Minn. (Litchfield Broadcasting Corp.); RM-923, Oconto, Wis. (Robert Henry Koeller); RM-925, Dodgeville, Wis. (Dodge-Point Broadcasting Co.); RM-931, Clare, Mich. (Bi-County Broadcasting Corp.); RM-932, Tioga, N. Dak. (Tioga Broadcasting Corp.); RM-935, Prentiss, Miss. (Jeff Davis Broadcasting Service); RM-938, Crossett, Ark. (Radio Station KAGH, Inc.).

In these eight cases, interested parties seek the assignment of a first class A channel in the community, without any other changes in the table. These communities are fairly substantial in size, ranging in population from 1,321 to 5,370, all but 1 being the county seat or the largest community in the county, and all having either no AM station or a daytime-only station. The only one of the eight communities which is not the county seat or the largest community in its county—Tioga, N. Dak., population 2,087—is some 35 miles from the only broadcast stations in its county, at Williston. We are of the view that each merits the proposed assignment. In the case of Mount Sterling, the proposed assignment of channel 280A will barely meet the required

minimum cochannel spacing to channel 280A at London, Ky. Any applicant for the Mount Sterling assignment should take into account the availability of potential sites at both Mount Sterling and London in selecting a transmitter site. In view of the above we find the proposals will serve the public interest and amend the table so as to add the following:

City	Channel No.
Crossett, Ark	285A
Mount Sterling, Ky	280A
Clare, Mich	237A
Litchfield, Minn	237A
Prentiss, Miss	252A
Tioga, N. Dak	280A
Dodgeville, Wis	296A
Oconto, Wis	296A

3. *RM–929, Bristow, Okla.*—Kenneth A. Green, in a petition received by the Commission on March 2, 1966, requested the reassignment of channel 253 from Tulsa to Bristow, Okla. The notice in this proceeding, after an examination of the facilities in Tulsa, the population of that city, and the current demand for channel 253, the city's last unlicensed FM channel,[1] as well as the lack of local service in Bristow, determined that it would not be in the public interest to institute a rulemaking proceeding to consider reassignment of channel 253 from Tulsa to Bristow but that, instead, it would be in the public interest to consider the assignment of channel 265A to Bristow.

4. Creek County, population 40,495, contains the community of Bristow, a community of 4,795 persons, with no local AM or FM service. It is petitioner's contention that because of the community's relatively substantial size, it needs a first aural service in order to provide it and the surrounding area with local entertainment and informational service. Petitioner's pleadings indicate not only that Bristow has no local service, but that there are few services in Creek County as a whole. We agree with Mr. Green in respect to the public service that could be rendered by a full-time FM station in Bristow. Petitioner Green, in comments in response to the notice, requested assignment of channel 261A instead of 265A, presumably because, in light of cochannel and adjacent-channel assignments on the two channels, 261A would afford less limited coverage than 265A. We cannot make the assignment of channel 261A in place of the proposed assignment of channel 265A, because a channel 261A located at Bristow would not meet the minimum mileage separation requirement of 65 miles to channel 258 assigned to Henryetta, Okla.

5. In view of the foregoing, it is our determination that the public interest will best be served by the assignment of channel 265A to Bristow.

6. *RM–934, Oxford, Miss.*—The notice, in response to a petition filed on March 7, 1966, by Carter C. Parnell, Jr., proposed to replace channel 237A in Clarksdale, Miss., with channel 269A and to assign

[1] There are two applications pending for its use: That of Oklahoma Broadcasting Co. (BPH–4175) and that of Southwestern Sales Corp. (BPH–4995).

channel 237A to Oxford (as petitioner requested) or Batesville or Water Valley, Miss.

7. Our notice produced a comment from petitioner and a comment and reply comment from Corinth Broadcasting Co., Inc. Petitioner's comment will be discussed below. The comments of Corinth Broadcasting Co. request our assignment of a channel 237A to Corinth, Miss. This proposed assignment, as admitted in the engineering statement attached to the reply comment, in no way is affected by or affects our consideration of the assignment of a channel 237A to Oxford, Batesville, or Water Valley. Hence, it is not necessary to consider this proposal in order to make a determination as to the proposal set out in our notice of proposed rulemaking. It is under consideration, moreover, in a pending proceeding, docket No. 16762.

8. As cited above, our notice proposed the consideration of the assignment of channel 237A not only to the community requested by petitioner, Oxford, but, alternatively, to Water Valley or Batesville. The purpose of our approach was to permit us to be able to provide for the future needs of Water Valley and/or Batesville in view of the lack of FM assignments in those communities. Petitioner urges that the needs of the alternative communities can be met by the assignment of channel 288A to the former, channel 221A to the latter, as well as channel 240A to Pleasant Grove, Miss.[2] In light of this, we are brought to the question of whether the assignment of channel 237A to Oxford, as such, is in the public interest, considering that community's population and the fact that it already has a class C channel (248). Oxford, with a population of 5,283, is the county seat of and largest community in Lafayette County, which contains 21,355 residents. Mr. Parnell alleges that the present population of Oxford, including the University of Mississippi, is about 12,000 persons. This county seat presently has but one aural service, WSUH, a daytime-only operation. Its only FM assignment, channel 248, was assigned to the community in 1965 in our second report and order in docket No. 15935, FCC 65–779, at the request of the University of Mississippi. The university stated an intention to apply for its use in order to provide a wide assortment of programs of broad social, intellectual, and cultural concepts to the entire northern region of the State of Mississippi, but which sought a commercial channel rather than a noncommercial educational frequency because of the asserted need for advertising revenue to fulfill its objectives. In view of the fact that channel 237A can be assigned to Oxford without precluding any future needed assignments in the area, that it would provide an outlet for purely local needs as against the regional capability of channel 248 also assigned to Oxford, and that it can be assigned without reducing the number of assignments elsewhere, we are of the view that the petitioner's proposal would serve the public interest and should be adopted. While the permanent population of Oxford is relatively small, we are of the view that its position as the location of

[2] Petitioner, in its comment, has expressed an interest in establishing an FM facility at Pleasant Grove, Miss. The material provided us in this proceeding is not sufficient for our institution of a rulemaking proceeding to assign channel 240A to that community. However, we will consider the need for such an assignment in the event a petition is filed in the future.

the university, as well as its situation as a county seat and location in an area removed from large centers of population, warrant the addition of a second channel, since other communities in the area can be accommodated if need arises. While we are reluctant generally to mix class B/C and class A assignments in the same community unless there are substantial considerations in favor of such a course, this appears to be less of a factor here than in the usual case because the operation on the class C channel may be, at least in part, noncommercial, if the university, which sought the assignment of that channel, becomes the licensee on it.

9. In view of the above, we are substituting channel 269A for channel 237A in Clarksdale and assigning channel 237A to Oxford.

10. *RM-939. Warsaw, Va.*—On March 23, 1966, the Commission received a petition from Northern Neck and Tidewater Broadcasting Co., licensee of standard broadcasting station WNNT, Warsaw, Va. In light of the petition, we instituted this rulemaking to consider the substitution of channel 265A for channel 237A in Warsaw.

11. Warsaw, with a population of 549, located in Richmond County, with a population of 6,375, has 1 broadcast service at the present time, WNNT, a daytime-only station. Petitioner would like to activate a full-time FM service in the community but alleges that it is unable to do so because channel 237A, Warsaw's only FM assignment, does not meet our minimum mileage separation requirements. It maintains that channel 265A, located at Warsaw, will meet our requirements and make it feasible for it to implement our intention of making possible a local FM service at the WNNT site.

12. It is not petitioner's intention to alter the number or nature of FM assignments available to Warsaw, but merely to make feasible an FM service, a service which we previously determined was warranted. Therefore, we are of the opinion that it is in the public interest to delete channel 237A from Warsaw and replace it with channel 265A.

13. *Kingsport, Tenn., Norton, Va., and Neon, Ky.*—On our own motion, the notice proposed to correct short-spaced assignments at Kingsport and Norton by making the following interrelated reassignments of channels:

City	Channel No.	
	Present	Proposed
Kingsport, Tenn	253, 292A	253, 285A
Norton, Va	296A	292A
Neon, Ky	285A	296A

Tri-Cities Broadcasting Corp. filed an opposition to our substitution of channel 285A for channel 292A at Kingsport, stating that it had intended to apply for channel 292A under section 73.203(b) of the Commission's rules (the "25-mile rule"), for use at Gate City, Va. Our engineering study indicates that Tri-Cities Broadcasting Corp. will be able to apply for the use of channel 285A at Gate City under the 25-mile rule on our assignment of that channel to Kingsport.

Radio station WKIN, Inc., licensee of station WKIN, Kingsport, and prospective applicant for a new FM station there, supports the proposal to substitute channel 285A for 292A. WKIN points out that it is not possible to find a site on channel 292A, which will meet all the required spacings and permit the required signal (70 dbu) to be placed over the entire city of Kingsport, while this would be possible with the proposed assignment. Our proposal eliminates two short-spacing problems and in no way alters the number or nature of any community's present assignments. Therefore, we find it in the public interest to adopt the proposed reassignments as set out above.

14. A decision concerning the matters relating to RM-933, Boone, Iowa, and related assignments, will be issued shortly.

15. Authority for the amendments adopted herein is contained in sections 4(i), 303, and 307(b) of the Communications Act of 1934, as amended.

16. In accordance with the determinations made above, *It is ordered*, That, effective September 5, 1966, section 73.202 of the Commission's rules, the Table of Assignments, *Is amended* to read, with respect to the communities listed below, as follows:

City	Channel No.	City	Channel No.
Arkansas:		North Dakota:	
Crossett	285A	Tioga	280A
Kentucky:		Oklahoma:	
Mount Sterling	280A	Bristow	265A
Neon	296A	Tennessee:	
Michigan:		Kingsport	253, 285A
Clare	237A	Virginia:	
Minnesota:		Norton	292A
Litchfield	237A	Warsaw	265A
Mississippi:		Wisconsin:	
Clarksdale	269A, 276A	Dodgeville	296A
Oxford	237A, 248	Oconto	296A
Prentiss	252A		

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

FCC 66–706

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.606, TABLE OF ASSIGNMENTS, TELEVISION BROADCAST STATIONS (AKRON AND CANTON, OHIO)	Docket No. 16538

REPORT AND ORDER

(Adopted July 27, 1966)

BY THE COMMISSION: COMMISSIONER JOHNSON NOT PARTICIPATING.

1. The Commission here considers its proposal to interchange the assignments of channels 67 and 23, respectively assigned to Akron and Canton, by the fourth report and order in docket No. 14229 et al. (FCC 65–504), and also to change the ETV reservation at Akron from channel 55 to 49. At the present time channels 49, *55, and 67 are assigned to Akron, and channels 17 and 23 to Canton. See notice of proposed rulemaking, adopted March 16, 1966 (FCC 66–265).

2. The notice pointed out the pertinent background. Summit Radio Corp., licensee of station WAKR–TV, channel 49, Akron, Ohio, had filed a petition in January 1963 to interchange that channel with channel 23, then assigned to Massillon; this was proposed for rulemaking in docket No. 15027, which in turn was incorporated in docket No. 14229. While that proposal was rejected, our subsequent examination of the area, prompted by a desire to review earlier petitions denied in the fourth report and order, showed that by considering flexibility unnecessary where there are existing stations at known sites, channel 23 could be assigned to Akron at the same efficiency as the assignment to Canton. We also noted that the overall plan's priorities and computer program called for assignment of lower channels to larger cities (Akron's population (1960 census) is 290,351 and Canton's 113,631). The notice also pointed out that Midway Television Inc.'s application for channel 23 at Canton (BPCT–3685) was no obstacle to the proposed change, since it was filed in December 1965 after the Commission's announcement, dated September 16, 1965 (FCC 65–813, mimeo. No. 72543), putting on notice applicants filing subsequent to this date that assignments contained in the fourth report table would be subject to change.

3. Parties filing comments in this proceeding are Summit Radio Corp., University of Akron, and WCUE Radio, Inc. All favor the proposed reassignment of channel 23 to Akron from Canton and channel 67 from Akron to Canton. The university, which presently is the applicant for channel *55, feels that the proposed switch of the reservation to channel 49 would be more desirable because the viewing

public is equipped to receive channel 49, which station WAKR–TV has been operating since 1953.

4. While WCUE Radio, Inc., favors the proposed change, it differs from Summit as to what disposition should be made of channel 23, and these views also affect the immediate disposition of the channel 49 assignment. Summit requests that an order be issued modifying station WAKR–TV's authorization from channel 49 to 23. It is urged that this would make it more competitive with the three Cleveland stations which cover Akron in whole or in part with city grade signals,[1] which has resulted in a "seven figure" operating deficit since commencing operation in 1953, and, more importantly, better serve the needs of Akron, which are separate from those of Cleveland. Summit's comments indicate that except for the all-channel legislation, continued operation of WAKR–TV might have been futile, and it foresees continued operating losses for some time, which it hopes will "not become impossibly burdensome"[2] even with the proposed change. WAKR–TV's objective is to strengthen its competitive position by operating the finest possible UHF facility. Thus, it intends to request an increase in power and antenna height when the results of all-channel legislation justify the expense. A major improvement would be achieved by shifting to a lower channel, specifically channel 23, if the proposed change is adopted.

5. WCUE Radio, while favoring the proposal, disputes station WAKR–TV's entitlement to channel 23 without a comparative hearing. This argument is made in reply comments which are untimely, that is, while dated and mailed May 14, 1966, were not received in the Commission until May 17, 1966, 1 day after reply comments were due under the extension granted at WCUE Radio's request (see order extending time for filing reply comments, dated April 29, 1966). Our rules require filing (not mailing) by the date(s) provided for comments and reply comments in a rulemaking. See subpart C of part 1 of the Commission's rules and regulations, which contain no provision comparable to section 1.47(f). Its main arguments appear to be that Summit Radio is not qualified because of an "amalgamation of various dominant, entrenched local interests, who also constitute a powerful nationwide media combine."[3] On the latter question, we do not believe that WCUE has made a convincing case. We note, for example, that there are several other AM and FM stations serving Akron.

6. With respect to the matter of a comparative hearing, although WCUE Radio states that the channel should be left open, we do not find in its comments any indication that it intends to file for the chan-

[1] Stations WKYC–TV (channel 3), WEWS (channel 5), and WJW–TV (channel 8).

[2] ARB Television Coverage Survey, 1965, reveals that station WAKR–TV serves Summit, Holmes, Wayne, and Portage Counties. The net weekly circulation is 20, 10, 6, and 5 percent, respectively, which is the amount of UHF conversion, except in Portage County (21 percent).

[3] Summit owns the stock of Group One Broadcasting, licensee of WONE–AM–FM, Dayton, Ohio. The Berk family, holder of 137½ of Summit's 250 shares, controls the Radio and Television Center of Akron, Inc., where stations WAKR–AM, FM and TV are located. The Beacon Journal Publishing Co., publisher of the Akron Beacon Journal, holder of 112½ shares of Summit, is controlled by Knight Newspapers, Inc., publisher of the Detroit Free Press, owner of the Miami Herald Publishing Co., publisher of the Miami Herald, and owner of 64 percent of the Knight Publishing Co. of Delaware, publisher of the Charlotte Observer and the Charlotte News. John S. Knight, who holds various positions in Knight Newspapers, Inc., and the Knight Publishing Co., is vice president and director of the Miami Tribune, Inc., publisher of the Miami Beach Daily Sun.

nel. Its statements are merely a general argument that the channel should remain available to the best qualified applicant. No other party has indicated an interest in applying. Under these circumstances, we are modifying Summit's license for WAKR–TV to specify channel 23. Since we are deleting channel 67 at Akron, the applicant therefor (Aben E. Johnson, BPCT–3592) may amend to specify channel 55; the educational applicant (University of Akron) may amend to specify channel 49.

7. Authority for the amendments adopted herein is contained in sections 4 (i) and (j), 303, and 307(b) of the Communications Act of 1934, as amended.

8. In view of the foregoing, *It is ordered*, That, effective September 6, 1966, the Television Table of Assignments (sec. 73.606(b) of the Commission's rules and regulations) *Is amended* as follows:

City	Channel No.
Akron, Ohio	23, *49, 55
Canton, Ohio	17, 67

9. *It is further ordered*, That, pursuant to the authority contained in section 316 of the Communications Act of 1934, as amended, the outstanding license of Summit Radio Corp., Akron, Ohio, *Is modified* to specify channel 23 in lieu of channel 49, subject to the following conditions:

(*a*) The licensee shall inform the Commission by August 15, 1966, of its acceptance of the modification.

(*b*) The licensee shall submit to the Commission by September 6, 1966, all technical information normally necessary for the issuance of a construction permit for operation on channel 23, including any changes in antenna and transmission line.

(*c*) The licensee may continue to operate on channel 49 until upon its request the Commission authorizes operation on channel 23.

10. *It is further ordered*, That this proceeding *Is terminated*.

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

FCC 66-708

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.606(b) OF THE COMMISSION RULES AND REGULATIONS (TABLE OF ASSIGNMENTS FOR TELEVISION CHANNELS) TO CHANGE THE PRESENT UHF ASSIGNMENTS AND ADD A THIRD CHANNEL TO TOPEKA, KANS.	Docket No. 16638

REPORT AND ORDER

(Adopted July 27, 1966)

BY THE COMMISSION: COMMISSIONER JOHNSON NOT PARTICIPATING.

1. By notice of proposed rulemaking released herein on May 13, 1966, the Commission proposed on its own motion to substitute three commercial UHF channels at Topeka, Kans., for the two presently assigned there, as follows:

City	Channel No.	
	Present	Proposed
Topeka, Kans.	*11, 13+, 29, 58	*11, 13+, 27, 43, 49

The proposal was designed to remove a hearing conflict between two applicants competing for channel 29 and designated for hearing. There is also a pending application for channel 58. As we pointed out in the notice, Topeka itself is in an area where available UHF channels are relatively scarce, but the availability increases sharply to the west, including at the transmitter locations proposed by the applicants; and, therefore, it does not appear necessary or desirable to hold a hearing for the sole purpose of selecting one of two qualified applicants. The proposed UHF channels were selected by our computer as the most efficient three-channel arrangement possible at Topeka.

2. Comments were filed by Highwood Service, Inc., one of the applicants for channel 29, and by Topeka Television, Inc., the applicant for channel 58. Reply comments were filed by the mayor of Topeka and, jointly, by Highwood and Kansas State Network, Inc., the other channel 29 applicant. The channel 29 applicants strongly support the proposal (Highwood stating that it will amend to channel 27) as does the mayor of Topeka. These parties assert the importance of Topeka as the State capital, with a population (1960 census) of 119,484, and position as an important business, educational, and

cultural center, serving a large retail trading zone. Pointing out that Topeka presently has only one television station (WIBW–TV, channel 13, a CBS affiliate) and must rely for other service on Kansas City stations which provide only slightly more than a signal of grade B intensity to the city, these parties approve the proposal as a means of bringing additional service to the city and area quickly, and urge its speedy adoption.

3. Topeka Television, the channel 58 applicant, does not expressly object to the proposed assignments, but asserts that our proposal is based on a false premise, that there really is demand for three UHF commercial channels in Topeka simply because there are three applicants, whereas Topeka Television believes that in fact there is demand for only two channels, with two stations who would get the ABC and NBC affiliations, and that no one really wants to operate a fourth station, which would necessarily be nonnetwork and, therefore, it is asserted, patently an uneconomic operation in this market of limited size. It asks that before acting herein the Commission ascertain and determine, by whatever means are appropriate, whether each applicant would accept a grant and construct and operate a station, substantially as proposed without diminution of program, staff, and technical proposals, even if it were forced to operate independently because the other two applicants had obtained the network affiliations. In reply, the channel 29 applicants oppose this suggestion as without merit, one which may well serve the private interests of Topeka Television by keeping the comparative hearing between the other two parties going but would not serve the public interest of Topeka. It is stated that the matter of access to network and other program sources should be determined in the marketplace, and that the questions of which applicants will get network affiliations, and whether the one not doing so will find it economically possible to operate, can best be resolved by our proposal, removing the necessity for a comparative hearing and letting the applicants move forward with their proposals.

4. Upon consideration of the matters urged, we are of the view that the proposal should be adopted, and that a fact-finding process of the sort suggested by Topeka Television is neither required nor warranted in this situation. Where additional channels can be made available without seriously impairing the making of other meritorious assignments later—as is the case here—we do not conceive it in the public interest to impose artificial barriers which would limit the major center of Topeka to three commercial channels. We are not prepared to foreclose the possibility of an additional and independent UHF station by refraining from making this assignment. We point out that Topeka will by no means be the smallest city, or the smallest market, where four commercial channels are assigned. The city has a 1960 census population of 119,484, and, according to American Research Bureau (ARB) figures ("Television Factbook," 1966 edition), it is the country's 131st television market, with 126,400 net weekly circulation and 173,900 TV homes. The city of Lubbock, Tex., with 4 commercial channels assigned, has a slightly larger city population (128,691), but in market terms it is ranked behind Topeka, the 140th market in net weekly circulation (118,800) and also lower in TV homes

106–505—66——2

(154,200). Four channels are also assigned to considerably smaller communities and markets such as Great Falls, Mont., Roswell, N. Mex., and Bismarck and Minot, N. Dak.

5. Moreover, it is not in the public interest for a city of the size and importance of Topeka to be limited for an extended period to service from one local station and outside stations providing little better than a grade B signal to it and its environs. If by an action such as that proposed here we can speed the rendition of additional services of local origin—which may well be the result of our action—this we conceive to be a substantial public interest consideration. Therefore, we are adopting the proposal.

6. The applicants now in hearing seek the lowest channel now assigned to Topeka, and, therefore, it is appropriate to reserve the lowest new channel for use by one of these applicants. The other of the hearing applicants, and Topeka Television, Inc., may amend their applications to specify either of the other two channels.

7. In view of the foregoing, *It is ordered*, That, effective September 6, 1966, section 73.606(b) of the Commission's rules and regulations *Is amended*, with respect to Topeka, Kans., to read as follows:

City	Channel No.
Topeka, Kans.	*11, 13+, 27, 43, 49

8. *It is further ordered*, That Highwood Service, Inc., and Kansas State Network, Inc., *May amend* their pending applications to specify channel 27 instead of channel 29 and if they so amend will remain in hearing status; or either or both of them may amend to specify channel 43 or channel 49 and will be removed from hearing status; and Topeka Television, Inc., *May amend* its pending application for channel 58 to specify channel 43 or channel 49.[1]

9. *It is further ordered*, That this proceeding *Is terminated.*

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

[1] The respective application and docket numbers are: Kansas State Network, Inc., BPCT-3537, docket No. 16606; Highwood Service, Inc., BPCT-3561, docket No. 16607; Topeka Television, Inc., BPCT-3662.

FCC 66-696

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF PART 21 OF THE COMMISSION'S RULES AND REGULATIONS PURSUANT TO DOCKETS NOS. 14712 AND 14729

ORDER

(Adopted July 27, 1966)

BY THE COMMISSION: COMMISSIONER JOHNSON NOT PARTICIPATING.

At a session of the Federal Communications Commission held at its offices in Washington, D.C., on the 27th day of July 1966;

1. The Commission, on December 10, 1962, released a memorandum opinion and order in docket No. 14712, which was published in the Federal Register on December 13, 1962 (27 F.R. 12372), and on July 12, 1963, released a memorandum opinion and order in docket No. 14729, which was published in the Federal Register on July 23, 1963 (28 F.R. 7476).

2. The report and order released in docket No. 14712, inter alia, allocated the frequency bands 2110–2130 Mc/s and 2160–2180 Mc/s exclusively for common carrier use in the Domestic Public Radio Services. Said order also specified a maximum bandwidth of 800 kc/s, and required that frequency stability be maintained within a tolerance of 0.001 percent of the assigned frequency. Additionally, the docket made available the frequency band 2150–2160 Mc/s for the development of omnidirectional systems.

3. Docket No. 14729 made certain frequency allocation adjustments between the private and common carrier fixed services. The Commission therein allocated the frequency bands 6425–6525 Mc/s and 11,700–12,200 Mc/s to communication common carriers and limited use of the frequency band 7050–7125 Mc/s by communication common carriers. Additionally, certain restrictions on television pickup operations by common carriers in the frequency bands 6425–6525 Mc/s were eliminated. Both of the considered orders provide that necessary amendments to part 21 of the rules would follow.

4. Since the amendments adopted herein conform to rule changes adopted following required rulemaking procedures and are editorial in nature, prior publication of notice of proposed rulemaking under the provisions of section 4 of the Administrative Procedure Act is unnecessary and the amendments may become effective immediately.

5. The amendments adopted herein are issued pursuant to authority

contained in sections 4(i) and 303 of the Communications Act of 1934, as amended.

6. Accordingly, *It is ordered*, effective August 5, 1966, part 21 of the Commission's rules is amended.

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

FCC 66-681

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AN INQUIRY INTO THE OPTIMUM FREQUENCY SPACING BETWEEN ASSIGNABLE FREQUENCIES IN THE LAND MOBILE SERVICE AND THE FEASIBILITY OF FREQUENCY SHARING BY TELEVISION AND LAND MOBILE SERVICES	Docket No. 15398

FURTHER NOTICE OF INQUIRY

(Adopted July 20, 1966)

BY THE COMMISSION: COMMISSIONER JOHNSON NOT PARTICIPATING.

1. Because the Advisory Committee for Land Mobile Radio Services is considering the practicability of reducing channel spacing in the frequency bands allocated to the land mobile services, this further notice of inquiry is concerned only with that portion of the above-captioned docket proceeding dealing with the feasibility of sharing frequencies between stations in the television broadcasting and Land Mobile Radio Services.

2. The Commission has under study the comments filed in this proceeding with a view toward determining the means by which sharing of television channels by land mobile services, if deemed feasible, could be accomplished. The Electronic Industries Association (EIA) and the Joint Technical Advisory Committee (JTAC), which were specifically invited to file comments, conclude that carefully controlled sharing of television channels by land mobile services is technically feasible and each submitted extensive information in support of those views. The Association of Maximum Service Telecasters, Inc. (AMST), also filed extensive comments, but in opposition to those of EIA and JTAC.

3. In the Commission's view, the wide divergence of opinion indicates either that data used as the basis for the theoretical computations were misinterpreted by the two factions or that opinions were developed on different bases. Because the Commission is not satisfied that sufficient data are available at this time to make a sound judgment regarding the practicability of sharing as proposed herein, it has decided to take two courses of action, both of which stem from the overall conclusion that tests should be conducted to provide additional information on which such a judgment may be based and which cannot be obtained from theoretical or laboratory studies.

4. The first course of action is to establish a committee to test sharing of television channels by land mobile radio systems. This committee and the scope of its authority is set forth in the public

notice adopted this date. Secondly, while the committee is forming, the Commission must obtain additional information which was not submitted in the original comments. This information, considered essential before a complete and accurate analysis of the comments can be made, refers to television receivers primarily and is as follows:

(*a*) How, and to what degree, are various television receivers affected when operating in strong signal areas (e.g., 1 to 5 v at the receiver antenna terminals) when subjected simultaneously to signals from stations in the land mobile service?

(*b*) What is the effect on television receivers of signals from multiple land mobile base transmitters operating simultaneously in the same area?

(*c*) There is insufficient information in the docket on tests that have already been conducted regarding adjacent and cochannel desired-to-undesired signal ratios which result in interference in television receivers. More detailed data are needed in order to determine median values and distributions of the performance characteristics of representative high and low VHF band television channels. These data should cover a range of frequencies from 6 Mc/s below to 6 Mc/s above that to which the measured receiver was tuned, and a range of desired signal levels including levels up to several volts.

(*d*) Information is also needed as to the estimated number of receivers in use by the public represented by each of the measured receivers, whether the receivers were color or monochrome, and whether the television signal was color or monochrome.

(*e*) What effect will solid state receivers have on the aforementioned data?

5. In accordance with section 1.419 of the Commission's rules, interested parties are requested to file an original and 14 copies of all comments and statements on or before September 2, 1966, and reply comments on or before September 19, 1966.

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

FCC 66-682

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

PUBLIC NOTICE

FCC ESTABLISHES COMMITTEE FOR TESTING SHARING OF TELEVISION CHANNELS BY LAND MOBILE RADIO SERVICES

(Adopted July 20, 1966)

BY THE COMMISSION: COMMISSIONER JOHNSON NOT PARTICIPATING.

On June 30, 1966, at the direction of the Commission, a meeting was held by industry and FCC personnel concerned with sharing of television channels with the land mobile services. As a result, the Commission today adopted a further notice of inquiry in docket 15398 in which it concluded that the information necessary for a decision regarding shared use of television channels by stations in the land mobile services is incomplete and that some of the required data can be obtained only through field tests involving actual operation of a typical land mobile system on a television channel. Additionally, the Commission requested information from interested parties concerning television receiver characteristics.

As an initial step toward setting up field tests, the Commission, effective this date and in accordance with section 3(b) of Executive Order 11007, is establishing an advisory committee to be composed of representatives from the Commission, the National Association of Broadcasters (NAB), Electronic Industries Association (EIA), National Association of Manufacturers (NAM), Association of Maximum Service Telecasters, Inc. (AMST), and the Joint Technical Advisory Committee (JTAC). This committee will be expected to: (1) Assess and analyze the information now available which bears on the feasibility of sharing television channels; (2) identify such additional information as may be necessary or desirable for a proper decision in the matter; (3) determine what part of, and the manner in which, such additional information can be obtained through field tests; (4) set up parameters and guidelines for tests which will provide meaningful results under conditions closely approximating normal operations of land mobile stations; (5) arrange for and conduct such tests; and (6) submit appropriate reports to the Commission concerning such test data.

As pointed out in the initial notice of inquiry in this proceeding, consideration of the feasibility of sharing television channels by stations in the Land Mobile Radio Services is restricted initially to the VHF channels 2 through 13 since the VHF Table of Assignments is more stabilized than is the Table of UHF Assignments, which is being changed frequently. Testing of UHF channel sharing may, however, be conducted at a later date. So long as the test purposes and parame-

ters are reasonable, no other restrictions will be placed on the committee at this time except that such tests should be conducted in a thoroughly professional manner and as expeditiously as possible.

The date and place of the first meeting and the appointment of a chairman will be announced shortly.

FCC 66-675

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE & TELEGRAPH CO. Charges, Practices, Classifications, and Regulations for and in Connection With Teletypewriter Exchange Service	Docket No. 15011

MEMORANDUM OPINION AND ORDER

(Adopted July 20, 1966)

BY THE COMMISSION: COMMISSIONERS HYDE, CHAIRMAN, AND LEE DISSENTING; COMMISSIONER LOEVINGER CONCURRING IN THE RESULT; COMMISSIONER JOHNSON NOT PARTICIPATING.

1. We have reviewed the findings of fact and conclusions in the recommended decision, and the exceptions and written submittals concerning such exceptions, with due regard for the fact that, following the close of the record herein, the Commission instituted a general investigation of rates of the Bell System companies for their interstate and foreign communications services (docket 16258). The purposes of the latter investigation are to determine the overall revenue requirements of respondents' interstate and foreign communications services and the principles that should apply in the distribution of those revenue requirements among the principal classes of respondents' services. Because of the pendency of the instant proceeding, the lawfulness of TWX rates was excluded as a specific issue in docket 16258.

2. We note that the adjustments made by the recommended decision on the claimed rate base, which adjustments are supported by the record, would result in a return of 8.99 percent if the proposed rates of respondents were to be permitted to go into effect on August 1, 1966, as now scheduled. Such return is considerably in excess of the earnings objective set by respondents according to the record herein. We further note that the rates proposed by respondents involve very substantial increases over present rates. In fact, respondents estimated that the proposed rates would result in increases of more than 100 percent in the charges to about 30 percent of all present users. As a consequence, respondents assumed these users would discontinue their TWX service. In addition, another 45 percent of all users would experience rate increases of up to 100 percent.

3. As we have already noted, we are now engaged in an overall proceeding in docket No. 16258. The determinations we make in the broader context of that proceeding will address themselves to the proper overall return for respondents as well as the contribution that the TWX service should make to such overall return. It could, and probably will, affect materially any determination we might now make

in the limited context of this proceeding. Under these circumstances, and particularly in the absence of appropriate evidence as to the proper earnings level herein, we are of the opinion that we should not make definitive rulings on this subject here or rule finally on the numerous exceptions to the recommended decision. Instead, we will defer definitive rulings in this regard until we dispose of these matters in our decision in docket No. 16258. Accordingly, we will consolidate the proceedings herein with the proceedings in docket No. 16258.

4. We must now determine what rates respondents shall be permitted to put into effect during the interim period; that is, until we reach our final determination in docket No. 16258. On the one hand, we cannot, on the basis of the evidence of record herein when considered within the limited context of the proceeding, permit the rates proposed by respondents to be effective for the interim period, for we cannot make the requisite findings of justness and reasonableness. On the other hand, again within the context of this proceeding, we are of the opinion that the earnings presently realized from TWX service should be adjusted upward by considerable amounts in order that the TWX service shall make a reasonable and adequate contribution to respondents' revenue requirements during the interim period and not be a burden on other services. After review of the entire matter, we believe that the objective can be achieved if the rates set forth in attachments A and B herein were to become effective. These rates for the basic TWX service are not inconsistent with the evidence of record and would be acceptable to the Commission for interim application without prejudice to such revisions as may be required or authorized in our final decision in the light of the determinations to be made in docket No. 16258, with which this proceeding is now being consolidated. It is to be noted that these rates, which we will permit respondents to make effective on not less than 1 day's notice, while providing revenues of some $5 million less per year than those proposed by respondents, will, however, increase present earnings substantially. Should respondents revise their proposed rates on an interim basis, in accordance with the suggestions set forth in attachments A and B hereof, we would be disposed to delete that part of our order herein of January 28, 1965, which requires respondents to keep an accounting of the amounts collected by reason of the increased charges proposed by respondents.

CONCLUSION

5. On the basis of all of the foregoing, we find and conclude that respondents have not demonstrated that the increases proposed by them are, or would be, just and reasonable, if permitted to be applied during the interim period until a decision is reached in docket No. 16258 and that such proposed rates should not be permitted to become effective. We further conclude that the rates set forth in attachments A and B hereto are warranted and should be permitted to become effective on not less than 1 day's notice. Finally, we conclude that the proceedings herein should be consolidated with the proceedings in docket No. 16258 and that the hearing order in that docket should be amended accordingly.

Accordingly, it is ordered, This 20th day of July 1966, that the proceedings herein in docket 15011 *Are hereby consolidated* with the proceedings in docket 16258, and issue 3 of our order of October 27, 1965, in docket 16258 (FCC 65–959) *Is amended* to read: "Whether the charges for (1) message toll telephone service, (2) WATS, (3) TWX, (4) private line telephone grade service, (5) private line telegraph grade service, and (6) all other service, except Telpak (as to which a separate proceeding is now pending in docket No. 14251) * * *": and

It is further ordered, That the TWX tariff schedules filed by respondents to become effective August 1, 1966, insofar as they are applicable to the basic TWX service for which rates are set forth in attachments A and B hereof, *May not become effective* and *Shall be cancelled;* and

It is further ordered, That respondents *Are hereby granted* special permission to file tariff schedules on not less than 1 day's notice to the Commission and to the public establishing the TWX rates set forth on attachments A and B hereof.

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

ATTACHMENT A

SUGGESTED MONTHLY CHARGES FOR BASIC TWX SERVICE

60 Speed typewritten connection using a 15 type keyboard sending and receiving (KSR) teletypewriter with type bars	$40.00 a month
60 Speed typewritten connection using a 19 type automatic sending and receiving (ASR) teletypewriter with type bars	$60.00 a month
100 Speed typewritten connection using a 33 type keyboard sending and receiving (KSR) teletypewriter with type wheel	$45.00 a month
100 Speed typewritten connection using a 33 type automatic sending and receiving (ASR) teletypewriter with type wheel	$60.00 a month
Installation and move charges for basic TWX service:	
Initial installation of a basic TWX service	$50. 00
Move of basic TWX service to different premises	50. 00
Move of basic TWX service on same premises	25. 00

ATTACHMENT B

SUGGESTED MONTHLY CHARGES FOR TWX CONNECTIONS

Rate airline mile		Interstate 2-point connections paid,[1] rate per minute or fraction thereof	Interstate conference connections paid[2]; the basis of charges is—	
Over—	Up to and including—		Between the 2 exchanges farthest apart and including 1 station in each of these exchanges (for initial period of 1 minute)[3]	For each additional station regardless of location
0	50	$0. 20	$0. 30	$0. 20
50	110	.25	.40	.25
110	185	.30	.45	.30
185	280	.35	.55	.35
280	450	.40	.60	.40
450	800	.45	.70	.45
800	1,300	.50	.75	.50
1,300	2,000	.55	.85	.55
2,000		.60	.90	.60

[1] For collect calls, add $0.15 to the total charge on a "paid" basis.
[2] On collect calls add $0.15 to the total conference charge computed on a "paid" basis.
[3] Additional period rate per minute is same as initial period rate.

FCC 66-676

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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

ORDER

(Adopted July 20, 1966)

BY THE COMMISSION: COMMISSIONERS HYDE, CHAIRMAN, AND LEE DISSENTING; COMMISSIONER LOEVINGER CONCURRING IN THE RESULT; COMMISSIONER JOHNSON NOT PARTICIPATING.

At a session of the Federal Communications Commission held at its offices in Washington, D.C., on the 20th day of July 1966;

The Commission having adopted a memorandum opinion and order today in docket 15011 consolidating the proceedings in docket 15011 with the proceedings in docket 16258;

It is ordered, That issue 3, specified in our order of October 27, 1965 (FCC 65-959), in docket 16258 *Is amended* to read: "Whether the charges for (1) message toll telephone service, (2) WATS, (3) TWX, (4) private line telephone grade service, (5) private line telegraph grade service, and (6) all other service, except Telpak (as to which a separate proceeding is now pending in docket No. 14251) * * *."

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

FCC 66-680

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of WESTERN MICROWAVE, BOZEMAN, MONT. For Fixed Point to Point Microwave Stations in the Domestic Public Radio Service	File No. 3562-C1-P-62

MEMORANDUM OPINION AND ORDER

(Adopted July 20, 1966)

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

1. The Commission has before it for consideration: (1) The above-captioned application; (2) a petition to deny filed on June 1, 1962, by the Meyer Broadcasting Co. (Meyer), licensee of station KUMV-TV, Williston, N. Dak.; (3) an opposition to petition to deny filed on June 28, 1962, by Western Microwave (Western); and (4) an informal protest filed on March 1, 1965, by the Circle TV Booster Club, Inc. (Circle), licensee of television translator stations K10AT and K13BC, Circle, Mont.[1]

2. This application, as originally filed, was one of four applications seeking to provide microwave service to CATV systems in Glendive and Sidney, Mont., and Williston, N. Dak. Western proposed to provide the signals of television stations KCPX-TV and KUED, Salt Lake City, Utah, and KOOK-TV and KULR-TV, Billings, Mont.[2] Subsequently, petitions to deny were filed against the applications by Glendive Broadcasting Corp., licensee of station KXGN-TV, Glendive, Mont., and by Meyer. The Glendive petition was withdrawn on March 26, 1965, and by amendments filed in May and June of 1965, Western agreed to accept a grant conditioned in accordance with the rules adopted by the Commission in its first report and order in dockets Nos. 14895 and 15233 (38 FCC 683, April 22, 1965). On August 4, 1965, the Chief, Common Carrier Bureau, pursuant to delegated authority, granted the applications proposing service to Glendive and Sidney and deferred action on the Williston portion of the applications pending appropriate action upon the Meyer petition to deny.

3. Meyer alleges, in its petition, that the economic impact of a grant of the Western application upon the operations of KUMV-TV in

[1] Circle rebroadcasts the signals of stations KUMV-TV, Williston, and KXGN-TV, Glendive, on channels 10 and 13, respectively, in Circle, Mont., on low power translators.
[2] By amendment of June 14, 1965, station KUTV, Salt Lake City, Utah, was substituted in place of station KUED.

Williston and within the station's coverage area would jeopardize the station's continued existence and/or result in the curtailment of the quality or quantity of the station's programing service; that 81 percent of its total gross income is derived from local sources in Williston and surrounding communities; that the station suffered operating losses in 1959, 1960, and 1961; and that in view of the nature and size of the area and population served by the station, there are squarely presented the issues of whether the public interest would be served by a grant, the impact of such operations upon the station's programing service, and whether the impact would threaten the station's continued existence or have an adverse impact on program service. In its opposition, Western contends that Meyer has failed to make specific allegations of fact sufficient to raise substantial and material issues; that, in any event, the existence of CATV systems would have only a slight impact upon KUMV–TV; that the competition introduced for 9½ percent of the station's audience should redound to the benefit of the public; and that since Western intends to satisfy the conditions set forth in the *Carter Mountain* case (*Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 321 F. 2d 359 (C.A.D.C.), cert. den., 375 U.S. 951 (1963)), that case supports a grant here.

4. Meyer's petition will be denied. The Commission in enacting the carriage and program exclusivity rules with respect to all CATV systems acknowledged that there is a competitive impact on local television stations arising from CATV operations, and expressly designed such rules to ease the effect of that impact by insuring that the competition involved would be conducted under fair and reasonable conditions. In the first report and order (par. 76), we stated that, "So long as CATV is not an insignificant factor in the competitive conditions facing the television broadcasting industry, we think every station affected is entitled to appropriate carriage and nonduplication benefits—irrespective of the specific damage which any individual CATV system may do to the financial health of the individual station. Commission action to achieve an accommodation of this nature between the two services is appropriate and in the public interest."

5. The rules adopted in the second report, 2 FCC 2d 725, 31 F.R. 4540, set forth the basic ground rules under which we will operate in this area. We recognized, however, that the rules would not solve all problems and stated that, should they be inadequate in individual cases, special action could be obtained upon an appropriate showing. But in the absence of such a showing we will adhere normally to the safeguards afforded by the rules. No such showing has been made in this case; nor has anything specific been filed by Meyer at any time during the course of this proceeding which would warrant our affording greater relief than that already provided for in the rules. Accordingly, the petition will be denied.

6. Circle's objections are based on (1) its fear that a grant of the Western application may result in the demise of KUMV–TV and (2) its belief that a grant would certainly prevent the activation of the other assigned VHF commercial channel (11) in Williston. The first objection has been considered in denying the Meyer petition to deny. As to the remaining objection we note that on November 24, 1965, the

Commission authorized the Dickinson Radio Association, licensee of station KDIX–TV, Dickinson, N. Dak., to operate a 100-w VHF translator (K11HC) on channel 11 in Williston, rebroadcasting the signal of station KDIX–TV, and that Western intends to carry this station on its CATV system. While we certainly recognize that a high-powered VHF translator operating on an assigned broadcast channel is not the total answer to the problem of inadequate television service, we did authorize such operations in the hope that they would ultimately develop into regular broadcast station operations (see report and order in docket No. 15858, 1 FCC 2d 15, 19 (1965)). In the new rules adopted with respect to all CATV systems the Commission has extended the carriage and same-day nonduplication requirements to translators operating in the community of the CATV system with 100 w or higher power. The carriage requirements as to translators do not apply in instances where the CATV system is carrying the originating station. In the instant situation, where the Williston CATV system intends to carry the signal of the station rebroadcast by the Williston translator (KDIX–TV), it would, similarly, be required to give the same degree of protection to this station as it would be required to give to the translator if it were carrying the translator. In view of the facts that (1) Circle does not operate a translator in Williston, (2) the station rebroadcast by the Williston translator is to be carried on the Williston CATV system, and (3) the carriage and program exclusivity rules will be extended to the parent station, Circle's petition will be denied.

Accordingly, *It is ordered*, That the petition to deny filed by Meyer Broadcasting Co. and the informal protest filed by Circle TV Booster Club, Inc., *Are denied*, and the above application, as amended, of Western Microwave, *Is granted*.

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

DISSENTING STATEMENT OF COMMISSIONER KENNETH A. COX

I concur in the grant of authority to bring in the Billings stations. However, I dissent to the balance of the action which permits applicant to leapfrog stations located much closer to Williston and to bring in the signals of two Salt Lake stations located more than 650 miles away. There are at least 8 or 10 television stations substantially nearer to Williston which quite probably have a greater community of interest with Williston and its people. I think the broadcast industry should be on notice that the leapfrogging issue will be considered by the Commission only on the request of stations bypassed by the microwave applicant. Of course, present and potential broadcasters in the community to which the distant signals are to be provided may petition for relief upon a substantial showing of probable impact upon their local operations.

I think this application also raises serious questions because it involves cross-ownership of broadcast and CATV interests. The applicant originally sought to provide microwave service to CATV systems in Glendive and Sidney, Mont., as well as in Williston, these

portions having been granted earlier. It is significant that one of the dominant interests in Western Microwave owns half of the Glendive CATV system and includes the licensee of one of the Salt Lake stations whose signals are being spread over these great distances. The application originally proposed carriage of the Salt Lake educational station, but it was amended to substitute the signal of the jointly owned commercial station in Salt Lake. While I have no objection to people having interests in both broadcast and CATV facilities, I think such cross-ownership poses problems where it is used to extend the signal of a jointly owned station, perhaps to the competitive disadvantage of other stations in the area.

FCC 66-699

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Application of COMMUNICATIONS SATELLITE CORP. For Authority To Construct Four Synchronous Communications Satellites and for the Approval of the Technical Characteristics Thereof	File No. 3-CSS-P-66

ORDER AND AUTHORIZATION

(Adopted July 27, 1966)

BY THE COMMISSION: COMMISSIONER JOHNSON NOT PARTICIPATING.

At a session of the Federal Communications Commission held at its offices in Washington, D.C., on the 27th day of July 1966;

The Commission having under consideration a request by the Communications Satellite Corp. (Comsat) to modify the Commission's order and authorization, file No. 3-CSS-P-66, issued November 15, 1965, with respect to certain technical specifications and to extend the time within which to complete construction from July 15, 1966, to September 16, 1966;

It appearing, That Comsat now proposes simultaneous operation of the four traveling wave tubes (TWT's) in the satellites during short intermittent switching periods rather than continuous use of three tubes with the fourth as a standby;

It further appearing, That this proposed mode of operation will increase the maximum effective radiated power of the satellites, but will not exceed the maximum flux density on the surface of the earth permitted under the Commission's rules and international regulations;

It further appearing, That Comsat proposes to modify the beacon transmitter frequency specified at 4121 Mc/s to 4058.15 and 4182.0 Mc/s;

It further appearing, That unavoidable delays have occurred in the construction schedule of the satellites but that the extension of time requested will not delay rendition of service for the Apollo program as required by NASA;

It further appearing, That the grant of the requested modifications should permit more effective operation of the satellites and thereby serve the public interest;

It is ordered, That the request for modifications of the order and authorization, file No. 3-CSS-P-66, issued November 15, 1965, *Is granted*, and that said order and authorization *Is modified*, to the extent hereinafter set forth;

106-505—66——3

(*a*) The technical specifications with respect to the permissible power of the satellites and beacon transmitter frequency *Be and hereby are deleted;*

(*b*) That in place thereof the following specifications *Be and hereby are incorporated* in the above-referenced order:

"Power with use of three traveling wave tubes: 47.9 w max. ERP single carrier, 32.2 w max. ERP multiple carriers.

"Power with simultaneous use of four traveling wave tubes during short intermittent switching periods: 60.3 w max. ERP single carrier, 42.6 w max. ERP multiple carriers;"

(*c*) Beacon transmitters:

"Frequency: 4058.15 and 4182.0 Mc/s."

It is further ordered, That the time within which construction of the satellites shall be completed is extended from July 15 to September 16, 1966.

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

FCC 66R-290

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of NED N. BUTLER AND CLAUDE M. GRAY, D.B.A. THE PRATTVILLE BROADCASTING CO., PRATTVILLE, ALA. For Construction Permit	Docket No. 14878 File No. BP-14571

APPEARANCES

Dean George Hill and *Ray R. Paul*, on behalf of Ned N. Butler and Claude M. Gray, d.b.a. the Prattville Broadcasting Co.; and *Larry M. Berkow*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted July 25, 1966)

BY THE REVIEW BOARD: BERKEMEYER AND KESSLER; BOARD MEMBER NELSON CONCURRING WITH STATEMENT.

1. Ned N. Butler and Claude M. Gray, d.b.a. the Prattville Broadcasting Co. (Prattville), seek permission to construct a new class III standard broadcast station to operate daytime only on the frequency 1330 kc with power of 1,000 w, directional array, at Prattville, Ala. By order (FCC 62-1266, released December 10, 1962) Prattville's application was designated for hearing in a comparative proceeding with the then mutually exclusive application of Billy Walker (docket No. 14879). Following the issuance of an initial decision (FCC 63D-70, released June 21, 1963) recommending a grant of Walker's application, information bearing on the character qualifications of both applicants was brought to the Review Board's attention and, as a result thereof, the record was reopened, the issues were enlarged, and the matter was remanded for further hearing and the preparation of a supplemental initial decision.[1] The withdrawal of Walker's application prior to termination of the remand proceeding moots all issues pertaining to him and the standard comparative issue.[2] At this juncture of the proceeding the decisive issues are those added against Prattville subsequent to the issuance of the initial decision,[3] to wit: (*a*) Whether in

[1] The issues against Walker were enlarged at the time the proceeding was remanded for further hearing (memorandum opinion and order, FCC 64R-464, released Sept. 29, 1964). Subsequently, by memorandum opinion and order, FCC 65R-83, 4 R.R. 2d 728, the issues against Prattville were enlarged.

[2] By order, FCC 65M-778, released June 16, 1965, the examiner granted Walker's petition requesting dismissal of his application.

[3] As originally designated the issues pertaining to Prattville seek to determine the areas and populations to be served; whether Prattville is financially qualified; whether a grant of its application would contravene the provisions of the Commission's duopoly rule (sec. 73.35(a)); and the standard comparative issue. With the exception of the standard comparative issue, each of the foregoing was decided in a manner favorable to Prattville. Our decision herein negates the need for further discussion of these issues.

connection with the last filed renewal application (1964) Ned N. Butler, as licensee of station WTLS, Tallassee, Ala., submitted falsified program logs to the Commission in violation of sections 73.111 and 73.112 of the Commission's rules; (*b*) whether as licensee of station WTLS Butler engaged in the practice of "double billing" subsequent to the issuance of the Commission's March 9, 1962, public notice concerning that practice; and (*c*) whether in light of the evidence adduced pursuant to the preceding issues, Prattville possesses the requisite character qualifications to be a licensee of the Commission. Hearing Examiner Basil P. Cooper, in his supplemental initial decision, resolved each of these issues adversely to Prattville and recommended that its application be denied.

2. We have considered the examiner's findings of fact in light of the exceptions filed, the oral arguments of the parties before a panel of the Board on May 26, 1966, and our review of the record. Except as otherwise indicated herein or in our rulings on exceptions contained in the appendix attached hereto, the examiner's findings of fact are adopted. The examiner's recommendation that Prattville's application be denied is premised on his conclusions that, as licensee of station WTLS, Ned N. Butler engaged in double billing after the issuance of the Commission's March 9, 1962, public notice, and that Butler submitted falsified program logs in connection with the 1964 application for the renewal of WTLS' license. We agree with the examiner's ultimate recommendation that Prattville's application be denied. However, because we are unable to concur with his conclusion that Butler engaged in double billing, and because it is unclear from the supplemential initial decision whether the examiner concluded that Butler had actual knowledge of the log falsification, we are substituting the following separate and independent conclusions for those reached by the examiner. Specifically we conclude:

(*a*) That the evidence of record does not permit a determination that as licensee of WTLS Butler engaged in double billing;

(*b*) That standing alone and without regard to our holding in (*c*) below, Butler knowingly submitted falsified program logs to the Commission in connection with the 1964 application for the renewal of WTLS' license; and

(*c*) That standing alone and without regard to our holding in (*b*), Butler's gross negligence and total disregard of his responsibilities as a licensee of the Commission in the preparation and submission of program logs require the imputation to him of the willful misconduct of the person or persons responsible for the log falsification.

We direct our attention first to the question of double billing.

DOUBLE BILLING

3. The essential facts are undisputed. Ned Butler, trading as the Ne-Ler Co., is the sole owner and licensee of standard broadcast station WTLS, Tallassee, Ala., which operates daytime only on the frequency 1300 kc with power of 1,000 w. In late 1962 Butler entered into an oral agreement with George B. Johnson, a partner in the George B.

Johnson Hardware Store,[4] Eclectic, Ala., for the sale of spot announcements. The price to be paid for the announcements was $1 each and they were to be broadcast by WTLS at the rate of 100 per month. It was agreed that the Johnsons would pay one-half of the monthly $100 charge in cash and that a $50 per month trade credit would be given to Butler for the balance. The "trade-out" provisions did not permit Butler to apply his credit directly against the purchase price of merchandise but only permitted him to purchase items at their wholesale price and to apply his credit to the difference between the wholesale and retail prices.

4. The monthly bills for the Johnson account were prepared by Mrs. Butler and attached to each was a certificate signed by Butler attesting to the facts recited in the bill. Butler admitted knowing that the bills and certificates were used to obtain cooperative advertising money from an electrical appliance supplier of the Johnsons. Mrs. Butler's record of WTLS' advertising accounts reflects the existence of the agreement with the Johnsons and that over its 2-year term the station accumulated a $1,200 credit. At no time from the inception of the agreement to the date of the remand hearing did Butler purchase any merchandise from the Johnsons and the $1,200 credit remains unused. Although it was the Johnsons' practice to keep credit notations on check stubs, no such notations appeared on the stubs of checks issued to Butler for the spot announcements. However, the testimony of George and Andrew Johnson confirms the existence of the agreement and the terms thereof as outlined above. Both brothers stated that if Butler were to come into the store at this time, they would honor the agreement.

5. Butler testified that he agreed to the trade-out arrangement because he had intended to enlarge the physical facilities of WTLS and would need building materials of the type sold by the Johnsons. He explained that his failure to purchase material from the Johnsons after entering the agreement was due to his decision to defer the planned expansion because of his involvement in the instant hearing.

6. The hearing examiner's conclusions on the double billing issue follow, in substance, those of the Broadcast Bureau. The Broadcast Bureau attacks the agreement as a fraudulent scheme designed to circumvent the Commission's policy against double billing, and in support of its position points out that Butler knew of the Commission's double billing policy; that he knew the agreement would facilitate getting cooperative advertising money from the supplier; that he never used the credit he accumulated; and that he misled the supplier by failing to indicate on the bills and certificates that half of the advertising cost was being paid through an unusual credit arrangement. To arrive at the result urged by the Bureau we would have to either (*a*) assume that the supplier had not been apprised of the trade-out arrangement and that had it been so apprised it would have refused to contribute to the Johnsons' advertising costs, or (*b*) conclude that the agreement itself was a sham. There is no evidence in the record as to what, if any, information concerning the trade-out

[4] The George B. Johnson Hardware Store is a partnership composed of George B. Johnson, his brother, Andrew Jackson Johnson, and their mother.

agreement was furnished to the supplier from whom the Johnsons received cooperative advertising money. Nor does the record support the conclusion that the arrangement was merely "window dressing" for a scheme to dupe the supplier. As previously noted, both parties to the agreement confirmed its existence and its essential terms; the station's business records reflect the accumulation of a $1,200 credit; and the Johnsons testified they consider themselves bound by the agreement and are prepared to honor it. Butler's explanation as to why he entered into the agreement and why he has not used the credit to date stands unrefuted. The credit accrued at the rate of $50 per month and it may reasonably be assumed, as Butler urges, that until the full credit of $1,200 was available there was no purpose in proceeding with the construction.

7. We are not persuaded by the Bureau's argument that the bona fides of the arrangement are subject to question because of insufficient consideration flowing from the Johnsons to Butler. By agreeing to sell merchandise to Butler at their wholesale price the Johnsons agreed to forgo what would otherwise have been their profit on the sales. Under the terms of the agreement the amount of profit to be relinquished is equal to half of the total price of the spot announcements. Having previously paid the other half in cash, Butler's use of the $1,200 credit will result in full payment for the spot announcements. Under these circumstances the evidence of record does not permit us to conclude, as did the hearing examiner, that Butler engaged in the proscribed practice of double billing as urged by the Bureau.

SUBMISSION OF FALSIFIED LOGS

8. In February 1964 Ned Butler filed his application for the renewal of WTLS' license and in connection therewith certified that the statements made in the application were true, complete, and correct to the best of his knowledge and belief. The renewal application specified that during the composite week 192 public service announcements ("PSA's") were broadcast between the hours of 8 a.m. and 6 p.m.[5] After first requiring Butler to correct discrepancies found to exist in the engineering section and the program log analysis, the application was granted [6] and WTLS' license was renewed as of April 1, 1964.

9. The first intimation that the composite week logs had been falsified came as a result of a December 1964 meeting between Commission personnel and Donald Tucker, who formerly had been employed by WTLS as an announcer and who had participated in the preparation of the logs. The accusations made by Tucker at this Washington meeting were reasserted in an affidavit executed on December 14, 1964, wherein Tucker alleged that Butler had personally directed him to add more PSA's to the logs.[7] As a result of these charges the log falsification issue was added.

---

[5] See footnote 8, infra.

[6] Public notice, mimeo. No. 49827, dated Apr. 10, 1964.

[7] Earlier, in June 1964, Tucker executed an affidavit charging Butler "• • • made false entries or entries that were not actually programed on the air and all this had to do with public service announcements • • •." At the hearing Tucker testified that he was unsure whether he mailed this earlier affidavit to counsel for Billy Walker (who at that time was still an applicant) or left it with him after conferring with Commission personnel in December.

10. That the logs were falsified and contained 135 PSA's never broadcast by the station is an admitted fact no longer open to question.[8] The decisive questions, and those on which dispute is focused, bear on the nature and extent of Butler's involvement in the deception and his responsibility for submission of the false logs. In his defense Butler maintains he was unaware of the deception until the Broadcast Bureau filed its request to add the log falsification issue. According to Butler's unequivocal testimony the fabricated PSA's were surreptitiously added by his "mentally ill" wife who, pursuant to his instructions, had prepared the programing portion of the renewal application and made copies of the logs. Moreover, Mrs. Butler, who served as the station's bookkeeper, typist, saleswoman, and part-time announcer, admitted adding the 135 PSA's and testified that she did so only after being advised by Donald Tucker that the Commission would not renew the license if it knew the station did not broadcast more PSA's than shown in the original composite week logs. According to Mrs. Butler, she first added the fabricated PSA's on the original logs and later prepared copies of the altered originals for submission with the application. The copies were prepared by typing the information contained in the first five columns and inserting by hand the information contained in the remaining five columns.[9] Following this procedure the copies of the logs took on the appearance of the originals.[10]

11. In contrast to the testimony offered by the Butlers, Donald Tucker testified that Butler knew of the falsification and directed the manner in which it was carried out. Although at one point Tucker indicated some uncertainty as to whether it was Butler or his wife who directed him to insert the false PSA's, he maintained that Butler was present and distinctly recalled Butler telling him, "If there is room,

---

[8] As submitted to the Commission, sec. 4(a) of the 1964 renewal application and the amendment thereto (see par. 13, infra) specify that 192 PSA's were broadcast between 8:00 a.m. and 6:00 p.m.; 4 between 6:00 and 11:00 p.m.; and 58 during all other hours. This information is false since the figures include 135 PSA's which were never broadcast, as well as PSA's which were counted twice. In this connection, Mrs. Butler testified that she first added fabricated PSA's to the original logs, and that when she later filled out the portion of the renewal application concerning the number of PSA's broadcast per week, she included in the 8:00 a.m. to 6:00 p.m. column all of the PSA's she counted on the original logs (192, including 135 fabricated PSA's), regardless of the time interval under which they were listed; that she then counted the PSA's logged between 6:00 and 11:00 p.m. a second time and inserted the total (4) in the 6:00 to 11:00 p.m. column; and that she followed the same procedure for the PSA's logged as having been broadcast at other hours and inserted that total (58) in the third ("Other") column—for a total of 254 PSA's.

The original program logs (as falsified) reflect the broadcast of 191 PSA's during the total 89½ hours of the station's daytime-only operation. (Mrs. Butler testified she counted 192 PSA's on the falsified original program logs.) Our review of these logs (Prattville exhibit 17) discloses that 42 of the 56 PSA's actually broadcast and 90 of the 135 fabricated PSA's were shown as having been broadcast between 8:00 a.m. and 6:00 p.m. The remainder were shown as having been aired between sign-on and 8:00 a.m., or between 6:00 p.m. and sign-off. Our finding that 56 PSA's were actually broadcast and 135 fabricated is substituted for the examiner's figures of 57 and 134, respectively. Although no exceptions were directed to the examiner's findings concerning the number of actual and fabricated PSA's shown on the logs, the Board, for clarification purposes, believes this correction to be appropriate in order to avoid further or continuing confusion on this subject.

[9] The information called for in the first five columns relates to "Time on," "Source and Type," "Program," "Customer or Sponsor," and "Symbol." The last five columns are designated "x," "Recorded or ET," "Station Break," "Ann," and "Time off." The handwritten information was inserted by Mrs. Butler with the help of Tucker and another announcer, Marvin Mitchell.

[10] Mrs. Butler testified that the last five columns were not typed because she "* * * can't type numbers too good" (Tr. 561). The examiner found that the handwritten notations were made on the logs to "give the impression that the logs submitted to the Commission were, in fact, the true logs of station WTLS." (Initial decision, par. 10.) The record does not support this finding and it is unnecessary to the result reached herein. It should be noted, however, that in submitting copies of original logs the better practice is to indicate clearly that the logs are copies only.

add more PSA's." Marvin Mitchell, who helped fill in the information on the copied logs, testified that neither Butler nor his wife instructed him to add PSA's.

12. Not only is the Butlers' account contradicted by Tucker's testimony, but standing alone it is so fraught with unresolved questions and illogical explanations as to strain credulity beyond its limits. The importance of the renewal process is known to all licensees and it is reasonable to assume that Butler, a broadcaster with more than 16 years of experience, was, or at least should have been, aware of the important role of the program logs as an integral part of the renewal application and the Commission's renewal processes. Yet despite this, Butler maintains he never reviewed either the originals or copies prior to signing the certification. Nor, according to Butler, did he see the logs when they were being copied by Mrs. Butler at home in his presence; [11] When he assisted his wife in preparing the log analysis and computing the percentages; when he signed the certification; when the logs were first returned with the application because of discrepancies in the computation of the program log analysis; or after the license was renewed. Butler maintains that when the logs were returned to him at the close of the renewal proceeding, he gave them to his wife to put away and that since that time he has been unable to find them.

13. That Butler would have recognized that the logs had been tampered with is apparent from his acknowledgment that the falsification was apparent on the face of the original logs. More important, however, is the fact that it was unnecessary for Butler to have reviewed the logs in order to discover the deception. In response to information requested in the program log analysis (par. 4(a) of the renewal application), 254 PSA's were shown as having been broadcast during the composite week. After the Commission returned the application for correction, Butler submitted an amendment containing a new program log analysis, again indicating that 254 PSA's—more than 4 times the actual number—were broadcast during the composite week. Butler signed the amendment directly below the line containing this information. Thus, even if it could be argued that Butler did not review the analysis in the application as originally filed, he could not have avoided seeing the representations made in the amendment. For the purpose of illustration this one-page document is set forth below in the same form in which it was submitted to the Commission.[12]

Amendment to page 2, section 4, paragraph 4A.[13]

[11] Logs for five of the composite week days were typed at the Butlers' home in Mr. Butler's presence. The logs for the remaining 2 days were typed in a beauty parlor.
[12] Official notice was taken of the 1964 renewal application, file No. BR-3599 (Tr. 582).
[13] Heading and jurat omitted.

	Program log analysis			
	8 a.m. to 6 p.m.	6 p.m. to 11 p.m.	Other	Totals
Network commercial				
Network sustaining				
Recorded commercial	84	100	84	85
Record sustaining			7	2
Wire commercial	2.5		5.5	2
Wire sustaining	.5		.5	1
Live commercial	7		0	5.5
Live sustaining	6		3.0	4.5
Total commercial	93.5		89.5	7.5 [92.5]
Complete total	100%	100%	100%	100%
Actual broadcast hours (per week)	66¾	1½	21¼	89½
No spot announcements (per week)	1,102	21	385	1,508
Number of noncommercial spot announcements (per week)	192	4	58	[1] 254

[1] See footnote 8, supra.

/s/ NED BUTLER
Ned Butler, *Owner.*

Thus, bearing in mind the close proximity and the close relationship of Butler's signature—approximately ½ inch below the line specifying the number of PSA's broadcast during the composite week—it is reasonable to assume that Butler, as owner-licensee of the station and as one of its announcers,[14] knew that this station did not broadcast 254 PSA's, but instead broadcast an infinitely smaller number. When consideration is given to the fabricated number (254) as compared with the actual number (56), the discrepancy is so patent as to alert, if not shock, any reasonable person who is an owner-licensee and announcer into a state of awareness.

14. Ostensibly, Mrs. Butler added the fabricated PSA's on the strength of Tucker's comment that the Commission would be looking for more public service. Yet on cross-examination Mrs. Butler freely admitted that she had known Tucker only a short time; that she had never trusted him; and that she did not think he was "an honest person."

15. The Board has carefully considered the evidence of record which is intended to discredit Tucker's testimony. Tucker's own testimony indicated that he had instituted legal proceedings against Butler for money allegedly due him. Tucker also acknowledged that he had told a Tallassee merchant he intended to get even with Butler if he did not get the money due him. Marvin Mitchell's testimony indicates that Tucker had told him that he (Tucker) could get money for certain information he possessed. The Board has taken these factors into consideration in determining the weight to be accorded Tucker's testimony and, in view of these factors, we have considered his testimony only as corroborative evidence of facts otherwise independently established.

16. Thus, we rest our conclusion that Butler had actual knowledge of the log falsification upon (*a*) the Butlers' untenable explanations concerning the falsification of the logs which have been detailed above

[14] Butler served as an announcer on five of the composite week days. The record shows that 27 fabricated PSA's were added at times during which Butler was the announcer on duty.

in paragraphs 10 to 14, supra, and (*b*) the inescapable view Butler had of the representations made in his amendment to the renewal application, which has been graphically set forth at paragraph 13, supra. In the Board's view, these independent factors are clear and convincing evidence of Butler's actual knowledge. In this circumstance we believe it would be unreasonable to wholly reject Tucker's testimony because of the evidence which casts doubt and suspicion upon his interest in this proceeding. For it is clear that Tucker's testimony does, as a matter of fact, corroborate our conclusion which has been based upon other independent evidence. Cf. *Blue Ridge Mountain Broadcasting Co., Inc.*, 36 FCC 1348, FCC 64R–255, released May 7, 1964, remanded FCC 64–898, released October 1, 1964, new decision, 37 FCC 791, 2 R.R. 2d 511, review denied FCC 65–5, released January 7, 1965, affirmed sub nom. *Gordon County Broadcasting Company* v. *FCC*, D.C. Cir. case No. 19165, decided September 14, 1965. The Board concludes that Butler's actual knowledge of the log falsification and his failure to correct that falsification constitute such a serious infraction of his duties and responsibilities as a broadcast licensee as to require a denial of the Prattville application. The Board denies this application on this ground standing alone, and without regard to the other separate and independent conclusions set forth in paragraphs 19–22, infra.

17. In reaching this conclusion to deny this application because of Butler's misconduct, we have considered the testimony attesting to Butler's reputation for good character in his community. In our view the fact that Butler enjoys such a reputation does not outweigh the circumstances which have led us to conclude that he had actual knowledge of the log falsification and does not mitigate the misconduct of which he is guilty in the stewardship of his station. Cf. *KWK Radio, Inc.*, 34 FCC 1039, 25 R.R. 577 (1963), reconsideration denied 35 FCC 561, 1 R.R. 2d 457, affirmed 119 U.S. App. D.C. 144, 337 F. 2d 540, 2 R.R. 2d 2071 (1964), cert. denied 380 U.S. 910 (1965); *WDUL Television Corp.*, 33 FCC 149, 22 R.R. 545, new decision, 34 FCC 1027, 25 R.R. 510, reconsideration denied 36 FCC 497, 2 R.R. 2d 131. As noted by the Commission in *WDUL Television Corp.*, supra, the import of the word "character" in the context of the circumstances here involved relates to Butler's conduct in his relations with the Commission and not to his reputation within the community.

18. We have also considered Prattville's contention that Butler had no reason to add the 135 fabricated PSA's since the actual broadcast of 56 PSA's substantially complied with the number proposed by Butler in his 1961 application for the renewal of WTLS' license.[15] As amended, the 1961 application showed that for the 1958–61 license period the station broadcast a total of 943 commercial spot announcements and 63 PSA's for the composite week. The application further indicated that for the same period the station devoted 98 percent of its total broadcast time to commercial programs and 2 percent to sustaining. Although Butler proposed no change in the number of commercial spot announcements and PSA's for the ensuing 3 years

[15] The Board has taken official notice of the relevant information contained in the 1961 renewal application and the amendment thereto.

(1961–64), he proposed to reduce the ratio of commercial time from 98 to 70 percent and to increase the ratio of sustaining time from 2 to 30 percent. The 1964 renewal application reveals that during the 1961–64 period Butler did not materially change the ratios of commercial and sustaining time, and that the station broadcast a ratio of 92.5 percent commercial time and 7.5 percent sustaining time. Moreover, during the same period Butler increased the number of commercial spot announcements broadcast from 943 per week to 1,508 per week—an increase of approximately 70 percent. With these facts in mind we cannot agree with Prattville that no motive for the falsified increase in PSA's can be ascribed to Butler.

19. We turn now to the other separate and independent conclusions requiring a denial of this application. Assuming arguendo that Butler did not have actual knowledge of the falsification, we are nevertheless satisfied that, viewed in a light most favorable to Butler, the findings of fact require that the willful falsification of the program logs be imputed to Butler by reason of his gross negligence and total disregard of his responsibility as a licensee of the Commission to maintain control over station operations. *KWK Radio, Inc.*, supra. In reaching this result we have considered the cases relied upon by Prattville and are convinced that because of the degree of gross negligence exhibited by Butler and the fraudulent intent of the person or persons responsible for the falsification, such cases are inapposite to this proceeding.[16]

20. We have further considered the assertion that Butler had no reason to distrust his wife and, thus, chose to rely upon her to prepare portions of the renewal applications and copies of the logs; however, such explanations cannot be used as an exculpatory basis by which Butler should be able to avoid—based upon any fair or reasonable standard—the consequences of his failure to exercise proper supervision. While certain duties may be performed by station employees pursuant to the delegated authority of the licensee, such delegation does not relieve the licensee of responsibility for the results achieved, absent a clear and convincing showing of reasonably adequate supervision by the licensee. For it is clear that delegation cannot be synonymous with abdication. *Eleven Ten Broadcasting Corp.*, 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). The Commission has repeatedly refused to absolve a licensee of responsibility for deceptions practiced by his employees, and in instances of serious transgressions has imposed sanctions upon the licensee notwithstanding his professed lack of knowledge. *Carol Music, Inc.*, 37 FCC 379,

[16] *Mark Twain Broadcasting Co.*, 29 FCC 1313, 21 R.R. 238 (1960) (no intent to deceive Commission; discrepancies were of engineering nature and not readily discernible by principal officer and stockholder who had only limited technical knowledge); *The Walmac Co.*, 36 FCC 507, 2 R.R. 2d 145 (1964) (no intent to deceive Commission; error resulted from applicant's shallow knowledge of accounting principles); *Publix Television Corp.*, 36 FCC 1215, 2 R.R. 2d 481 (1964) (some effort made to ascertain true facts; nevertheless, such carelessness would weigh heavily against an applicant in comparative proceedings); *Florida Gulfcoast Broadcasters, Inc.*, 32 FCC 197, 23 R.R. 1 (1962), 37 FCC 833, 4 R.R. 2d 1 (1964), reconsideration denied 38 FCC 1, 4 R.R. 2d 81 (1965), affirmed —— U.S. App. D.C. ——, 352 F. 2d 726 (1965) (no intent to deceive Commission; applicant indicated the additional estimated PSA's had actually been broadcast).

3 R.R. 2d 477 (1964), reconsideration denied 37 FCC 979, 4 R.R. 2d 188 (1964), appeal dismissed November 4, 1965, U.S. App. D.C. Cir. case No. 19089 (revocation resulted in part from refusal of station manager to furnish information requested by the Commission); *KWK Radio, Inc.*, supra (revocation resulted from fraud practiced by station's general manager in conducting a "treasure hunt" contest); *Eleven Ten Broadcasting Corp.*, supra (renewal denied in part because of log alterations made by station employee). Moreover, contrary to the assertion of the applicant, we do not believe that our decision herein imposes a greater burden on the smaller, owner-operator licensee than on larger corporate licensees. 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. See *KWK Radio, Inc.*, supra, and *Eleven Ten Broadcasting Corp.*, supra.

21. Nor is there merit to Prattville's argument that before responsibility for the transgressions can be imputed to the licensee it is necessary to establish that the culpable employee was either a partner, director, officer, or stockholder of the licensee. Mrs. Butler was acting within the scope of her delegated duties and her willful misconduct may properly be imputed to Butler. To hold otherwise would, in effect, make the form of the licensee entity determinative of the issue and preclude imputation in all cases of sole proprietorship. Such a view is, of course, completely untenable and unsupported by existing authority. Thus in *Carol Music, Inc.*, supra, the information was withheld by the general manager who neither held office nor had a proprietary interest in the licensee.[17] Similar results were reached in *United Broadcasting Co. of New York, Inc.*, FCC 65–52, 4 R.R. 2d 167; *Southeast Texas Broadcasting Co.*, FCC 65–1000, 6 R.R. 2d 448; *Eleven Ten Broadcasting Corp.*, supra; *Palmetto Broadcasting Company*, 33 FCC 250, 23 R.R. 483 (1962), reconsideration denied 34 FCC 101, 23 R.R. 486 (1963), affirmed 118 U.S. App. D.C. 144, 334 F. 2d 534, cert. denied 379 U.S. 843; and *Mile High Stations, Inc.*, 28 FCC 795, 20 R.R. 345 (1960).

22. Finally, our observations would be incomplete if we did not also note Butler's emphasis on the state of his wife's mental health. According to Butler, the physicians treating Mrs. Butler suggested she be permitted to work at the station and take an active part in its activities. Thus, it is understandable that Butler permitted her to work at the station. However, the record contains evidence that in view of her medical history Mrs. Butler could have used poor judgment in dealing with a business. Under this circumstance, the Board has difficulty in reconciling Butler's position that he gave Mrs. Butler broad—unsupervised—discretion and responsibility in the important task of preparing the renewal application, despite the state of her health. While the Board is sympathetic to the desirability of Mrs. Butler's employment at the station we, nevertheless, believe that under the circumstance of her illness, it is reasonable to assume that a greater degree—not a lesser degree—of supervision is required. To now say

[17] It should be noted that in *Carol Music, Inc.*, supra, the guilty employee was the husband of the principal stockholder.

that Butler can rely upon such carte blanche delegation and his professed lack of knowledge as a means of avoiding the consequences of the falsification would defeat the Commission's policy of licensee responsibility. As succinctly stated in *Eleven Ten Broadcasting Corp.*, supra:

> Inherent in such a 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.*, supra.) 32 FCC at 707–708, 22 R.R. at 701.

Accordingly, it is ordered, This 25th day of July 1966, that the application of Ned N. Butler and Claude M. Gray, d.b.a. the Prattville Broadcasting Co. (BP–14571), for a construction permit at Prattville, Ala., *Is denied.*

SYLVIA D. KESSLER, *Member.*

APPENDIX

RULINGS ON EXCEPTIONS TO THE SUPPLEMENTAL INITIAL DECISION

EXCEPTIONS OF NED N. BUTLER AND CLAUDE M. GRAY, D/B AS THE PRATTVILLE BROADCASTING CO.

Exception No.	*Ruling*
1	Granted to the extent indicated in decision, note 10.
2	Denied. The log falsification was admitted and it is not improper to describe the logs containing the fabricated PSA's as "falsified or doctored."
3	Denied. We have interpreted the examiner's statements to mean that the logs submitted with the renewal application purported to be true and correct. That they were not true and correct is admitted by the applicant.
4	Denied. The examiner's finding is not misleading.
5	Denied in substance. See decision, par. 11.
6a	Denied. Tucker's affidavit of June 24, 1964, accuses Ned Butler of filing fraudulent entries on the logs and that "[I]n filing these logs * * * Ned Butler made false entries * * *." We do not interpret the affidavit as saying Ned Butler physically added the fabricated PSA's but only that he knew of the deception when the logs were submitted to the Commission.
6b	Denied in substance. We have considered those facts which might have motivated Tucker's action and have weighted his testimony accordingly. See decision, pars. 15 and 16.
7	Denied. The record (Tr. 562, lines 3–5) indicates Nelda Johns assisted in filling out the transmitter and not the program logs. Moreover, this factor is not of decisional significance.
7a	Granted to the extent indicated in decision, par. 17.
7b	Granted to the extent indicated in decision, note 10. Our decision herein does not require a finding that Ned Butler attempted to pass off the copied logs as originals.
8	Granted to the extent indicated in decision, par. 13.

Exception No.	*Ruling*
9	Denied. The record supports the examiner's finding which is relevant to the manner in which the copied logs were prepared.
10	Granted to the extent that the examiner's finding implies that the logs submitted to the Commission were passed off as the original logs. Denied in all other respects. See decision, note 10.
11	Denied. The record supports the examiner's findings.
12	Granted in substance. See decision, par. 22.
13	Granted. The record indicates that the station uses only one form of bill but that the certification required by national accounts is not filled out for local accounts (Tr. 627).
14	Granted.
15	Denied. The examiner's finding is supported by the record and is not misleading.
16	Denied. The examiner did not find that Butler prepared two monthly bills in differing amounts.
17 (a)-(c)	Granted. See decision, par. 5.
18	Denied. The examiner found that the Johnson brothers testified that if requested they would honor the agreement (supplemental initial decision findings, par. 34).
19	Denied. The substance of the requested additional finding is adequately reflected in the examiner's supplemental initial decision.
20	Granted to the extent that the examiner's conclusions (*a*) that the logs were "so skillfully and cleverly concocted as to lead Commission personnel to believe that they were, in fact, the original logs * * *" and (*b*) "* * * every other person then employed at the station knew of and participated in making the false logs * * *" are unsupported by the record. With respect to (*a*) see ruling on exception 1. With respect to (*b*) there is no evidence that Announcer Marvin Mitchell knew of the deception. Denied in all other respects for the reasons reflected in the decision.
21	Denied. See decision, pars. 12, 13, 19–21.
22	Denied. See decision, par. 8.
23	Denied. See decision, pars. 19–21.
24	Denied for the reasons stated in the decision.
25	Granted in substance.
26	Granted.
27	Denied in substance. See decision, pars. 15 and 16.
28	Denied in substance. See decision, par. 17.
29	Granted only to the extent that the examiner concluded Ned Butler had engaged in double billing. Denied in all other respects for the reasons stated in the decision.

CONCURRING STATEMENT OF BOARD MEMBER JOSEPH N. NELSON

I concur. However, I believe that the record contains substantial evidence that Ned N. Butler knowingly engaged in the practice of double billing subsequent to the issuance of the Commission's March 9, 1962, public notice concerning that practice.

FCC 63D–70

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
NED N. BUTLER AND CLAUDE M. GRAY, D.B.A. THE PRATTVILLE BROADCASTING CO., PRATTVILLE, ALA.	Docket No. 14878 File No. BP–14571
BILLY WALKER, PRATTVILLE, ALA.	Docket No. 14879
For Construction Permits	File No. BP–14729

APPEARANCES

Dean George Hill, on behalf of Ned N. Butler and Claude M. Gray, d.b.a. the Prattville Broadcasting Co.; *Maurice R. Barnes*, on behalf of Billy Walker; and *Larry M. Berkow*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER BASIL P. COOPER

(Adopted June 19, 1963)

PRELIMINARY STATEMENT

1. In this proceeding, Ned N. Butler and Claude M. Gray, d.b.a. the Prattville Broadcasting Co. (Broadcasting), request a permit to construct a new class III standard broadcast station to operate daytime only on the frequency 1330 kc with power of 1 kw, directional array, at Prattville, Ala.; and Billy Walker (Walker) requests a permit to construct a new class III standard broadcast station to operate daytime only on the frequency 1330 kc with power of 500 w at Prattville, Ala.

2. The Commission by order dated December 5, 1962, released December 10, 1962, found that except as indicated by the issues, each of the applicants was legally, technically, and otherwise qualified to construct and operate the station proposed by it but as the proposals were mutually exclusive the applications were designated for hearing on the following issues:

1. To determine the areas and populations which would receive primary service from the proposed operations of the Prattville Broadcasting Co. and Billy Walker, and the availability of other primary service to such areas and populations.

2. To determine whether either of the above-captioned applicants is financially qualified to construct and operate its proposed station.

3. To determine whether a grant of the proposal of the Prattville Broadcasting Co. would be in contravention of the provisions of section 3.35(a) of the Commission's rules with respect to multiple ownership of standard broadcast stations.

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 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 service the public interest, in the light of the evidence adduced pursuant to the foregoing issues and the record made with respect to the significant differences between the applicants as to:

(*a*) The background and experience of each having a bearing on the applicant's ability to own and operate the proposed standard broadcast station.

(*b*) The proposals of each of the applicants with respect to the management and operation of the proposed stations.

(*c*) The programing services proposed in each of the applications.

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

Thereafter, the Review Board, in a memorandum opinion and order dated January 30, 1963, released February 1, 1963, enlarged the issues to include the following:

To determine whether the instant proposal of Billy Walker would cause interference to the existing operation of WGWC, Selma, Ala., or any other standard broadcast stations, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.

It was further ordered that the hearing examiner, on his own motion or on petition properly filed by a party to the proceeding, and upon sufficient allegations of fact in support thereof, may enlarge the issues by the addition of the following issue:

To determine whether the funds available to the applicant will give reasonable assurance that the proposals set forth in the application will be effectuated.

It was also ordered that in the event of a grant of either of the above-captioned applications, the construction permit shall contain the following conditions:

1. This authorization is subject to compliance by permittee with any applicable procedures of the FAA.

2. Pending a final decision in docket No. 14419 with respect to presunrise operation with daytime facilities, the present provisions of section 3.87 of the Commission's rules are not extended to this authorization, and such operation is precluded.

3. Permittee shall accept any interference that may result in event of a grant of the application of Robert J. Martin, file No. BP-15239, Selma, Ala.

3. Prehearing conferences were held on January 11 and February 7, 1963. Evidentiary hearings were held on March 20 and 21, 1963. By formal order dated and released April 12, 1963, the hearing examiner received in evidence certain material and closed the record in this proceeding.

4. Proposed findings of fact and conclusions of law were submitted on behalf of both applicants and the Chief, Broadcast Bureau, on May 15, 1963.

5. Unless otherwise stated, all population figures in this initial decision are based on the 1960 census.

FINDINGS OF FACT

The Community To Be Served

6. The city of Prattville, population 6,616 persons, is the county seat and largest city in Autauga County, Ala. Prattville is approximately 12 miles northwest, approximately 305°, of the center of the city of Montgomery, Ala. It is approximately 86 miles south by southeast, approximately 160°, of Birmingham, Ala. The city is served by two major U.S. highways and a major State highway. Transportation is available by rail over the facilities of the Gulf, Mobile & Ohio RR., by major bus lines, and trucking facilities. Air transportation is available from the nearby Montgomery airport, which may be reached by a highway bypassing the downtown portions of the city of Montgomery.

7. The 1960 population of Prattville, 6,616 persons, reflects a substantial increase over the 1950 census figure of 4,385 persons. Prattville is not a part of any urbanized area. The city has a mayor-city council form of government and its own police and fire departments. Ten major religious denominations maintain churches within the city. The public school system consists of two elementary, one junior high, and two high schools. In addition, there is one private school, grades 1 through 12. There are a number of civic clubs and organizations within the community.

8. Retail sales in Prattville for the fiscal year ending September 30, 1962, were estimated at $6,282,000. The major sources of income for the city of Prattville are agriculture, manufacture of textiles, furniture, and lumber products, and retail trade. The largest establishments in Prattville are the Continental Gin Co., cotton ginning machinery, employing 800 men and 10 women; Gurney Manufacturing Co., processing of cotton textiles, employing 100 men and 220 women; Armour & Co., processing of meats and poultry, employing 36 men and 45 women; and Nappies, Inc., infants' wear and stuffed toys, employing 20 men and 25 women. Two banks with combined resources in excess of $6 million serve Prattville and Autauga County.

9. Autauga County, population 18,739 persons, is near the central part of the State of Alabama. Autauga County is basically an agricultural area. The principal agricultural products are cotton, corn, cattle, hogs, dairy products, and peaches. The agricultural income for the county for the year 1960 was estimated at $6,400,000 excluding income from the sale of timber. In 1960, the rural population constituted approximately 65 percent of the population in the county. Of the families in the county, 54 percent are classified as nonfarm families. Of the farm families, 44 percent had telephones, 70 percent had television, and 88 percent had radios.

10. As of the present time, there is no broadcast station, either AM, FM, or TV, assigned to either Prattville or Autauga County. Prattville has a local weekly newspaper, The Progress, which has a circulation of 1,800.

11. The city of Prattville now receives primary service of 2 mv/m or better from stations WBAM, WMGY, WRMA, WCOV, and WHHY, all assigned to the city of Montgomery, and from station

106-505—66——4

WETU, Wetumpka, Ala., approximately 17 miles northeast of Prattville.

12. The city of Montgomery, population 134,393 persons, is the capital of the State of Alabama. Montgomery is the principal city in the Montgomery urbanized area, which has a population of 142,893 persons. The city of Montgomery and the Montgomery urbanized area now receive primary service from stations WBAM, WMGY, WRMA, WCOV, WHHY, and WAPX, all assigned to the city of Montgomery, and from station WETU, Wetumpka, Ala.

Financial Issue, Issue 2

The Prattville Broadcasting Co.

13. Ned N. Butler and Claude M. Gray are equal partners in the Prattville Broadcasting Co., the primary purpose of which is to apply for, construct, and operate the proposed broadcast station at Prattville, Ala. The estimated cost of construction of the proposed station is as follows:

Transmitter proper, including tubes	$4,655.00
Antenna system, including antenna ground system, coupling equipment, transmission lines	6,232.00
Frequency and modulation monitors	1,200.00
Studio technical equipment, microphones, transcription equipment, etc	4,219.45
Acquiring land	3,000.00
Acquiring building	7,000.00
Other items itemized, including freight, labor, and miscellaneous	1,000.00
Total estimated cost	27,306.45

The estimated cost of operation for the first year is $26,000. The transmitter, antenna system, and $3,019.45 of the technical equipment will be purchased from the Collins Radio Co. at a total cost of $13,906.45. Collins will furnish this equipment under an agreement pursuant to which the applicant will make a downpayment of $3,476.61 in cash with the balance, $10,429.84, payable in 36 equal monthly installments with interest at the rate of 4 percent per annum on the initial unpaid balance. The frequency and phase monitors and the land is to be furnished by Claude M. Gray, the owner of the phase monitors and the land. Ned N. Butler will furnish studio equipment at a value of $1,200. A building contractor has agreed to construct a building to house the studio, offices, and transmitting equipment, which will cost $7,000. He will lease said building to Butler and Gray under an agreement pursuant to which Butler and Gray will make monthly payments of $75. These monthly payments may be applied toward the purchase of the building. For this reason, the estimated cost of construction should not include the $7,000 allocated for "Acquiring building" inasmuch as this will be paid with funds included in monthly operating costs.

14. The partnership will require cash in the amount of $3,476.61 for the downpayment on the equipment, plus $1,000 to meet the cost of freight, labor, and miscellaneous expenses, plus $6,500 to operate the station for 3 months assuming no revenue, or a total of $10,976.61. To

raise this necessary capital, Butler and Gray will furnish cash in the amounts of $4,000 and $1,000, respectively, and each will loan the company $4,800, thus making available a total of $14,600 in cash. Butler and Gray presently have on hand the equipment they will contribute to Broadcasting.

15. Butler's balance sheet as of January 8, 1963, showed a net worth of more than $30,000. Current assets included $3,100 in cash. In addition, he can obtain a loan from the Peoples Bank of Carrville in the amount of $10,000 if necessary.

16. As of January 8, 1963, Claude M. Gray had a net worth in excess of $60,000. He had as of that day cash in the bank in the amount of $7,417.04 and in addition can obtain a loan in the amount of $3,000 from the First National Bank of Birmingham.

17. The facts stated in the preceding paragraphs establish that the Prattville Broadcasting Co. is financially qualified to construct and operate the proposed station.

Billy Walker

18. The estimated cost of construction of the station proposed by Billy Walker is $13,551.69, of which $11,951.69 represents the cost of the transmitter, antenna, and various technical equipment; $400 for the cost of the studio; and $1,200 for the cost of acquiring or constructing the proposed transmitter and studio building. The total cost of construction, plus $6,000 for the estimated cost of operation for the first 3 months, will require total revenue of $19,551.69. Collins Radio Co. will grant Walker credit in the amount of $9,155.27 on the purchase of the technical equipment, this sum to be paid in 48 equal monthly installments with interest at the rate of 4 percent per annum on the initial unpaid balance.

19. Billy Walker will need $10,396.42 to construct the station and operate it for an initial period of 3 months assuming no revenue. Billy Walker's balance sheet as of January 28, 1963, reflected a net worth in excess of $85,000. The balance sheet also reflected cash in the amount of $2,000 and a note payable on demand in the amount of $15,000. Walker also owns several pieces of property on which he places a value in excess of $50,000.

20. Several years ago, Billy Walker bought a piece of property in the city of Montgomery which he sold in 1962 for $32,500. Shortly thereafter, his father, L. L. Walker, purchased a 160-acre farm in Clanton, Ala. Billy Walker loaned his father $15,000 with which to purchase this 160 acres. His father, thereupon, gave Billy Walker a mortgage on the father's home place, an 80-acre farm in St. Clair County, Ala., to secure this $15,000 loan. This 80-acre farm borders a large lake which is being formed by a dam. The Alabama Power Co. has purchased all of the land surrounding the lake except the Walker farm. It is Walker's understanding that approximately 5 or 6 years ago, the Alabama Power Co. offered $27,000 for this farm. The Walkers, however, did not sell it as they intend to hold it for an investment. Billy Walker's father presently owns four farms, including the 80-acre home place on which he has given his son, Billy Walker,

a $15,000 mortgage. This mortgage secures the $15,000 demand note which Walker lists in his financial statement.

21. From the facts stated in the foregoing several paragraphs, it is established that Billy Walker is financially qualified to construct and operate for a period of 3 months the station proposed by him at Prattville, Ala.

Areas and Populations To Be Served, Issue 1

The Prattville Broadcasting Co.

22. The site of the station proposed by Broadcasting is approximately 2 miles due south of the city of Prattville. From this site, Broadcasting proposes to operate daytime with a power of 1 kw utilizing a two-tower directional antenna. These towers will be spaced 36° apart on a bearing N. 80° E. The station proposed will receive some interference within its normally protected 0.5-mv/m contour from stations WEBY and WGWC operating with power of 1 kw. Utilizing the directional antenna, and based on the radiations specified for this antenna and ground conductivities as shown by figure M–3 of the Commission's rules, the station proposed by Broadcasting will serve areas and populations as follows:

Contour (mv/m)	Area (sq. mi.)	Population
2	598	173,812
0.5 (normally protected)	2,187	213,290
Interference from WEBY	65 [1] (3%)	1,549 [1] (0.7%)
Additional interference from WGWC (1 kw)	33 [2] (1.5%)	814 [2] (0.4%)
Total interference	98 [1] (4.5%)	2,363 [1] (1.1%)
Interference-free	2,089	210,927

[1] Percentages relative to population and area within 0.5-mv/m normally protected contour.
[2] Interference from WGWC overlaps part of WEBY interference area.

23. The site of Broadcasting's transmitter is approximately 10 miles northwest of the center of the city of Montgomery. The directional array is such that the major lobe of the signal of the proposed station is directed to the southeast in the direction of Montgomery. The 2-mv/m contour of Broadcasting's station falls approximately 20 miles southeast of the transmitter site or approximately 10 miles southeast of the center of Montgomery. The 0.5-mv/m contour falls approximately 39 miles southeast of the transmitter site or approximately 29 miles southeast of the center of Montgomery. In other directions, the distances to the 0.5-mv/m contour are approximately as follows: To the south, 30 miles; to the west, 13 miles; to the north, 24 miles; and to the northeast, 27 miles.

24. All of the area to be gained by the proposed station receives primary service of 0.5 mv/m or better from stations WBAM, WMGY, WRMA, WCOV, and WHHY, Montgomery, and WETU, Wetumpka, Ala. In addition, stations WDAK, Columbus, Ga.; WABT, Tuskegee, WVOK, Birmingham, and WAPX, Montgomery, Ala., serve between 75 and 99 percent of the area to be gained. No part of

the area to be gained receives less than 10 primary services, whereas parts of the area receive service from as many as 16 other stations.

Billy Walker

25. The site of the station proposed by Walker is near the northwestern city limits of Prattville, Ala., approximately 1.5 miles northwest of the center of the city. From this site, Walker proposes to operate daytime with a power of 500 w, utilizing a nondirectional antenna. The station proposed will receive some interference within its normally protected 0.5-mv/m contour from stations WEBY and WGWC, operating with power of 1 kw. Utilizing nondirectional operation, an antenna developing 134.5 mv/m and the ground conductivity shown by figure M–3 of the Commission's rules, the station proposed by Walker will serve areas and populations as follows:

Contour (mv/m)	Area (sq. mi.)	Population
2	460	96,300
0.5	1,780	131,250
Interference from WEBY	40 [1] (1.4%)	760 [1] (0.6%)
Additional interference from WGWC (1 kw)	144 [2] (8.9%)	3,280 [2] (2.5%)
Total interference	184 [1] (10.3%)	4,040 [1] (3.1%)
Interference-free	1,596	127,210

[1] Percentages relative to population and area within 0.5-mv/m normally protected contour.
[2] Interference from WGWC overlaps part of WEBY interference area. This overlap of interference area affects an area of 8 square miles and 270 persons.

26. The site of Walker's transmitter is approximately 12.5 miles northwest of the center of the city of Montgomery. The 2-mv/m contour of Walker's station passes through the center of the city of Montgomery. The 0.5-mv/m contour of Walker's proposed station falls approximately 27 miles southeast of the transmitter or approximately 15 miles southeast of the center of Montgomery. In other directions, the distances to the 0.5-mv/m contour are approximately as follows: To the south, 28 miles; to the west, 19 miles; and to the north and northeast, 21 miles.

27. All of the area to be gained by the proposed station receives primary service of 0.5 mv/m or better from stations WBAM, WCOV, WMGY and WRMA, all in Montgomery. In addition, stations WHHY, Montgomery, WETU, Wetumpka, and WVOK, Birmingham, serve between 75 and 99 percent of the area to be gained. No part of the area to be gained receives less than 10 primary services, whereas parts of the area receive service from as many as 15 other stations.

Coverage Comparisons

28. The differences in the location of the transmitter sites, power, and antenna systems to be employed by Broadcasting and Walker result in differences in coverage. As Broadcasting's 2-mv/m contour extends 10 miles to the southeast of Montgomery, Broadcasting will serve all of the city of Montgomery and the Montgomery urbanized area. On the other hand, the 2-mv/m contour of Walker's proposed station passes through the approximate center of the city of Mont-

gomery, with the result that Walker will serve approximately 50 percent of the population in that city and approximately 35 percent of the adjacent urbanized area. The urban populations to be served by the proposed operations are as follows:

City	Population	Broadcasting	Walker
Prattville	6,616	6,616	6,616
Montgomery (city)	134,393	134,393	67,200
Adjacent urbanized area	8,500	8,500	2,979
Total urban		149,509	76,795

The distribution between urban and rural populations to be served is as follows:

Interference-free contour (mv/m)	Broadcasting	Walker
0.5	210,927	127,210
Urban (within 2 mv/m)	149,509	76,795
Rural	61,418	50,415

29. An examination of the engineering exhibits (Broadcasting exhibit 1, pp. 5 and 7, and Walker exhibit 1, pp. 7 and 8) discloses that whereas Walker's 0.5-mv/m contour will provide service for several miles farther to the west and north of Prattville than will Broadcasting, in all other directions Broadcasting's 0.5-mv/m contour extends to a greater distance. The identified exhibits also show that 12 services of 0.5 mv/m or better are available to the rural areas in the immediate vicinity of Prattville. These 12 stations are assigned to cities as follows: To Montgomery, 6 stations (identified in par. 12, supra); to Birmingham, 3 stations (WVOK, WAPI, and WSGN); and 1 station to each of the following 3 cities, Wetumpka (WETU), Clanton (WKLF), and Tuskegee (WABT).

Interference to Station WGWC

30. On April 16, 1963, the Commission granted the then pending application of station WGWC, a class IV station, 1340 kc, 250 w, U. Selma, Ala., to increase daytime power to 1 kw. The application to increase daytime power of station WGWC (BP-15239) was filed December 8, 1961. The engineering exhibits which were a part of this application disclosed that station WGWC operating with daytime power of 1 kw will gain a substantial area and population. An engineering exhibit, after noting the pendency of the applications of the Prattville Broadcasting Co. (BP-14571) and of Billy Walker (BP-14729) for new stations at Prattville, Ala., stated that:

> Neither of the Prattville proposals will produce any additional interference to the present or proposed operation of WGWC in Selma, Ala.

31. The engineering testimony in this proceeding establishes that the proposals of Broadcasting and Walker will each cause objectionable

interference within the normally protected contour of station WGWC operating with power of 1 kw. The objectionable interference referred to is first channel adjacent interference in which the stronger signal supplants the weaker signal. The interference which will be caused to station WGWC by either Broadcasting or Walker will fall approximately midway between Selma and Prattville, and will affect a narrow strip of land approximately 2 miles at its widest point and extending approximately 25–30 miles in a north-south direction. While the contour maps in engineering exhibits identify the area of interference to station WGWC operating with power of 1 kw, neither of the applicants stated for the record either the size of the area in square miles or the population residing therein. Part of the area within which station WGWC will receive this adjacent-channel interference from either Prattville proposal also receives objectionable interference from station WFEB. The additional interference to station WGWC from Broadcasting will affect an area of 30.3 square miles and a population of 439 persons. The additional interference to station WGWC from the Walker proposal appears to be of similar magnitude; the record, however, does not specify either the number of square miles or the population which will be affected.

32. The Commission action of April 16, 1963, granting the increase in power of station WGWC renders moot the issue adopted January 30, 1963, in so far as it pertains to the interference which would be caused by the proposal of Billy Walker to station WGWC operating with power of 250 w, daytime.

The Duopoly or Overlap Issue, Issue 3

33. Ned N. Butler, 50 percent partner and proposed general manager of Broadcasting's proposed Prattville station, is the owner-licensee of station WTLS, Tallassee, Ala. Station WTLS operates on the frequency 1300 kc with power of 1 kw, daytime only. The site of the WTLS transmitter is 33.5 miles east-northeast of the site of Broadcasting's proposed Prattville transmitter. The cities of Prattville and Tallassee are approximately 33.5 miles apart. Tallassee is approximately 26 miles northeast of the city of Montgomery.

34. The 0.5-mv/m interference-free contour of station WTLS extends a distance of approximately 33 miles to the south and southwest of Tallassee. In other directions, the distance to the 0.5-mv/m contour varies between 23 and 26 miles. The 0.5-mv/m contour of Broadcasting's proposed Prattville station extends approximately 28 miles to the northeast in the direction of the WTLS transmitter site. As a result, the 0.5-mv/m contour of station WTLS overlaps Broadcasting's 0.5-mv/m contour over an elliptical area having a maximum depth of penetration of approximately 26 miles [1] in width and approximately 52 miles in length.

35. The following table shows the extent to which the 0.5-mv/m interference-free contour of station WTLS will overlap the 0.5-mv/m

[1] The depth of penetration on the direct line between the transmitter sites is approximately 21 miles.

interference-free contour of the station proposed by Broadcasting at Prattville:

0.5-mv/m interference-free contour	Area (sq. mi.)	Population
Station WTLS, Tallassee, Ala.	2,314	72,280
Proposed broadcasting	2,089	210,927
0.5-mv/m overlap	951	26,963

36. In terms of percentage, 41.2 percent of the land area of WTLS and 37.3 percent of its population will be served by the proposed Broadcasting station at Prattville, whereas 45 percent of the area and 12.7 percent of the population of the proposed Broadcasting station is now served by station WTLS.

37. The 2-mv/m contour of station WTLS extends for a distance of approximately 15 miles in the direction of the site of Broadcasting's proposed Prattville transmitter. The 2-mv/m contour of the proposed Broadcasting station extends approximately 16 miles to the northeast in the direction of the WTLS transmitter site. As the transmitter sites are 33.5 miles apart, the 2-mv/m contour of the station proposed by Broadcasting at Prattville will not overlap the 2-mv/m contour of station WTLS.[2]

38. The 0.5-mv/m contour of station WTLS falls approximately 7 miles to the east or short of Prattville, whereas the 0.5-mv/m contour of Broadcasting's station at Prattville will fall approximately 5 miles to the west or short of Tallassee.

39. All of the area of overlap falls within the State of Alabama. Population by county in the overlap area is as follows: Elmore, 10,752 persons; Macon, 1,399 persons; Bullock, 644 persons; and Montgomery, 14,168 persons.

40. All of the area within which the 0.5-mv/m contour of Broadcasting's proposed Prattville station will overlap the 0.5-mv/m contour of station WTLS now receives primary service from stations WBAM, WMGY, WRMA, WCOV, WHHY, all in Montgomery, WETU, Wetumpka, WDAK, Columbus, and WABT, Tuskegee. In addition, stations WAPX, Montgomery, and WVOK, Birmingham, serve between 75 and 99 percent of the overlap area. All of the overlap area receives primary service of 0.5 mv/m or better from at least 12 stations, parts from as many as 15 stations. If present service of station WTLS is included, these figures should be increased by 1.

41. Two daily newspapers are published within this overlap area; namely, the Montgomery Advertiser and the Alabama Journal, both published in the city of Montgomery. A weekly newspaper, the Wetumpka Herald, is published in Wetumpka. Within the overlap

[2] In Commission order dated Dec. 5, 1962, released Dec. 10, 1962, designating the application for hearing, the Commission noted that there would be a substantial overlap of the 1.0-mv/m contours of station WTLS and the proposed Broadcasting station. This comment relative to the overlap of the 1.0-mv/m contours is due to the fact that the Commission on July 16, 1962, released a notice of proposed rulemaking in docket No. 14711 (FCC 62-747). The matters pertaining to the proposed rulemaking procedure in docket No. 14711 were called to the attention of Broadcasting at the prehearing conferences on Jan. 11 and Feb. 7, 1963. Broadcasting, however, determined that it would not introduce evidence pertaining to the 1.0-mv/m contour of either station WTLS or of its proposed Prattville station.

area are to be found the transmission facilities of the Montgomery, Ala., stations identified in paragraph 12, supra, and the transmitter of station WETU, Wetumpka, Ala.

Tallassee, Alabama

42. The only standard broadcast station assigned to Tallassee in station WTLS owned, licensed to, and operated by Ned N. Butler. Tallassee, population 4,934 persons, is located partially in Elmore County and partially in Tallapoosa County, Ala. Immediately east of Tallassee is the community of Carrville, population 1,081 persons. Tallassee is on Alabama Highway 14 approximately 30 miles northeast of the city of Montgomery. The city of Tallassee has a mayor-city council form of government. Within the city, there are 19 churches, 3 elementary schools, 2 junior high schools, and 2 senior high schools. The city has two banks, two theaters, several restaurants, drugstores, grocery, clothing, and other stores. It also has a modern hospital. There are a number of civic clubs and organizations within the community.

43. Among the industrial establishments in Tallassee are the following: Tallassee Mills, cotton textiles, employing 2,300 persons; Tallassee Manufacturing Co., ladies' apparel, employing 60 persons; Meldon Industries, ladies' clothing, employing 40 persons; and Alabama Power Co., employing 35 persons. One weekly paper, the Tallassee Tribune, is published in Tallassee.

44. In 1962, the source of the advertising revenue for station WTLS was as follows: Local, 90 percent; regional, 6 percent plus; national, 4 percent plus. Of 121 accounts which the station had in 1962, 99 had businesses located in Tallassee or Carrville. Ten other accounts came from three small communities within a radius of 12 miles of Tallassee. Substantially all of the revenue of station WTLS is derived from the sale of spot announcements. The sales staff of station WTLS does not solicit business west of Eclectic, Ala., a small community of 926 persons, approximately 10 miles northwest of Tallassee. In the main, the WTLS sales force limits its activities in Elmore County to the eastern area. The sales staff has never solicited business in the city of Montgomery or in Montgomery County.

45. Ned N. Butler, 50 percent partner and general manager of Broadcasting's proposed Prattville station, is the owner-licensee and general manager of station WTLS. He proposes to serve as general manager for both stations. The present staff of station WTLS consists of one announcer-engineer, one announcer-copywriter, one announcer-salesman, and a bookkeeping department consisting of one person who handles the bookkeeping and performs secretarial duties. Mr. Butler, as sales manager, also assists the commercial department. In the event Broadcasting's application for Prattville is granted, Mr. Butler will retain the position of general manager of station WTLS, but will appoint a station manager and discontinue his activities with the commercial department of that station.

46. The staff for the proposed Prattville station will be similar to that of station WTLS except that the accounting for the Prattville

station is to be performed by a public accountant. With the exception of Ned N. Butler, each station will have a separate sales staff.

47. Mr. Butler does not propose the same programing over the Prattville station as is now carried by station WTLS. The type of advertising to be permitted over the proposed Prattville station will be similar to the type which is presently accepted at station WTLS. Station WTLS will not permit the advertising of alcoholic beverages. There will be no joint rates and no discounts for placing advertising on both stations.

Comparison of Applicants and Their Programing Proposals, Issue 5

The Prattville Broadcasting Co.

48. The Prattville Broadcasting Co. is a partnership composed of Ned N. Butler and Claude M. Gray.

49. *Claude M. Gray*, 50 percent partner in Broadcasting, was born in Anniston, Ala., and has spent most of his life in Alabama except for a period of approximately 5 years when he resided in Fort Worth, Tex. On graduating from Georgia Tech, he received a B.S. in electrical engineering and, from 1932 to 1945, he worked as an engineer at broadcast and police radio stations with the exception of the period 1940 to 1942 when he was a staff engineer for the Federal Communications Commission. Since 1945, he has been engaged in the practice of consulting radio engineer. Mr. Gray's association with broadcast stations has been that of an engineer. He has had no past experience in the ownership, management, or control of any standard broadcast station. He will serve as engineering consultant for the proposed station.

50. *Ned N. Butler*, 50 percent partner in Broadcasting, was born in Fayette County, Ala., and much of his adult life has been spent within the State of Alabama. He served honorably in the U.S. Navy from 1946 to 1948. He has attended the Cook Radio Engineering School and holds a first class radiotelephone license.

51. Mr. Butler's contacts with radio stations has been as follows: From 1950 to 1951, as an engineer for station KVOL, Lafayette, La.; from 1951 to 1952, as chief engineer and announcer at station WGLC, Centreville, Miss.; from 1952 to 1953, assisted in the construction of and served as an engineer for station WTBC, Tuscaloosa, Ala.; from 1953 to 1954, installed equipment and served as chief engineer, announcer, and acting manager of station WOZK, Ozark, Ala.; from 1954 to 1956, served as manager of station WTLS, Tallassee, Ala.; from 1956 to 1957, constructed and served as manager of station WJHB, Talladega, Ala.; from 1957 to 1958, served as general manager of stations WJHB, Talladega, and WTLS, Tallassee, Ala.; from 1958 to 1959, was general manager of stations WJHB, Talladega, and WTLS, Tallassee, both in Alabama, and of station WMBC, Macon, Miss.; in 1959, he became station manager, sales manager, and chief engineer of station WTLS, Tallassee, and since that date has been associated exclusively with this station.

52. Mr. Butler was a partner, owning approximately 33⅓ percent interest, in Confederate Broadcasting Co., which in 1956 received a license for station WJHB, Talladega, Ala. In 1957 the partnership

was terminated and the Confederate Broadcasting Co. Inc. was formed to hold the license, which corporation in 1958 became the licensee of station WTLS, Tallassee, Ala. In 1958, Mr. Butler acquired a 50 percent interest in the corporation. In the same year, the corporation became the licensee of station WMBC, Macon, Miss. During this period, Mr. Butler was the president of the licensee corporation. In 1959, Mr. Butler sold his stock in the Confederate Broadcasting Co. Inc. and thereafter purchased from the corporation station WTLS, Tallassee. Since 1959, he has been the owner, station manager, sales manager, and chief engineer of station WTLS, Tallassee. The coverage and power of this station has been previously shown in paragraphs 33 to 39, inclusive.

53. Mr. Butler is a member of the Tallassee Lions Club, past president and member of the chamber of commerce, past president of the Jaycees, vice president of the Greater Tallassee-Carrville Industrial Committee, secretary-treasurer of the Tallassee Little League and is a member of the Boy Scout council.

54. Broadcasting's programing proposals for the proposed Prattville station reflect, in the main, Butler's experience of some 10 years with radio stations in communities approximately the same size as the city of Prattville. In addition, he had personal knowledge of the city of Prattville, which knowledge was obtained by visits to that city. Prior to filing his application, he visited Prattville, counted churches and schools, and noted construction and business activity in general. At the time of preparation of his application, he was aware that a survey was being conducted by the Autauga County Rural Development Committee. The facts gathered in this survey, however, were not published until after Broadcasting's application was filed. The survey, when published, confirmed to Mr. Butler's satisfaction the accuracy of his own conclusions respecting the city of Prattville and the nearby areas.

55. At the hearing, Mr. Butler could identify but one person with whom he had discussed programing prior to the filing of the application. Since filing, however, he had discussed programing with a number of persons, some of whom are identified by name in the transcript.

56. Broadcasting's proposed program schedule is predicated on the assumption that the station will sign on at 6 a.m. and sign off at 5:15 p.m. each day in the week for a total of 78.75 hours during the week.

57. The analyses of the programing proposals by type or program content and by source or origin are as follows:

By type		By source	
Entertainment	75.4%	Recorded commercial	51.40%
Religious	6.3%	Recorded sustaining	27.61%
Agricultural	2.3%	Wire commercial	5.41%
Educational	2.3%	Wire sustaining	4.13%
News	11.1%	Live commercial	7.95%
Discussion	0.7%	Live sustaining	3.50%
Talks	1.9%	Total commercial	64.76%
		Total sustaining	35.24%
Total	100.0%	Number of commercial spot announcements	664
		Number of noncommercial spot announcements	83

58. A more detailed description of Broadcasting's programing proposals is as follows:

(*a*) *Entertainment.*—Substantially all of these programs will be recorded musical programs featuring hillbilly, popular, folk, waltz, and semiclassical recordings.

(*b*) *Religious.*—10 to 10:15 a.m., Monday through Saturday, "Devotional," a nondenominational religious program to be rotated among churches; 10:15 to 10:30 a.m., Monday through Saturday, "Hymns of All Faiths," gospel music with announcements of church affairs; 8:45 to 9 a.m., Sunday, "Sunday School," a nondenominational religious program for children; 9:15 to 9:30 a.m., Sunday, "Sunday Singers," live religious music; 9:30 to 10 a.m., Sunday, "Hymns of All Faith," recorded music and church announcements; and 11 a.m. to 12 noon, Sunday, "Church Service," a live broadcast from local churches. The programs "Devotional," "Sunday School," and "Church Service" will be allocated to churches that are members of the Prattville Ministerial Alliance. However, where a religious institution is not represented in the alliance, equal time will be assigned to such church.

(*c*) *Agricultural.*—7:15 to 7:30 a.m., Monday through Saturday, "Farm News," featuring the county agricultural agent for Autauga County; and 4:40 to 4:45 p.m., Monday through Saturday, "Closing Farm Prices," featuring the county agricultural agent giving the latest farm prices.

(*d*) *Educational.*—4:35 to 4:40 p.m., Monday through Saturday, "This Date in History," a program placing emphasis on present or past events of importance featuring pupils from the Prattville schools; and 4:45 to 5 p.m., Monday through Saturday, "Calling All Kiddies," a quarter hour of recorded programs designed for children in the primary grades.

(*e*) *News.*—Five 15-minute news programs on Monday through Saturday and six 15-minute news programs on Sunday will be presented. The source of most of these newscasts will be wire with additional news of local events.

(*f*) *Discussion.*—2:30 to 3 p.m., Sunday, "Forum Discussion," featuring leaders in the field of business, government, social service, agriculture, and education.

(*g*) *Talk.*—2:30 to 2:45 p.m., Monday through Saturday, "Your City," a program to spotlight significant events to keep the residents informed of the changing environment in the community.

Billy Walker

59. *Billy Walker* was born in Pell City, Ala. He attended the public schools of St. Clair County and Howard College of Birmingham, Ala. He has enrolled in a correspondence law course. From 1942 to 1945, he was engaged in defense work. He became a pastor of a small rural church in St. Clair County in 1942. From 1951 until 1957, he traveled throughout the United States, Mexico, and Cuba as publicity manager and coordinator for evangelistic campaigns. In 1957, he became pastor of the Baptist Revival Center in Montgomery, Ala., and has served continuously in that capacity since that time. He broadcasts a 25-minute religious service each Sunday morning

over the facilities of station WMGY, Montgomery. He plans to continue such broadcasts.

60. Mr. Walker's broadcasting experience to date has consisted almost entirely of appearances in front of the microphone. He began broadcasting on radio in 1942, and during the past 20 years has conducted radio programs on over 100 different radio and television stations. He frequently serves as master of ceremonies and as a speaker at various civic and religious organizations and meetings. In 1958, he was a candidate for Governor of the State of Alabama, during which campaign he appeared on a number of radio stations within the State.

61. Mr. Walker's father and mother live on a farm near Billingsley, Ala., approximately 15 miles northwest of Prattville. He presently lives in the city of Montgomery, Ala., approximately 12 miles southeast of Prattville. Prior to filing the application for the proposed station, Mr. Walker visited Prattville on a number of occasions. These included visits while a candidate for Governor in 1958 and when he passed through the city to visit his mother and father. He has conducted religious services in Prattville and has many friends within the city.

62. Prior to September 24, 1959, on which date Mr. Walker filed his application for the proposed Prattville station, he discussed programing with a number of residents of Prattville and Autauga County. Among those with whom Mr. Walker discussed his plans were members of the Negro race.[3] Mr. Walker identified a substantial number of persons with whom he discussed programing, some before and some after the filing of his application.[4] Shortly before the hearing, four persons were contacted for Mr. Walker by a personal friend, a minister in Prattville.[5]

63. Attached to and made a part of the application filed by Billy Walker on September 24, 1959, for the proposed station at Prattville was a proposed program schedule in which he gave a title to each 15-minute segment of the proposed program day and indicated the source of the program; i.e., whether live, recorded, or wire, and whether the program would be sustaining or commercial. Except for a 15-minute program, Monday through Friday, beginning at 11:30 a.m., entitled "School Bell" and classified as "educational," none of the proposed time segments were classified by type or content. The application contained a percentage breakdown of the programs by both source and type. These percentages were computed by a Mr. Hargreaves, who was then the manager of a broadcast station and also acting as Mr. Walker's consulting engineer. The Commission, in its order designating the application for hearing, did not place in issue the programing proposals of Mr. Walker except in so far as they were pertinent to the comparative aspects in this proceeding. It was not until Mr. Walker had exchanged his proposed program schedule and program descriptions that the parties were advised of the type or program content of the 15-minute time segments. At the

[3] Tr. 197, 213, and 214.
[4] Walker exhibit 12 and Tr. 197, 239, and 240.
[5] Tr. 217 and 248.

time the program proposals were offered in evidence, objection to the receipt thereof was predicated on the allegation that the program proposals were at "variance" with the original program proposals as filed with the Commission by Mr. Walker on September 24, 1959. An examination of the originally filed program proposals with the program proposals offered in evidence disclosed that except for the addition of a column showing the type or program content, the proposed program schedule was identical with that originally filed.[6] There was, however, a difference in the percentage classification of the programs by type or program content. The extent to which the amount of time to be devoted to programs of the various categories differs from that shown in the original application is as follows:

	1959 application			Walker exhibits 7 and 8			Difference	
	Percent	Hours	Minutes	Percent	Hours	Minutes[1]	Hours	Minutes
Entertainment	64.1	45	0	66.4	46	30	−1	30
Religious	4.6	3	15	8.3	5	45	+2	30
Agricultural	10.7	7	15	4.0	2	45	−4	30
Educational	1.8	1	15	2.1	1	30	+0	15
News	12.5	8	45	12.1	8	30	−0	15
Discussion	1.8	1	15	2.1	1	30	+0	15
Talks	4.5	3	15	5.0	3	30	+0	15

[1] The time figures in this column are as shown in Walker exhibits 7 and 8. All other columns contain those minor inaccuracies which are inherent in the use of "rounded out" percentage figures.

64. The hearing examiner's independent analysis of the program percentages (Walker exhibit 8) in the light of Walker's program descriptions (Walker exhibits 11 and 14) discloses that the areas within which Walker's type classifications as shown in exhibit 8 differ from the type classifications as shown in his application as filed in 1959 reflecting nothing more than changes in the type classification of a program which, under Commission rules, may be classified under two or more type categories. To illustrate, the analysis prepared by Mr. Hargreaves of Walker's original programing indicated that 4.6 percent of broadcast time would be devoted to "religious" programs. Walker, in his exhibit 8, raises this percentage to 8.3 percent by classifying as "religious" the programs "Songs of Faith," recorded religious music, 6:45 to 7:30 a.m., Sunday; "Go to Church Today," church announcements with music, 7:30 to 7:45 a.m., Sunday; "Sunday Concert," recorded religious music, 1 to 2 p.m., Sunday; and "Treasures," recorded religious music, 3:30 to 4 p.m., Saturday. Music with a religious theme may be classified as either "religious" or "entertainment."

65. Walker's original programing analysis indicated that 10.7 percent of broadcast time would be devoted to "agricultural" programs. It seems that Mr. Hargreaves, who prepared the original type analysis, concluded that the program, "Alabama Hayride," 7 to 7:45 a.m., Monday through Saturday, was "addressed to the early rising farm

[6] The hearing was recessed while this examination was made. Tr. 176, 177, 178, and 193.

population"[7] and classified it as "agricultural." Walker's exhibits 11 and 14 describe "Alabama Hayride" as country and western tunes designed for the listening pleasure of the "early rising rural population." Thus, Walker's change in the type of classification of 4 hours and 30 minutes of programing time to "entertainment" from "agricultural" reflects the use of the word "rural" rather than the word "farm."

66. A similar analysis of other programs in which there has been a change in the type classifications indicates that the variations in percentage type figures reflect nothing more than the fact that Walker did not apply Commission type descriptions in the same manner as did Mr. Hargreaves.

67. Walker's original programing proposals listed several time segments under the title "Public Service." Walker's exhibits 7, 11, and 14 show that the "Public Service" time segments will be devoted to agricultural, talk, educational, discussion, and entertainment programs. "Public Service" classified as "entertainment" will consist of programs on behalf of the Army, Navy, Marines, Air Force, and other Government agencies, or contain free want ads and lost and found announcements.

68. Walker's proposed program schedule is predicated on the assumption that the station will sign on at 6:45 a.m. and sign off at 4:45 p.m. each day in the week for a total of 70 hours during the week.

69. The analyses of the programing proposals by type or intent and by source or content, as prepared by Walker, are as follows:

By type[1]		By source	
Entertainment	66.4%	Recorded commercial	47.9%
Religious	8.3%	Recorded sustaining	21.8%
Agricultural	4.0%	Wire commercial	10.0%
Educational	2.1%	Wire sustaining	7.1%
News	12.1%	Live commercial	3.6%
Discussion	2.1%	Live sustaining	9.6%
Talks	5.0%	Total commercial	61.5%
		Total sustaining	38.5%
Total	100.0%	Number of commerical spot announcements	350
		Number of noncommercial spot announcements	115

[1] The type analysis of the same program proposals as prepared by Mr. Hargreaves is shown in par. 63, supra.

70. A more detailed description of Walker's programing proposals is as follows:

(*a*) *Entertainment.*—Substantially all of these programs will be recorded musical programs featuring recordings of western, popular, classical, broadway show tunes, and gospel music. Gospel music includes spiritual music as sung or recorded by Negro singers.[8] Mr. Walker testified that he would like to play recordings by Mahalia Jackson every day.[9] Mr. Walker, however, does not propose to broadcast "rock and roll" music.

[7] As shown in pars. 8 and 9, supra, 88 percent of the farm families have radios. Farm income in 1960 amounted to approximately $6,400,000, a sum which exceeded the 1962 Prattville retail sales.

[8] Tr. 243, 244, 245, and 257.

[9] Tr. 217.

(*b*) *Religious.*—6:45 to 7:30 a.m., Sunday, "Songs of Faith," recorded religious music; 7:30 to 7:45 a.m., Sunday, "Go to Church Today," announcements of various local church services interspersed with religious music; 7:45 to 8 a.m., Sunday, "Sunday Briefing," résumé of church news; 8 to 8:30 a.m., Sunday, "The Baptist Hour," a recorded program through the auspices of the Southern Baptist Convention; 11 a.m. to 12 noon, Sunday, "Church Service," a live broadcast from one of the churches in the area; 1 to 2 p.m., Sunday, "Sunday Concert," a program of recorded religious music; 8 to 8:15 a.m., Monday through Saturday, "Morning Devotional," a religious program available to all denominations; and 3:30 to 4 p.m., Saturday, "Treasures," recorded religious music. Broadcast time for religious services will be offered to Negro churches and the facilities of the station will be made available to Negro ministers.[10]

(*c*) *Agricultural.*—6:45 to 7 a.m., Monday through Saturday, "Farm Markets and News," a program giving farm market reports, commodity prices, etc.; and 9 to 9:15 a.m., Monday through Friday, "Public Service," a program at the disposal of the county agent.

(*d*) *Educational.*—11:30 to 11:45 a.m., Monday through Friday, "School Bell," a program in which time will be provided to PTA's,[11] white and colored, principals of schools and also featuring lectures and talks; and 2:15 to 2:30 p.m., Saturday, "Public Service," tapes of school activities such as assemblies, pep rallies, glee clubs, interviews with school personnel, etc.

(*e*) *News.*—Thirty-four 15-minute (8 hours and 30 minutes) news programs will be broadcast at specified hours during the week.

(*f*) *Discussion.*—4:15 to 4:30 p.m., Monday through Friday, "Prattville Talks," a program of public service announcements, interviews, and discussions concerning community activities[12] and drives such as Red Cross, Cancer, Heart Fund, United Fund, etc.; and 4:15 to 4:30 p.m., Sunday, "Public Service," a taped program recorded during the week and will be the same as "Prattville Talks," which will be broadcast from 4:15 to 4:30 p.m., Monday through Friday.

(*g*) *Talks.*—9:15 to 9:30 a.m., Monday through Saturday, "Woman's Whirl," news of special interest to local women and talks by women leaders of the community; 4:30 to 4:45 p.m., Monday through Saturday, "Sports Report," information and scores on basketball, baseball, football, and other sports activities; 9 to 9:15 a.m., Saturday, "Public Service," a program to be given to civic organizations for the purpose of community promotion, such as Boy Scouts, YMCA, chamber of commerce, etc.; and 4:30 to 4:45 p.m., Sunday, "Sports Wrap-Up," a résumé of the week's sports events.

Proposed Staffs

71. Broadcasting's staff will be under the supervision of Ned N. Butler, who will serve as general manager and station manager. Station personnel will include one salesman and three persons in the pro-

[10] Tr. 217 and 245.
[11] Tr. 246.
[12] Walker exhibit 11, p. 4, and Tr. 244.

gram and technical department. Claude M. Gray will serve as technical director and consulting engineer.

72. The station proposed by Walker will have a staff of six persons, consisting of Walker as general manager, one person in the commercial department, one person in the technical department, and three persons in the program department.

73. Walker has made a downpayment on the property on which he proposes to erect the antenna and studio facilities of his proposed station. In the event this application is granted, he will acquire additional property adjacent thereto on which he will build his home, to which he will move and from which he will be able to give day-to-day supervision to the operation of his proposed station.

Conclusions

1. In this proceeding, Ned N. Butler and Claude M. Gray, d.b.a. the Prattville Broadcasting Co., request a permit to construct a new class III standard broadcast station to operate daytime only on the frequency 1330 kc with power of 1 kw, directional array, at Prattville, Ala.; and Billy Walker requests a permit to construct a new class III standard broadcast station to operate daytime only on the frequency 1330 kc with power of 500 w at Prattville, Ala. The two applications are mutually exclusive.

2. Ned N. Butler and Claude M. Gray, the partners in Broadcasting, were born in Alabama and have spent most of their adult lives within that State. Gray's participation in the proposed Broadcasting station will be principally that of a consulting engineer. Butler has had extensive experience in the ownership and management of a number of radio stations. He is presently the licensee and general manager of station WTLS, Tallassee, Ala. If Broadcasting's application is granted, he will serve as general manager of the Tallassee and proposed Prattville stations.

3. Billy Walker was born in Alabama and has spent the greater portion of his adult life within the State. He has had no prior experience as owner or manager of a broadcast station. He has had extensive experience before the microphone. If his application is granted, he will move to Prattville, where he will devote his time and attention to operating the proposed station except for such time as he will continue to devote to his duties as the minister of the Baptist Revival Center in Montgomery, Ala., and the broadcast of a 25-minute program on Sunday morning over station WMGY in Montgomery.

4. Broadcasting is given a preference in the matter of prior experience in the ownership and management of broadcast stations; Walker is given a preference in the matter of integration of ownership with management as he will be the resident owner, will manage but one station, and appear in person before the microphone of his station.

5. Broadcasting's application was filed after Butler visited Prattville and, based almost entirely on his own observation, concluded that there was a need for a station in this community. The programing proposals for Prattville were predicated, in the main, on Butler's experience in managing and operating radio stations in communities

106-505—66——5

which were similar, in many respects, with Prattville. Subsequent to filing the application in December 1960, Butler made limited contacts with people in the community during which he discussed the needs of the community and the programing proposals.

6. Walker had many contacts with Prattville and the people therein prior to filing his application in 1959. These arose from the fact that he had visited Prattville when running for Governor in 1958, had conducted religious services in the community, and had discussed his proposed station with a number of persons. He identified for the record a number of persons with whom he had discussed programing before filing his application in 1959 as well as after that date.

7. Neither Walker, whose application was originally filed on September 24, 1959, nor Broadcasting, whose application was filed on December 13, 1960, conducted an extensive community survey to determine the needs of the community prior to filing their respective applications. Walker has a more intimate personal knowledge of Prattville than does Butler.

8. The Commission, prior to designating the applications for hearing, found that the programing proposals of each of the two applicants were adequate. The hearing developed the fact that such differences in the programing as proposed were primarily those relating to the emphasis to be placed on certain types of programs. It is noted that the programing proposal of neither applicant was predicated on the assumption that the station would be on the air from 6 a.m. to 6 p.m., the length of day normally used by applicants for showing programing proposals for daytime-only stations. Neither applicant, however, commented on this fact either at the hearing or in proposed findings. Both applicants propose to broadcast a Sunday school service and a church service as part of their religious programing. These live programs will be rotated among the various churches in the community. Both propose to broadcast a substantial amount of music with a religious theme which they have classified as "religious." Both propose to present programs directed to the farm population, using the services of the local county agricultural agent. Both propose a reasonable amount of news, talk, discussion, educational, and entertainment programs. In summary, the programing proposals are basically the same and neither applicant is accorded a preference because of the emphasis to be placed on a given type of program.

9. Each applicant proposes to operate with a limited staff. Walker is entitled to a slight preference on staffing in that he will move to Prattville and will personally supervise the day-to-day operation of the station. Butler, on the other hand, will divide his time by supervising the proposed Prattville station and station WTLS, of which he is both licensee and general manager.

10. Each of the proposed operations will increase slightly the amount of objectionable adjacent-channel interference which station WGWC, Selma, Ala., a class IV station operating on the frequency 1340 kc, will receive when that station begins to operate with power of 1 kw pursuant to Commission action of April 16, 1963, authorizing that station to operate with power of 1 kw during daytime hours. The extent of this interference is discussed in paragraph 31 of the findings

of fact. The Commission action of April 16, 1963, granting the application of station WGWC to increase daytime power renders moot the issue adopted January 30, 1963, insofar as that issue pertained to interference which would be caused by the proposal of Billy Walker to station WGWC operating during the day with power of 250 w.

11. The station proposed by Broadcasting will serve within its interference-free daytime contour an area of 2,089 square miles within which there is a population of 210,927 persons, an area and population substantially in excess of the 1,596 square miles and 127,210 persons to be served by the station proposed by Walker. The greater coverage of the station proposed by Broadcasting, however, flows from the fact that its proposed antenna array is such that its major lobe will be directed toward the southeast and the city of Montgomery, and in this direction will extend approximately 14 miles beyond the 0.5-mv/m contour of the station proposed by Walker. Of the 210,927 persons which will be served by Broadcasting, approximately 68 percent, or 142,893 persons reside in the city of Montgomery and the Montgomery urbanized area, whereas of the 127,210 persons to be served by Walker, approximately 55 percent, or 70,179 persons, reside in the city of Montgomery and parts of the adjacent Montgomery urbanized area. The record does not show the total populations served by either of the applicants in areas which fall generally to the southeast of the city of Montgomery. If the urban population within the city of Montgomery and the adjacent urbanized areas are excluded, it will be seen that Broadcasting will serve 68,034 persons, whereas Walker will serve 57,031 persons. Walker's 0.5-mv/m contour will provide service several miles farther to the west and north of Prattville than will Broadcasting; in all other directions, Broadcasting's 0.5-mv/m contour extends to a greater distance.

12. Ned N. Butler, 50 percent partner and proposed general manager of Broadcasting's proposed Prattville station, is the licensee and general manager of station WTLS, Tallassee. Station WTLS serves an interference-free area of 2,314 square miles within which there is a population of 72,280 persons. There would be no overlap of the 2-mv/m contours of the stations involved. The 0.5-mv/m contour of Broadcasting's proposed Prattville station will overlap the 0.5-mv/m contour of station WTLS over an area of 951 square miles within which there is a population of 26,963 persons. In terms of percentage, 41.2 percent of the land area of station WTLS and 37.3 percent of its population will be served by Broadcasting's proposed station at Prattville. While the overlap area will amount to 45 percent of the area and 12.7 percent of the population of Broadcasting's proposed Prattville station, section 3.35(a) of the Commission's rules refers to the overlap of the service area of the existing rather than the proposed station. All of the overlap area receives primary service from at least 12 stations, with parts of the area receiving primary service from as many as 15 stations. In the overlap area, however, the only broadcast transmission facilities are those assigned to the Montgomery, Ala., stations and to station WETU, Wetumpka. The only newspapers published in the overlap area are the two daily newspapers published in Montgomery and a weekly newspaper published in Wetumpka.

196-505—66——6

13. The magnitude of the Prattville-WTLS overlap, 951 square miles and 26,963 persons, may be compared with the overlap involved in the application of John Laurino, tr/as Virginia Regional Broadcasters, docket No. 14382 (FCC 62D-58), 34 FCC 712. In the exceptions to the initial decision which proposed a grant of the application, the Broadcast Bureau states that "The area within the overlap of the 0.5-mv/m contour of Laurino's existing station and the 0.5-mv/m contour of the proposed Laurino station at Chester, which will be commonly served by the proposed and existing station, constitutes 225.4 square miles and a population of 28,734 persons." On March 8, 1963, Laurino filed a petition requesting the grant of his application subject to a condition that program tests of the proposed Chester station not begin until after he (Laurino) has disposed of his interest in station WIVE, Ashland, Va. By memorandum opinion and order adopted April 11, 1963, released April 12, 1963 (FCC 63R-188), 34 FCC 710, the Review Board, commenting on the proposed sale of station WIVE, stated that "Such sale would, of course, moot the section 3.35(a) issue and remove the only impediment to grant of this application." The Board went on to state that "Laurino's petition for conditional grant will be granted. The proposed condition concerning program tests *would avoid violation of the Commission's multiple ownership rules.*" (Emphasis supplied.)

14. On the point of coverage, Broadcasting is to be preferred by virtue of the fact that its station will serve the larger area and population. This preference is tempered, in part, by the fact that approximately 68 percent of the total population to be served resides in the Montgomery urbanized area to which the Commission has assigned six standard broadcast stations. The coverage preference is also tempered by the fact that Broadcasting's proposed station will overlap the service of station WTLS over a substantial area in which, except for the Montgomery broadcast stations and daily newspapers, there is but a single broadcast transmission facility and a single weekly newspaper.

15. The center of Prattville is approximately 12 miles northwest of the city of Montgomery. Prattville is the county seat of Autauga County. It is a community separate and distinct from Montgomery. In this sense, the city of Prattville cannot be considered to be a part of the Montgomery metropolitan complex within the meaning and intent of the Commission's decisions in *Huntington Broadcasting Co.*, 5 R.R. 721 (1950), and *Radio Crawfordsville, Inc., et al.*, docket No. 12798, et al., 34 FCC 996, FCC 63-480, decided May 22, 1963, released May 24, 1963.

16. The frequency requested by both applicants, 1330 kc, under Commission rules is a regional frequency to which class III stations are assigned. Section 3.21 of the Commission's rules defines a class III station as "a station which operates on a regional channel and is designed to render service primarily to a principal center of population and the rural area contiguous thereto." The site of the station proposed by Walker is north of Prattville. The power proposed by him, 500 w, is the minimum permitted for a regional station under the Commission's rules. Such coverage as Walker will obtain over the city of Montgomery and the Montgomery urbanized area results

from the proximity of that city to Prattville. The site of the station proposed by Broadcasting is approximately 2 miles south of Prattville. The power proposed is 1 kw. The directional array is such that the major lobe of the proposed operation will extend to the southeast toward the city of Montgomery. While the use of the directional array minimizes the interference to station WGWC, Selma, Ala., the fact remains that the use of such array with power of 1 kw will enable this station to render primary service of 2-mv/m or better to all of the Montgomery urbanized area. The use of 1 kw also results in increasing the area within which the 0.5-mv/m contour would overlap the service area of station WTLS beyond that which would occur were the proposed station to operate with the minimum power permitted by the Commission's rules. It is good engineering practice to propose an operation which will eliminate or minimize interference to existing stations and at the same time serve a large area and population. It is reasonable to assume, however, that the selection of transmitter site, directional array, and power proposed by Broadcasting were influenced, in part, by the fact that the proposed station would render primary service not only to the entire Montgomery urbanized area but to a substantial area to the southeast of that city.

17. Under Commission policy, a broadcast station is obligated to serve or attempt to serve all areas and populations within its interference-free contour. See Commission Policy on Programing, FCC 60–790, released July 29, 1960, 20 R.R. 1901 at 1913. The 2-mv/m contour of Broadcasting's proposed station encompasses all of the Montgomery urbanized area and will fall approximately 10 miles southeast of the center of that city. The 0.5-mv/m contour will fall approximately 29 miles southeast of the center of Montgomery. Stated in another way, the 0.5-mv/m contour of Broadcasting's station will extend farther to the southeast of the center of the city of Montgomery than the same contour extends either to the west, north, or northeast of the city of Prattville. Under these circumstances, it is reasonable to conclude that if Broadcasting is to serve Montgomery and the area to the southeast thereof, such obligation will, of necessity, diminish or lessen the time and attention which can be devoted to serving the proposed principal city, Prattville, and population in the rural area contiguous to that city. On the other hand, if Broadcasting does not propose to serve the Montgomery urbanized area and the area to the southeast of that city, such area and population should not be used as a basis for preferring Broadcasting over Walker. If Walker is the successful applicant, he will be expected to assume the responsibility of serving all areas and populations within his interference-free contour. The fact remains that Walker's 2-mv/m contour does not serve all of the Montgomery urbanized area, and a relatively small part of his proposed service area lies to the southeast of the city of Montgomery. Under these circumstances, it is assumed that the greater portion of his time and attention will be given to serving the proposed principal city, Prattville, and the population in the rural area contiguous thereto.

18. In the opinion of the hearing examiner, the facts relating to the coverage and overlap issues are the major or controlling facts on

which the resolution of this proceeding should be based. As previously stated, if only the areas and populations within the interference-free contours are to be considered, Broadcasting is entitled to a substantial preference. The applications under consideration are for a station to operate on a regional frequency which, in this case, is to be used to serve Prattville and the rural area contiguous thereto. Because of the differences in the obligations which flow from the differences in coverage, it is reasonable to conclude that Walker would devote more time and attention to meeting the primary obligation to serve Prattville and the rural areas contiguous thereto than would Broadcasting. Furthermore, the station proposed by Broadcasting will overlap the service area of station WTLS, Tallassee, licensed to and operated by Ned N. Butler, a 50-percent partner in Broadcasting. The area of overlap amounts to 951 square miles, within which there is a population of 26,963 persons, representing 41.2 percent of the land area and 37.3 percent of the population within the interference-free contour of station WTLS. Except for the transmission facilities of stations assigned to the city of Montgomery and the two daily newspapers published in that city, there is within the area of overlap but a single radio transmission facility and a single weekly newspaper. While the 2-mv/m contour of Broadcasting's proposed Prattville station will not overlap the 2-mv/m contour of station WTLS, the overlap of the 0.5-mv/m contours affecting an area of 951 square miles representing 41.2 percent of the service area of station WTLS and 45 percent of the service area of the proposed Prattville station, must be considered to be "substantial" as that term is used in section 3.35(a) of the Commission's rules. This overlap area is several times as large as the 225.4 square miles of overlap involved in the Laurino application, which overlap was removed in order to eliminate a condition which the Review Board, in its memorandum opinion and order adopted April 11, 1963, released April 12, 1963, in re application of *John Laurino, tr/as Virginia Regional Broadcasters*, docket No. 14382, 34 FCC 710, indicated would constitute a violation of the Commission's multiple ownership rules. Without deciding whether the overlap in issue is or is not of sufficient magnitude as to constitute a violation per se of the spirit and intent of section 3.35(a) of the Commission's rules, it is, nevertheless, of such magnitude as to require that Walker be given a decided preference in the matter of diversification, inasmuch as a grant to Walker would not lead to the concentration, within and near this 951-square-mile overlap area, of control of the media for the mass dissemination of news, information, and entertainment.

19. A review of the entire record, summarized in the foregoing several paragraphs, leads to the conclusion that the public interest, convenience, and necessity will be better served by granting the application of Billy Walker.

It is ordered, This the 19th day of June 1963, 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 1.153 of the rules, the application of Ned N. Butler and Claude M. Gray, d.b.a. the Pratt-

ville Broadcasting Co. (docket No. 14878, file No. BP-14571), for a permit to construct a new class III standard broadcast station at Prattville, Ala., to operate daytime only on the frequency 1330 kc with power of 1 kw, directional array, *Be* and the same *Is hereby denied*; and the application of Billy Walker (docket No. 14879, file No. BP-14729) for a permit to construct a new class III standard broadcast station at Prattville, Ala., to operate daytime only on the frequency 1330 kc with power of 500 w, *Be* and the same *Is hereby granted* subject to the following conditions:

1. This authorization is subject to compliance by permittee with any applicable procedures of the FAA.
2. Pending a final decision in docket No. 14419 with respect to presunrise operation with daytime facilities, the present provisions of section 3.87 of the Commission rules are not extended to this authorization, and such operation is precluded.
3. Permittee shall accept any interference that may result in event of a grant of the application of Robert J. Martin, file No. BP-15239, Selma, Ala.

FCC 66-667

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of BARTON W. FREELAND, SR., L. O. FREMAUX, AND EDMOND M. KEIM, D.B.A. RICE CAPITAL BROADCASTING CO., CROWLEY, LA. Requests: 1560 kc, 1 kw, DA-D, Class II For Construction Permit	Docket No. 16785 File No. BP-15130

MEMORANDUM OPINION AND ORDER

(Adopted July 20, 1966)

BY THE COMMISSION: COMMISSIONER BARTLEY CONCURRING IN THE FINANCIAL ISSUE; COMMISSIONER LOEVINGER ABSTAINING FROM VOTING; COMMISSIONER JOHNSON NOT PARTICIPATING.

1. The Commission has before it for consideration (*a*) the above-captioned and described application, as amended; (*b*) the petition to deny or designate for hearing, filed on December 10, 1962, by KSIG Broadcasting Co., Inc., licensee of station KSIG, Crowley, La.; (*c*) the opposition to petition to deny or designate for hearing, filed on January 7, 1963, by the applicant; (*d*) the reply to opposition to petition to deny or designate for hearing, filed on January 25, 1963, by KSIG; (*e*) the supplement to petition to deny or designate for hearing, filed on September 26, 1963, by KSIG; (*f*) the amendment to petition to deny or designate for hearing in response to Commission inquiry, filed on October 9, 1964, by KSIG; (*g*) the reply to amendment to petition to deny, filed on October 27, 1964, by the applicant; (*h*) the response to Rice Capital's reply, filed on November 6, 1964, by KSIG; (*i*) and other related pleadings.

2. The petitioner (KSIG) alleges standing as a party in interest in this proceeding on the grounds that the proposed station would be directly competitive with its existing station KSIG for audience, advertising revenues, and programing. The Commission finds that the petitioner has standing as a party in interest pursuant to section 309 (d) (1) of the Communications Act of 1934, as amended, and section 1.580(i) of the Commission's rules. *F.C.C.* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 9 R.R. 2008 (1940).

3. The petitioner requests that the Commission deny the above-captioned application or, in the alternative, designate it for hearing on the following issues: To determine whether there are adequate revenues in the area to support more than one standard broadcast station in Crowley, La., without loss or degradation of service to the area (*Carroll* issue [1]); to determine whether there is any need in Crowley or the

[1] *Carroll Broadcasting Company* v. *F.C.C.*, 258 F. 2d 440, 17 R.R. 2066 (1958).

area for the proposed new station; to determine whether applicant's estimates of expected operating revenues, operating expenses, and resulting profits (or losses) are reasonable; to determine whether the applicant, in view of its proposals as to staff, is qualified or capable of operating its station in the manner proposed; to determine whether the applicant is financially qualified to construct and operate its proposed station in particular view of such levels of operating revenues, expenses, and profits (or losses) as may reasonably be projected; to determine what efforts, if any, were made by the applicant to ascertain the program needs and interests of the community and area to be served, and the manner in which the applicant proposes to meet such needs and interest (*Suburban* issue [2]); and to determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the instant application would serve the public interest, convenience, and necessity.

4. The petitioner requests the specification of a *Suburban* issue on the grounds that the applicant has not demonstrated that he has ascertained the particular programing needs and interests of the community sought to be served or how he proposed to meet the needs and interests of the community. The petitioner further contends that the application includes a program schedule which lists programs only by general classification without any titles or descriptions. The applicant, in its opposition pleading, alleges that two of the three partners in the applicant have been lifelong residents of Crowley and that they have been engaged in civic and fraternal activities in the community. The applicant further alleges that the third partner (Edmond M. Keim), who will manage and operate the proposed station, has had over 7 years of broadcasting experience in Crowley as a former member of the station KSIG staff. In an amendment filed on September 4, 1963, the applicant submitted a proposed program schedule, including specific program titles and descriptions. In addition, the applicant submitted the names of the community leaders and residents contacted to discern the programing needs and desires of Crowley. On the basis of these showings, the Commission finds that the applicant is sufficiently familiar with the programing needs and interests of the community so as to make the specification of the requested *Suburban* issue unnecessary. Accordingly, the request for its specification as an issue will be denied.

5. The petitioner contends that the applicant does not have the basic financial qualifications to construct and operate its proposed station. The petitioner asserts that the applicant's estimated operating revenues ($60,000), estimated operating expenses ($48,000), projected level of profits ($12,000), and the proposed operating staff are impractical, unrealistic, and inadequate to sustain its proposed operation. The Commission considers an applicant financially qualified if it can show that it has sufficient funds to complete construction and to meet all fixed charges and operating expenses during the first year of operation either by proof that adequate funds are available and committed to the proposed station for this purpose without income or

[2] *Henry et al. (Suburban Broadcasters)* v. *F.C.C.*, 302 F. 2d 191, 23 R.R. 2016 (1962).

by convincing evidentiary showing that the available and committed funds will be supplemented by sufficient advertising or other revenue to enable the applicant to discharge its financial obligations during the first year. *Ultravision Broadcasting Co., et al.*, 1 FCC 2d 544, 5 R.R. 2d 343 (1965). By amendment filed in July 1965, the applicant has indicated that it estimates that the downpayment on equipment, payment, and interest on an equipment contract and bank loan and operating expenses will total $62,132. To meet these commitments, the applicant will have contributions to partnership capital in the amount of $20,000 and a bank loan of $10,000, a total of $30,000. It is apparent, therefore, that the applicant must rely, in part, on anticipated revenue to meet fixed charges and operating expenses. The applicant has submitted a brief statement in support of its estimate of revenue which consists of an indication of the allowance for the number of spot announcements per week, the average rate per spot, and the statement that the rates would be competitive with those of KSIG. The applicant mentions rates shown on the KSIG rate card for 1958 and some statistics on commercial practices of KSIG as contained in KSIG's latest renewal application. The Commission does not regard this as a persuasive indication of the availability of the advertising revenues in the proposed service area, nor is there any indication of what portion of those revenues will be available to the applicant. The applicant does not state whether it has commitments from potential advertisers. Accordingly, the applicant will be given an opportunity to substantiate its estimate of revenue.

6. In support of its estimate of construction costs and operating expenses, the applicant has submitted an itemization of expenses. In the light of the fact that the applicant should be afforded an opportunity to substantiate its estimate of revenue and in view of the estimated operating expenses and construction costs which appear to be somewhat less than the average for similar operations, the applicant will also be permitted to adduce evidence in support of the estimate of the cost of construction and initial operation. *Ultravision Broadcasting Co.*, supra.

7. The petitioner also requests the specification of an issue to determine whether the applicant, in view of its proposals as to staff, is qualified or capable of operating its station in the manner proposed. The petitioner asserts that the applicant's staff of seven full-time and two part-time employees is inadequate to effectuate its proposed programing, especially in light of the fact that 14 hours out of the 84 broadcast hours proposed per week would be devoted to live programing. On April 1, 1963, the applicant submitted an amendment in which it reduced the amount of programing proposed to be devoted to live programing from approximately 14 hours per week to approximately 9 hours per week. In light of the showings and descriptions submitted by the applicant in connection with its proposed programing schedule, the Commission is of the view that the 9 hours per week is a proper classification of the applicant's live programming. The applicant has provided adequate information as to the number of personnel involved and the allocation of functions. The Commission has considered the nature of the proposed programs and the manner

in which the applicant proposes to present them, and is of the opinion that the applicant's staffing proposal is reasonable to enable it to effectuate its programing proposals. The facts relied on by the petitioner do not establish a sufficient basis for questioning these proposals. Accordingly, the requested issue will not be specified.

8. The petitioner also requests the specification of an issue to determine whether there is any need in Crowley or the area for the proposed broadcast station. The petitioner asserts that there is no such need because of the existence of a local radio service (KSIG), as well as a multiplicity of other broadcast and newspaper media serving Crowley and surrounding areas. The petitioner contends that the applicant should be required to show a need for the proposed station, citing *Mountain Empire Broadcasting Co.*, 21 R.R. 630 (1961). However, this cited case is distinguishable from the present situation in that it involved a proposed station which would have imposed substantial adjacent-channel interference upon two existing stations. The burden was placed on the applicant to show that the need for the additional service outweighed the service which would be lost to the two existing stations. In the present case no such interference considerations are involved. The applicant proposes to establish a second local standard broadcast station in a community which presently has only a single licensed broadcast facility. Since there are no 307(b)[3] or technical (e.g., interference) issues involved in this case, the applicant is not required to show a need for the proposed station. Furthermore, the petitioner's allegations that its station (KSIG) provides a local service to Crowley and that there are a multiplicity of other broadcast and newspaper media serving Crowley and surrounding areas are not sufficient, standing alone, to raise a substantial or material question concerning the need for the proposed new service. The petitioner has not alleged any other facts which would warrant the specification of the requested issue. The adverse effect, if any, that the proposed station would have on the public interest is a matter which may properly be considered under the *Carroll* issue in determining whether a grant of the proposal would result in a net loss or degradation of standard broadcast service to the area. The petitioner's request for the specification of a separate issue on the need for the proposed new service will be denied.

9. The petitioner, in its petition to deny, requests that a *Carroll* issue be specified on the grounds that the revenues in the area are inadequate to support another broadcast station without a net loss or degradation of service to the area. In the *Missouri-Illinois Broadcasting Co.* case, 3 R.R. 2d 232 (1964), the Commission listed the type of material that a petitioner should submit in support of the request for a *Carroll* issue. Since the petitioner did not have notice of these new pleading requirements, he was given an opportunity to amend and amplify its allegations in support of the requested *Carroll* issue.

[3] Sec. 307(b) of the Communications Act of 1934, as amended, provides: "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

The Commission has considered the petition to deny, as amended, as well as the applicant's response thereto.

10. In response to the Commission inquiries, the petitioner supported his request for a *Carroll* issue with specific allegations of fact sufficient to show that a grant of the application would be prima facie inconsistent with the public interest standards of section 309 of the Communications Act of 1934, as amended. Although the burden on the petitioner is heavy, it is not required to prove its case prior to hearing. The Commission is of the opinion that the petitioner has met the burden of pleadng to the extent required by the *Missouri-Illinois Broadcasting Co.* case, 3 R.R. 2d 232 (1964). The Commission finds that the petitioner has raised substantial and material questions of fact concerning the ability of the area involved to support a second standard broadcast station without a net loss or degradation of service to the area. Accordingly, the application will be designated for hearing, specifying a *Carroll* issue. The burden of proof and proceeding with the introduction of evidence will be placed on the petitioner.

11. There remain no other material or substantial questions of fact which would warrant the specification of issues in this proceeding. Accordingly, the petition to deny, filed by KSIG Broadcasting Co., Inc., licensee of station KSIG, Crowley, La., will be granted to the extent indicated above and denied in all other respects.

12. Except as indicated by the issues specified below, the applicant is legally, technically, financially, and otherwise qualified to construct and operate as proposed. However, the Commission is unable to make the statutory finding that a grant of the application would serve the public interest, convenience, and necessity, and is of the opinion that the application must be designated for hearing on the issues set forth below.

It is ordered, That, pursuant to section 309(e) of the Communications Act of 1934, as amended, the subject 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 there are adequate revenues to support more than one standard broadcast station in the area proposed to be served by the applicant's proposal without net loss or degradation of standard broadcast service to such area.
2. To determine the basis of the applicant's (*a*) estimated construction costs, and (*b*) estimated operating expenses for the first year of operation.
3. To determine the basis for the applicant's estimated revenues for the first year of operation.
4. To determine, in the light of the evidence adduced pursuant to the two foregoing issues, whether the applicant is financially qualified.
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 the petition to deny or designate for hearing, filed by KSIG Broadcasting Co., Inc., licensee of station KSIG, Crowley, La., *Is granted* to the extent indicated above and *Denied* in all other respects.

It is further ordered, That KSIG Broadcasting Co., Inc., licensee of station KSIG, Crowley, La., *Is made a party* to the proceeding.

It is further ordered, That the burden of proceeding with the introduction of evidence and the burden of proof with respect to issue No. 1 *Are placed* on KSIG Broadcasting Co., Inc.; the burden of proceeding with the introduction of evidence and the burden of proof with respect to issues Nos. 2, 3, and 4 *Are hereby placed* on the applicant.

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

> Pending a final decision in docket No. 14419 with respect to presunrise operation with daytime facilities, the present provisions of section 73.87 of the Commission's rules are not extended to this authorization, and such operation is precluded.

It is further ordered, That, to avail themselves of the opportunity to be heard, the applicant 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.

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*.

FCC 66–678

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
KWHK BROADCASTING CO., INC. (KWHK), HUTCHINSON, KANS.	Docket No. 16588 File No. BP–15356
COLUMBIA BROADCASTING SYSTEM, INC. (WCAU), PHILADELPHIA, PA.	Docket No. 16589 File No. BP–15446
KAKE–TV AND RADIO, INC. (KAKE), WICHITA, KANS.	Docket No. 16590 File No. BP–15968
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted July 20, 1966)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING: COMMISSIONER LEE ABSTAINING FROM VOTING; COMMISSIONER JOHNSON NOT PARTICIPATING.

1. There is before us a petition of KWHK Broadcasting Co., Inc. (KWHK), seeking reconsideration of our memorandum opinion and order released April 19, 1966, 3 FCC 2d 409, designating this proceeding for hearing, and related pleadings.[1] KWHK requests dismissal of the application of KAKE–TV and Radio, Inc. (KAKE), as contrary to section 73.35 of the rules, because the 1-mv/m contour of KAKE's proposal would overlap that of station KUPK, Garden City, Kans., which latter station was acquired several months ago by KAKE. The KWHK petition is supported by the Chief, Broadcast Bureau. The Bureau also urges dismissal of KAKE's application because KAKE failed to update its application to reflect acquisition of station KUPK, as required by section 1.65 of the rules.

2. KAKE concedes that overlap would exist between its proposed operation and that of KUPK. KAKE asserts, however, that it would dispose of KUPK in the event of grant of its present application, prior to commencement of operations with its new facilities. Since such divestment would eliminate the section 73.35 question, KAKE urges that its application be continued in hearing.

3. We have in a number of instances, where the circumstances warranted, permitted an applicant to continue to prosecute its proposal conditioned upon disposal of an existing broadcast interest which, if retained, would render the proposed operation contrary to section 73.35 of the rules. See *Nebraska Rural Radio Association*, 5 R.R. 2d 67 (1965); *Radio Metter (WMAC)*, 21 R.R. 481 (1961); *King Broad-*

[1] The pleadings are: (a) Petition for reconsideration filed May 18, 1966, by KWHK Broadcasting Co., Inc., (b) opposition filed May 23, 1966, by KAKE–TV and Radio, Inc., (c) comments filed June 2, 1966, by the Chief, Broadcast Bureau, and (d) a reply to the opposition, filed June 3, 1966, by KWHK Broadcasting Co., Inc.

casting Co., 20 R.R. 1069; *Cookeville Broadcasting Co.*, 19 R.R. 742 (1960); *B. J. Parrish*, 17 R.R. 482 (1958); and *Great Lakes Television, Inc.*, 11 R.R. 246 (1954). The material before us indicates that the offer to dispose of station KUPK in the event of a grant of the KAKE application is made in good faith.[2] Station KUPK was acquired at a time when the KAKE application had been dismissed, and there was serious doubt whether it would be reinstated. The KAKE application seeks to improve facilities of an existing station, and purports to provide a first primary reception service to a substantial population and area. Regarding the Bureau's argument concerning section 1.65 of the rules, although a formal amendment reflecting KAKE's acquisition of KUPK should have been filed, we do not believe that a substantial question of nondisclosure has been raised warranting further inquiry. Under these circumstances, we believe it would be in the public interest to permit KAKE to continue to prosecute its application, on the condition that, as represented, KAKE will, in the event it prevails, dispose of KUPK prior to commencement of operations with its new facilities.[3] The present petition for reconsideration seeking dismissal of KAKE's application will, therefore, be denied.[4]

4. *Accordingly, it is ordered*, This 20th day of July 1966, that the petition for reconsideration filed May 18, 1966, by KWHK Broadcasting Co., Inc., *Is denied.*

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

---

[2] It is unlikely that the prohibition of sec. 1.597 of the rules (the "3-year rule") will bar KAKE from disposing of KUPK, if KAKE prevails herein. The 3-year period will probably have run by the time this proceeding is finally concluded and construction of the new facilities of KAKE is completed. There is nothing in the present record which indicates that a transfer of KUPK at such a time would otherwise be inconsistent with the public interest.

[3] The Commission is aware that the Review Board, by memorandum opinion and order, FCC 66R-272, released July 14, 1966, has reached essentially this same determination in denying a motion to enlarge issues.

[4] The petition is contrary to sec. 1.111 of the rules in that it seeks relief not authorized by that section. Although waiver of that section is requested in the petition, no valid justification therefor has been set forth. The petition could be dismissed summarily as contrary to sec. 1.111. However, to expedite the instant proceeding, and in light of the nature of KAKE's response, we have considered the petition on the merits.

FCC 66-684

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of HARRISCOPE, INC. (KTWO), CASPER, WYO. Has: 1470 kc, 1 kw, 5 kw-LS, U, Class III Requests: 1030 kc, 10 kw, DA-2, U, Class II-A	Docket No. 16787 File No. BP-16713
FAMILY BROADCASTING, INC., LA GRANGE, WYO. Requests: 1030 kc, 50 kw, DA-1, U, Class II-A For Construction Permits	Docket No. 16788 File No. BP-17204

MEMORANDUM OPINION AND ORDER

(Adopted July 20, 1966)

BY THE COMMISSION: COMMISSIONERS BARTLEY AND LEE ABSENT; COMMISSIONER JOHNSON NOT PARTICIPATING.

1. The Commission has before it for consideration (*a*) application of Harriscope, Inc., licensee of KTWO, Casper, Wyo., filed on May 6, 1965, for a construction permit for a new class II-A facility on 1030 kc; (*b*) petition to deny, filed by Hubbard Broadcasting Co., licensee of KOB, Albuquerque, N. Mex., on September 8, 1965; (*c*) opposition to petition to deny, filed by Harriscope on September 20, 1965; (*d*) application of Family Broadcasting, Inc., for a construction permit for a new standard broadcast station in La Grange, Wyo., filed on October 29, 1965;[1] (*e*) petition to deny, filed by KOB on January 4, 1966, against the Family application; (*f*) opposition to petition to deny, filed by Family Broadcasting, Inc., on January 17, 1966; (*g*) joint petition to remove applications from Commission's pending file and to designate for comparative hearing, filed by Harriscope and Family on June 3, 1966; and (*h*) statement of Hubbard Broadcasting, Inc., filed on June 13, 1966.

2. KOB has been formally licensed on 1030 kc since March of 1941, but has actually been broadcasting under program test authority (and earlier, under special service authorization) on 770 kc since October of 1941, pending action on its application for license to cover operation on 770 kc. Disagreement between WABC, New York, flagship station of the American Broadcasting Co. radio network, licensed on 770 kc, and KOB concerning the continued operation of KOB on 770 kc, has led to numerous Commission proceedings and to litigation in the U.S. Court of Appeals for the District of Columbia. On February 21,

[1] As originally filed, this application specified Cheyenne, Wyo., as the location. La Grange was substituted in an amendment filed Apr. 18, 1966.

1966, the Supreme Court denied the Commission's request for a writ of certiorari [2] following the most recent decision of the court of appeals, *American Broadcasting-Paramount Theatres, Inc.* v. *Federal Communications Commission*, 120 U.S. App. D.C. 264, 345 F. 2d 954 (1965). The Commission is currently in the process of formulating its response to the Court's decision.

3. This latest opinion, and the uncertainties generated by it, are fully discussed in the memorandum opinion and order of July 14, 1965 (FCC 65–624).[3] Until the questions created by the decision are resolved by further administrative or judicial proceedings, the status of all clear channel authorizations must remain unsettled. Such uncertainty obtains in the case of KOB and has been alluded to by us in a memorandum opinion and order, *In re John A. Barnett*, adopted September 29, 1965 (FCC 65–869), 1 FCC 2d 880.

4. In an earlier decision, *American Broadcasting-Paramount Theatres, Inc.* v. *Federal Communications Commission*, 108 U.S. App. D.C. 83, 280 F. 2d 631 (1960), the court of appeals affirmed a Commission determination that operation of KOB on 770 kc, rather than 1030 kc, would best implement the mandate of section 307(b) of the Communications Act of 1934, as amended. In the report and order in the Clear Channel Proceeding (docket No. 6741), 31 FCC 656, the Commission reaffirmed a previous decision to remove KOB from 1030 kc and to give it the status of a class I–B station on 770 kc. The same proceeding led to a reclassification of 1030 kc from a class I–B to a class I–A channel, and earmarked it for class II–A duplication in Wyoming. In none of the proceedings held between October 1941 and the present has it been determined that 1030 kc would be the frequency of choice for KOB. On the contrary, numerous factual determinations have been made against the desirability of reassigning KOB to 1030 kc. Nevertheless, in view of the present posture of this case, no final decision will be made until the status of KOB with respect to 1030 kc is finally determined.

5. The above-referenced applications have been held in abeyance pending a final decision in the KOB matter. The petitions filed by KOB request that the Harriscope and Family applications be denied or designated for hearing with Hubbard as a party, alleging that a grant of either application would modify the KOB license by creating extensive nighttime skywave interference to KOB on 1030 kc, the frequency on which it is formally licensed.

6. As the KOB license to operate on 1030 kc has been renewed subsequent to the Clear Channel Report and Order, it now incorporates that Commission policy, and therefore would not be modified now by the addition of a II–A facility. *Transcontinent TV Corporation* v. *Federal Communications Commission*, 113 U.S. App. D.C. 384, 308 F. 2d 339 (1962); *The Goodwill Stations, Inc.* v. *Federal Communications Commission*, 117 U.S. App. D.C. 64, 325 F. 2d 637 (1963).

7. On June 3, 1966, Harriscope, Inc., and Family Broadcasting, Inc., filed a joint petition to remove applications from Commission's pend-

[2] 383 U.S. 906 (1966).
[3] A more complete report of the 770 kc history will be found therein.

ing file and to designate for comparative hearing their mutually exclusive applications. In response, on June 13, 1966, Hubbard Broadcasting, Inc., filed a statement. In their joint petition, Harriscope and Family requested that their applications be set for comparative hearing immediately, notwithstanding the pending KOB–WABC controversy. They urged the importance of an early II–A grant in Wyoming, and suggested that an early decision as between their mutually exclusive applications would reduce the inevitable delay if and when a II–A allocation on 1030 kc in Wyoming is ultimately confirmed. Both applicants stipulated that whatever action is taken by the Commission in the comparative hearing would be without prejudice to the ultimate decision in the KOB–WABC matter, in which the Commission has reached no final determination. Hubbard, licensee of KOB, did not oppose the joint petition. The Commission is of the view that a comparative hearing between Harriscope and Family held at this time would be in the public interest. If the ultimate decision in the KOB matter renders either of the proposed 1030 kc operations in Wyoming unacceptable, the public interest will not have suffered by virtue of the early decision between the two applications. If, however, and as seems far more likely, the final resolution of the KOB matter reaffirms the proposed II–A operation on 1030 kc in Wyoming, there will be no further delay in the grant of an application.

8. Hubbard, in its statement, suggested that the pending 770 kc applications (the WABC renewal application, file No. BR–167; the KOB modification application, file No. BMP–1738, and Hubbard's application for 770 kc in New York City, file No. BP–13932) should also be designated for hearing in a consolidated proceeding and processed to a decision based on the present rules. The Commission has not at this time determined the nature of the further proceedings to be held in the KOB–WABC dispute. While the latter requires further study, it is apparent that the resolution of the conflict between Harriscope and Family can proceed immediately, and need not await the action to be taken on the 770 kc dispute. However, because of the pendency of the KOB–WABC dispute, neither applicant in this proceeding will be granted a construction permit prior to the ultimate resolution of the matter raised by the U.S. Court of Appeals in *American Broadcasting-Paramount Theatres, Inc.* v. *Federal Communications Commission*, 120 U.S. App. D.C. 264, 345 F. 2d 954 (1965), cert. den. 383 U.S. 906 (1966), and any supplementary proceedings relevant thereto. Accordingly, the joint petition of Family and Harriscope will be granted, and the statement of Hubbard, to the extent it requests a consolidated hearing at this time, will be denied. We will, however, make Hubbard a party to the proceeding ordered below.

9. Family Broadcasting, Inc., is a nonprofit, no stock corporation planning to construct a noncommercial educational station. Examination of the application indicates that $186,000 will be needed to construct and operate the proposed station for 1 year without revenues. The applicant intends to raise $164,524 through loans from two of its members, Harold Camping ($50,000) and Scott L. Smith ($114,524). Their respective balance sheets, however, do not show sufficient liquid

or quick assets to meet their loan commitments. In addition, the applicant relies on a $71,250 credit from an equipment manufacturer. However, the letter of credit does not appear to be a firm commitment. Therefore, an appropriate financial issue will be included.

10. In opposing KOB's petition to deny, Harriscope requests as alternative relief a grant of its application contingent upon continued use by KOB of some frequency other than 1030 kc. Such a grant would create needless uncertainty for KTWO in view of the conclusions reached above, and would be inconsistent with settled Commission practice.

11. It has not been determined that the proposed antenna system of Family Broadcasting, Inc., would not constitute a menace to air navigation. Accordingly, an appropriate issue will be specified.

12. Family Broadcasting, Inc., proposes to operate with 50 kw of power, utilizing a directional antenna system (DA–1) to suppress the radiation toward the 0.5 mv/m-50 percent secondary service area of the dominant cochannel station (WBZ, Boston, Mass.). The degree of suppression proposed is severe—the minimum MEOV proposed is only 42 mv/m/50 kw, and raises a substantial question as to whether the proposed array can in actual practice be adjusted and maintained within the proposed MEOV's. Applicant's own engineering studies show that the proposed 0.025 mv/m-10 percent contour would be separated from the 0.5 mv/m-50 percent secondary service area of WBZ by only some 35 miles. In view of the foregoing, the Commission is of the view that an issue should be included as to whether the array can be adjusted and maintained as proposed and whether adequate protection will be afforded the dominant station (WBZ).

13. The transmitter site proposed by Family Broadcasting, Inc., is located approximately 0.8 mile west of La Grange, the city sought to be served. As a result, the city is located in the null area of the proposed radiation pattern. On a direct line from the proposed site toward the center of La Grange the calculated value of radiation is only 5.5 mv/m and the MEOV is 42 mv/m. It is apparent, therefore, that a substantial question remains as to whether the proposed operation would provide coverage of the city sought to be served in accordance with the Commission's rules.

14. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues set forth below.

Accordingly, *It is ordered*, That, pursuant to section 309(e) of the Communications Act of 1934, as amended, the above-captioned 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 Family Broadcasting, Inc., and the availability of other primary service to such areas and populations.
2. To determine the populations which may be expected to gain or lose primary service from the proposed operation of KTWO and the availability of other primary service to such areas and populations.

3. To determine, with respect to the application of Family Broadcasting, Inc.:

(*a*) Whether Harold Camping and Scott L. Smith have sufficient liquid or quick assets to meet their respective loan commitments.

(*b*) Whether a firm commitment of a $71,250 credit is available to the applicant from its designated equipment manufacturer.

(*c*) Whether, in the light of evidence adduced pursuant to (*a*) and (*b*), above, the applicant has sufficient funds available to construct and operate its proposed station for 1 year without revenues and thus demonstrate its financial qualification.

4. To determine, in view of paragraph 14 above, whether Family Broadcasting, Inc., will be able to adjust and maintain the directional antenna system as proposed in the instant application.

5. To determine, in the light of the evidence adduced pursuant to issue 4, above, whether Family Broadcasting, Inc., will be able to afford adequate protection to WBZ, Boston, Mass.

6. To determine, in view of paragraph 15 above, whether the proposed 25-mv/m, 5-mv/m and nighttime limitation contours would provide service to La Grange in accordance with section 73.188 of the rules.

7. To determine whether there is a reasonable possibility that the tower height and location proposed by Family Broadcasting, Inc., would constitute a menace to air navigation.

8. 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.

9. 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 the Federal Aviation Agency, Westinghouse Broadcasting Co., Inc., licensee of standard broadcast station WBZ, Boston, Mass., and Hubbard Broadcasting Co. *Are made parties* to the proceeding.

It is further ordered, That neither applicant in this proceeding will be granted a construction permit prior to the ultimate resolution of the matters raised by the decision of the U.S. court of appeals in *American Broadcasting-Paramount Theatres, Inc.* v. *Federal Communications Commission*, 120 U.S. App. D.C. 264, 345 F. 2d 954 (1965), cert. den. 383 U.S. 906 (1966), and any supplementary proceedings relevant thereto.

It is further ordered, That the Hubbard Broadcasting Co. petitions to deny *Are granted* to the extent indicated above and *Are denied* in all other respects, and the Hubbard Broadcasting Co. statement, insofar as it requests a consolidated hearing on the applications for 770 kc, *Is denied*.

It is further ordered, That the joint petition of Harriscope, Inc., and Family Broadcasting, Inc., *Is granted* to the extent indicated above.

It is further ordered, That, to avail themselves of the opportunity to be heard, the applicants and parties 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.

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.*

4 F.C.C. 2d

106-505—66——7

FCC 66-679

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of HUBBARD BROADCASTING, INC. (KOB), ALBUQUERQUE, N. MEX. For Modification of Construction Permit	Docket No. 6584 File No. BMP-1738
AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC. (WABC AND AUXILIARIES), NEW YORK, N.Y. For Renewal of Existing License	Docket No. 14225 File No. BR-167
In the Matter of CLEAR CHANNEL BROADCASTING IN THE STANDARD BROADCASTING BAND	Docket No. 6741

MEMORANDUM OPINION AND ORDER

(Adopted July 20, 1966)

BY THE COMMISSION: COMMISSIONER JOHNSON NOT PARTICIPATING.

1. On February 25, 1965, the U.S. Court of Appeals for the District of Columbia Circuit remanded the above-captioned matters to the Commission, directing that consideration be given to certain alternatives looking toward "equitable channel treatment" for ABC in relation to the facilities in New York City of the National Broadcasting Co. and the Columbia Broadcasting System. *American Broadcasting-Paramount Theatres, Inc.* v. *Federal Communications Commission*, 120 U.S. App. D.C. 264, 345 F. 2d 954.[1] Specifically, the court stated that the Commission should make a new assessment of the need for broadcast service in the Southwest and determine whether the operation of KOB as a class II station would satisfactorily meet such need. In addition, the court stated that the status of New York stations owned by NBC and CBS could be reexamined with a view toward achieving "comparatively equal channel facilities."

2. On April 7, 1966, after several intervening steps, the Commission ordered KOB, ABC, and the Broadcast Bureau to submit memoranda setting forth their views as to the manner in which the court's mandate should be implemented. The Commission has before it for consideration the responsive pleadings of the parties.[2] These pleadings reveal complete unanimity among the parties that no purpose would be served by attempting to resolve this proceeding through the adjudicatory process. There is also complete unanimity that the proper avenue of approach is by means of a reopening of docket No. 6741. The

[1] The background of this proceeding is set forth in detail at 25 F.C.C. at 794-799 and at 1 F.C.C. 2d at 327-330, and, accordingly, is not repeated here.

[2] In particular, presently under consideration are the Broadcast Bureau's memorandum, ABC's suggested procedures, and KOB's memorandum of views, each filed May 27, 1966, and KOB's reply to the Broadcast Bureau and to ABC, filed June 13, 1966.

parties differ, however, with respect to the scope the further proceeding should have.

3. The Commission agrees with the parties that the matters raised by the court's remand can most appropriately be resolved at this juncture through rulemaking rather than adjudication. We have reached no conclusion with respect to the various rulemaking alternatives submitted by the parties. These and other possible courses of action will be carefully considered and our determination will be set forth in a further order to be released in docket No. 6741. In the meantime the above-captioned application of KOB for modification of construction permit and the application of ABC for renewal of license of station WABC will be removed from hearing status and held in abeyance pending further order of the Commission.

Accordingly, *It is ordered*, This 20th day of July 1966, that the above-captioned applications *Are removed from hearing status*, and that the KOB and ABC applications (BMP–1738 and BR–167, respectively) *Are held in abeyance* pending further order of the Commission.

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

FCC 66-690

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of WWIZ, INC., LORAIN, OHIO For Renewal of License of Station WWIZ, Lorain, Ohio	Docket No. 14537 File No. BR-3707

MEMORANDUM OPINION AND ORDER

(Adopted July 27, 1966)

BY THE COMMISSION: COMMISSIONERS COX AND JOHNSON NOT PARTICIPATING.

1. The Commission has before it for consideration (*a*) a petition to set aside order, reopen the record, and enlarge or change the issues in the above-captioned proceeding, filed on June 9, 1966, by WWIZ, Inc. (WWIZ), and (*b*) an opposition thereto, filed June 16, 1966, by the Elyria-Lorain Broadcasting Co.

2. At this late date,[1] WWIZ requests that the Commission set aside its order of March 25, 1964 (which, inter alia, denied WWIZ's application for renewal of license of station WWIZ), reopen the record therein, and enlarge or change the issues which governed the proceeding. The basis for this request is that lesser sanctions than outright denial of a renewal application were provided in the designation order in the *Elyria-Lorain Broadcasting Co.* proceeding, which also involves questions of unauthorized transfer of control and renewal of broadcast licenses.[2] WWIZ submits that the Commission acted arbitrarily in framing issues for WWIZ which limited the hearing to renewal or denial of license renewal, but framing issues involving a choice of lesser sanctions in *Elyria-Lorain*, where the alleged derelictions are the same. WWIZ, therefore, requests the Commission to set aside the decision in the above-captioned proceeding, frame new issues for WWIZ identical to those framed in *Elyria-Lorain*, and reopen the record to allow WWIZ and other interested parties an opportunity to adduce evidence, cross-examine witnesses, and otherwise protect its substantial interests.

3. The end of the judicial process cannot be regarded simply as a signal to begin anew with pleas to the agency. Only a strong and compelling case would warrant taking up the matter again after the agency and judicial process has been completed. No such showing has been made here. See *Carol Music, Inc.*, FCC 66-649, released

[1] At no time heretofore in this proceeding has WWIZ made a request similar to the one presently under consideration. WWIZ has exhausted its appeals from the Commission's orders; most recently, the Supreme Court of the United States denied WWIZ's petition for rehearing before that Court. *WWIZ, Inc.* v. *F.C.C.*, —— U.S. ——, 86 S. Ct. 1455 (May 16, 1966).

[2] FCC 65-857, 6 R.R. 2d 191, released Sept. 29, 1965 (dockets Nos. 16209, 16210).

July 18, 1966. No valid reasons are demonstrated by WWIZ for grant of the relief which it now seeks at such a late date. This untimeliness would warrant its denial at the threshold and for having failed to raise the question previously and at an appropriate occasion before the Commission. However, going on to the substance of WWIZ's proposal, we note that while the two proceedings appear to be similar superficially, a reading of the orders [3] leading to the designation of the respective proceedings for hearing discloses that the issues specified in each proceeding arose from markedly different factual situations. Unlike the *WWIZ* situation, the preliminary information in the *Elyria-Lorain* proceeding, as discussed in that order of designation, persuaded the Commission that provision should be made for the possible imposition of lesser sanctions than denial of renewal of license, should that action be deemed to be more appropriate in the circumstances reflected in the hearing record. In short, the Commission determined at the outset that the charges in the *Elyria-Lorain* proceeding appeared to be less serious in nature than those advanced in the *WWIZ* proceeding; consequently, different issues were called for in *Elyria-Lorain*. Furthermore, in light of our conclusion that denial of WWIZ renewal was required as the appropriate sanction upon the hearing record before us, the speculative possibility that an alternative sanction might have been specified when the matter was designated is not a relevant factor for our consideration at this time.

4. In view of the foregoing, *It is ordered*, This 27th day of July 1966, that the petition to set aside order, reopen the record, and enlarge or change the issues, filed June 9, 1966, by WWIZ, Inc., *Is denied*.

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

---

[3] *WWIZ, Inc.*, FCC 62–223, 22 R.R. 1073 (1962); *Elyria-Lorain Broadcasting Company*, FCC 65–857, 6 R.R. 2d 191 (1965).

FCC 66–652

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
LORENZO W. MILAM & JEREMY D. LANSMAN, A PARTNERSHIP, ST. LOUIS, MO.	Docket No. 15615 File No. BPH–4218
CHRISTIAN FUNDAMENTAL CHURCH, ST. LOUIS, MO.	Docket No. 15617 File No. BPH–4402
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted July 20, 1966)

BY THE COMMISSION: COMMISSIONER JOHNSON NOT PARTICIPATING.

1. The Commission has before it for consideration an application for review of the Review Board's decision (FCC 66R–135, released April 6, 1966), filed May 13, 1966, by Lorenzo W. Milam & Jeremy D. Lansman, a partnership (M&L); (2) an opposition thereto filed June 7, 1966, by Christian Fundamental Church (Church); (3) comments on application for review filed June 7, 1966, by the Broadcast Bureau; and (4) reply to opposition filed June 22, 1966, by M&L.

2. The above applications were heard on (*a*) a comparative coverage issue; (*b*) the standard comparative issue; and (*c*) a site availability issue as to M&L. Hearing Examiner Kyle concluded that M&L had sustained its burden of proof under the site availability issue, and considered the applications under the two comparative issues, which he resolved in favor of Church. Thereafter, a panel of the Review Board (Members Berkemeyer and Pincock, with Member Nelson dissenting) concluded that M&L had not met its burden of proof with respect to the site availability issue and denied the application for lack of basic qualifications. The Board majority held that its judgment on the site availability issue rendered moot the comparative aspects of the case, and dictated a grant of Church's application.

3. The site availability issue was added at the request of the Broadcast Bureau to determine whether there is a reasonable assurance that the antenna site proposed by M&L will be available for its use. To meet its burden on this issue, M&L introduced into evidence a lease-option agreement between it and the owners of the building on which it proposed to locate its antenna. This document was signed by Miss Thelma M. Tucker, the building rental agent, on behalf of the owners of the building after receipt of sketches from M&L disclosing their construction plans. Miss Tucker testified at the hearing concerning her authority to sign lease-option agreements on behalf of the owners and about the availability of the building rooftop as an antenna site.

4. 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. *Beacon Broadcasting System, Inc.*, 21 R.R. 727, 728 (1961); *Suburban Broadcasting Co., Inc.*, 19 R.R. 956a, 959 (1960); *Brennan Broadcasting Company*, 15 R.R. 12e (1957); and *B. J. Parrish*, 14 R.R. 480, 483 (1956). We have carefully examined the record evidence in this case and are of the view that M&L has demonstrated reasonable assurance that the antenna site proposed by it is available for its use. We conclude, therefore, that M&L has met its burden of proof on this issue. The decision of the Board majority to the contrary is reversed.

5. In view of our holding on the site availability issue, we shall remand this matter to the Review Board for its further consideration of the applications under the comparative issues.

6. *Accordingly, it is ordered*, This 20th day of July 1966, that the application for review filed May 13, 1966, by Lorenzo W. Milam & Jeremy D. Lansman, a partnership, *Is granted* to the extent reflected herein and *Is denied* in all other respects; and

7. *It is further ordered*, That the decision of the Review Board (FCC 66R–135, released April 6, 1966) *Is set aside*, and that this proceeding *Is remanded* to the Review Board for its further consideration consistent with this memorandum opinion and order.

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

FCC 66-683

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. AND POWAY CABLE TV, POWAY, CALIF., RESPONDENTS	Docket No. 16786

MEMORANDUM OPINION AND ORDER

(Adopted July 20, 1966)

BY THE COMMISSION: COMMISSIONERS BARTLEY AND LOEVINGER DISSENTING; COMMISSIONER JOHNSON NOT PARTICIPATING.

1. The Commission has before it for consideration a petition filed on March 17, 1966, by Midwest Television, Inc. (Midwest), licensee of KFMB-TV, San Diego, Calif., a supplement thereto filed on April 4, 1966, and responsive pleadings in connection therewith.[1] The petition was filed pursuant to sections 74.1107 and 74.1109 of the Commission's

[1] The following responsive pleadings have also been filed and considered: Comments of Jack O. Gross (Gross), permittee of station KJOG-TV, San Diego, filed on Apr. 15, 1966; opposition to petition and supplement filed by Mission Cable TV, Inc., Pacific Video Cable Co., and Trans-Video Corp. (hereafter collectively referred to as Mission) on Apr. 18, 1966; opposition to petition and supplement filed by Southwestern Cable Co. (Southwestern) on Apr. 18, 1966; a statement of position filed by Southwestern on Apr. 18, 1966; a motion to sever filed by Southwestern on Apr. 18, 1966; a motion to dismiss filed by Southwestern on Apr. 18, 1966; an opposition and petition to be dismissed filed by Rancho Bernardo Antenna System (Rancho) on Apr. 18, 1966; a reply of petitioner to opposition to petition for immediate temporary relief and answer to motion to dismiss petition for immediate temporary relief filed by Midwest on Apr. 25, 1966; an answer to motion to sever filed by Midwest on Apr. 25, 1966; a reply of petitioner to oppositions to petition for permanent relief and answer to motions to dismiss petition for permanent relief filed by Midwest on May 2, 1966; and a reply to answers of Midwest to motions to sever and dismiss filed by Southwestern on May 5, 1966. Additional interlocutory pleadings concerning extensions of time were filed and have been acted upon, pursuant to delegated authority. On Apr. 6, 1966, Poway Cable TV filed a motion asking that it be dismissed as a party respondent; Midwest filed an answer stating that in view of the agreement reached, it would be appropriate to dismiss Poway as a party. We will grant this request.

rules, adopted March 8, 1966, effective March 17, 1966 (31 F.R. 4540),[2] and requests basically that the Commission immediately order respondents, pending final disposition of the petition, to cease and desist from extending service to additional subscribers served by their respective systems within the grade A contours of the San Diego stations and, after any necessary hearing, issue a final order appropriately confining carriage of Los Angeles television signals by respondents' San Diego area systems. In its later pleadings, Midwest modified its initial request for temporary relief to a request that respondents be directed not to extend the Los Angeles television signals to subscribers beyond the specific geographic boundaries of areas in which subscribers were being served on February 15, 1966.

2. In support of its requests for relief, Midwest states that respondents are the holders of franchises to operate CATV systems issued by the cities of San Diego, Chula Vista, National City, La Mesa, Imperial Beach, El Cajon, and San Diego County.[3] The city of San Diego has a population of approximately 648,500, occupying 208,631 housing units, and the county of San Diego has a population of approximately 1,213,000, occupying 379,483 housing units; nearly all of the county population lies within the grade A contour of KFMB–TV, and San Diego is ranked by the American Research Bureau as the 54th market based on net weekly circulation. San Diego is presently served by five television stations, a construction permit has been issued for channel 51 (KJOG), an application is pending for channel 15, and the assignment of an additional UHF commercial channel to San Diego is under consideration in docket No. 14229. Midwest alleges that respondents' CATV systems carry the signals of between six and nine Los Angeles television stations, none of which stations provide measured or calculated grade B service to more than the northern portion of the city of San Diego nor to any parts of six other separate communities adjacent to the city; that all of Mission's systems except Poway supply regularly eight Los Angeles stations beyond their calculated grade B contours (Mission's Poway system carries three beyond grade B signals and the independent Poway system carries two); that neither Poway nor Rancho Bernardo receive actual grade B service from any Los Angeles stations; and that Southwestern supplies regularly to all of its subscribers at least three Los Angeles stations beyond their calculated grade B contours.

3. Midwest goes on to allege that within the past year, and increasingly in recent months and weeks, there has been "widespread and intensive CATV activity within KFMB–TV's grade A contour" and that service to Poway, Chula Vista, and Pacific Beach was instituted only 2 to 4 months prior to the filing of the petition. It is alleged that the other systems have greatly extended their lines and substantially increased the number of subscribers since April of 1965; that the sys-

[2] Sec. 74.1107 of the Commission's rules relates to CATV systems operating or proposing to operate in 1 of the top 100 television markets and carrying distant television stations' signals. Sec. 74.1109 of the rules relates to the filing of petitions for waiver of the rules, additional or different requirements, and rulings on complaints or disputes.

[3] Trans-Video is 100 percent owner of Pacific Video, majority owner of Mission Cable and has a minority interest in Southwestern. It has no franchises and is a management company. Trans-Video operates under contract the CATV systems owned by and franchised to Mission, Southwestern, and Pacific.

tems have increasingly emphasized the laying of lines, far outstripping the solicitation and hooking up of new subscribers, with cables being strung in some areas for miles with very few drops and in some cases none; and in those communities where the systems are operational or wired, only portions of such communities are involved. Midwest estimates that as of February 15, 1966, there were 17,000 homes in the county and within the station's grade A contour connected to cable systems, of which approximately 6,500 were located in the city; that while this constitutes only 4.6 percent of the county homes within the station's grade A contour, there are at present approximately 294,000 homes in the communities within this contour in which CATV systems carrying Los Angeles signals have begun to operate, and this figure represents approximately 78 percent of all homes in the county within the grade A contour. Approximately 90 percent of all homes in the county within the station's grade A contour are alleged to be in areas covered by CATV franchises. Because of the alleged emphasis on line extensions rather than on hookups, Midwest contends that a large number of new subscribers could be wired up in a relatively short time even if there were no further cable expansion.

4. Midwest contends that the importation of a multiplicity of distant signals will, if allowed to expand, fragment and drastically reduce the local stations' viewing audience notwithstanding the nonduplication rules. Midwest points out that in its case, 44 percent of its programing is nonnetwork and will be subject to duplication and that, with respect to the San Diego independent stations, nearly 100 percent of their programing will be subject to duplication; that virtually all of the nonnetwork recorded programs now under contract to the San Diego stations are also under contract or available to the Los Angeles stations; that the importation of such programs impairs their value to the San Diego stations and causes audience losses, eventually resulting in reduced advertising revenues and curtailed local and quality programing; that over 94 percent of the Los Angeles programs carried on the respondents' systems in a given week have been, are being, or will be duplicated on San Diego stations in the same form or by way of San Diego equivalents; and analysis of the remaining 6 percent indicates that the same public interest is or would be served in an alternate way by the San Diego stations.

5. Midwest also alleges that respondents' systems, with the exception of Poway Cable TV, carry the signal of KFMB-TV on channel but materially degrade the quality of the signal broadcast, particularly the color signals; that the signal of the local UHF station, KAAR, is markedly worse on the cable than those of the VHF stations; that the signals of the Los Angeles stations appear better on the cable than those of the local stations despite the fact that the Los Angeles stations generally do not place a grade B signal over San Diego; and that the effect of degradation has been not only to damage the local station's reputation but has placed the distant signals on a higher competitive level than the local signals.[4] Finally, Midwest contends that in addi-

[4] Midwest states that because of degradation, the Pacific Beach system carries KFMB-TV on channels 8 and 2, but that this dual carriage confuses the public, weakens its station identification, and causes possible rating losses.

tion to the foregoing considerations, the CATV situation in San Diego falls squarely within the principle enunciated in the *Second Report* in footnote 69, where the Commission pointed out that, although, in general, CATV activity which does not involve extension of a signal beyond its grade B contour may continue, an important exception exists where two major markets fall within one another's grade B contours. In such a situation, the carriage by a CATV system in Baltimore, for instance, of the Washington signals might equalize the quality of the distant signals, change the viewing habits of the local population, and affect the development of local television stations. Midwest contends that the San Diego-Los Angeles situation is a classic illustration of this problem and that relief should be afforded on this basis as well as the basis previously set forth.

6. In view of the above, Midwest requests, essentially, that the Commission issue a final order appropriately confining carriage of Los Angeles signals by respondents' systems and that, if a hearing is necessary, the respondent be ordered to confine delivery of the Los Angeles signals to subscribers located within the specific geographic boundaries inside of the general geographic areas where the systems were operating on February 15, 1966.[5] In a document filed on April 15, 1966, Jack O. Gross, holder of a construction permit for UHF station KJOG–TV, channel 51, San Diego, supports the Midwest petition and states that a grant of the requested relief would materially contribute to the success of UHF in San Diego generally and KJOG in particular.

7. Mission's opposition, filed on behalf of Mission, Pacific, and Trans-Video, contends that the Commission can only issue temporary relief in accordance with the provision of section 312 of the Communications Act (47 U.S.C. 312(c)) and that there is no statutory authority for the type of relief requested. Mission contends that such relief is analogous to a motion for stay and that, as such, it is inadequate because Midwest has failed to show irreparable injury to itself (Mission contends that Midwest's allegations in this regard are only conclusionary and not supported by material facts); has failed to demonstrate injury to the public (Mission contends that allegations in this regard are also conclusionary and highly speculative, and denies that there is any degradation of the San Diego stations' signals by the CATV systems); and has not demonstrated that there is a likelihood that it will succeed on the merits (Mission contends that Midwest's allegations relating to a "pell-mell" extension of cable lines are completely unsupported by facts, is untrue, and that respondents have merely continued their normal wiring activity).

8. Mission alleges further that there is nothing in the rules which prohibits the actions of respondents which Midwest seeks to prevent, since the rules speak of extension of signals to "new geographic areas"

[5] In support of its request for temporary relief pending the outcome of any hearing, and in an attempt to describe the extent of respondents' operations in San Diego and southwestern San Diego County as of Feb. 15, 1966, Midwest filed a supplement to its petition, to which it attached a map purporting to show that there were eight separate islands of CATV subscriber service as of Feb. 15, 1966, located in recognized geographical areas in San Diego which were further circumscribed by recognizable and known geographical limitations and boundaries within the larger geographical areas. In the supplement, Midwest alleges that since Feb. 15, 1966, the respondents have extended lines and service beyond the specific boundaries within the general areas and also into entirely new geographic areas.

and Midwest has not factually supported its allegation that there has been such an extension. Further, Mission contends, Midwest has failed to show that the signals extended are beyond predicted grade B and it is Mission's position, in any event, that its Poway system is "grandfathered" under the rules since it was franchised under the San Diego County franchise; service had commenced prior to March 17, 1966, and the countywide franchise authorized CATV at any place in San Diego County outside of corporate limits.[6] Mission states that the outside-of-corporate limits construction in San Diego has proceeded to the point where approximately 70 percent of the populated area adjacent to metropolitan San Diego has been wired and 30 percent of the homes in the wired area have subscribed. Finally, Mission alleges, with respect to the request for temporary relief, that the public will be irreparably injured, since it ignores the need for expansion of television service, prevents expansion of educational television, deprives the public of improved color reception, municipalities of revenues from CATV, and potential subscribers of the same choice of programs that their neighbors who have already subscribed have; that respondents will be irreparably injured since their franchises may be forfeited if construction is delayed, contract rights may be lost, and respondents' employees may lose their jobs; the Commission's rules are yet untested and are probably illegal; and the rights of Midwest or the public can be fully protected by a decision on the merits, after a hearing, if the Commission determines that any action is required.

9. As to Midwest's request for permanent relief, Mission incorporates its same arguments with respect to the request for temporary relief and contends further that its franchises were obtained before the Commission decided to exercise jurisdiction and that construction and installation of cable was started before February 15, 1966, or March 17, 1966. Additionally, Mission alleges that while CATV is a less expensive and more convenient type of antenna service for signals already present in San Diego, CATV is needed in certain areas in order to provide adequate reception of San Diego channels 8 and 10, and that CATV expansion is necessary for the acceptance and viability of UHF stations. Mission points out that since the San Diego stations' programs cannot be duplicated on the same day and surveys show that during prime time the San Diego stations have 84 percent of the viewing audience, it does not appear that fragmentation of the remaining 16 to 20 percent of the television audience, among the four or five Los Angeles independents and the San Diego UHF, could have any serious impact on the ability of the San Diego network stations to continue their operations. Finally, Mission contends that the addition of subscribers to its systems after February 15, 1966, does not constitute extensions to new geographical areas since, under its city franchises, the appropriate geographic boundaries are the city limits and, under its county franchises, the appropriate boundaries are the unincorporated

[6] Midwest had alleged, in its petition, that Mission's system in Poway had commenced operations after Feb. 15, 1966, in violation of sec. 74.1107 of the rules, and requested that the Commission issue a cease and desist order as to said system. On Apr. 6, 1966, after an independent inquiry, the Commission issued an order to show cause why a cease and desist order should not be issued with respect to the Poway operation. FCC 66-292, Apr. 6, 1966. On June 22, 1966, the Commission issued a cease and desist order as to Mission's Poway system. FCC 66-548.

areas of the county.[7] In view of all of the above, Mission requests that Midwest's petition, both as to temporary and permanent relief, be denied.

10. Southwestern filed an opposition, a motion to sever, and a motion to dismiss.[8] In its pleadings, Southwestern alleges that the petition must fail since Midwest has failed to show that its system is carrying beyond grade B signals and that Southwestern's engineering studies show that the commercial television signals which it is carrying are all of grade B intensity. Southwestern further contends that its system is "grandfathered," since it began operating prior to February 15, 1966, is not expanding throughout the entire community or into new areas, and has only continued normal wiring operations. Moreover, Southwestern alleges that its system helps UHF and that, while Midwest has submitted no probative data regarding impact, Southwestern's market study, a copy of which it attached as an exhibit to its opposition, shows that CATV helps UHF generally and channel 39 specifically since carriage of the UHF station on the cable increases the station's audience, improves its picture quality, and provides greater penetration for, and viewing frequency of, the station. Southwestern also points out that Midwest's claim of signal degradation does not relate to its system since it has always carried Midwest's station on channels 8 and 2 of the cable. Southwestern also claims that its franchise area is unique, since the residents and antennas in that area are oriented to the Los Angeles stations and since it is within the predicted or measured grade B contours of the commercial signals of the stations carried on its system. Southwestern contends that Midwest's showing of fragmentation has no applicability to its system since the survey was conducted in a part of San Diego where the off-the-air reception of the Los Angeles stations is of less quality, the survey was conducted prior to the commencement of service by Southwestern and the various sections of San Diego vary significantly, and the audience survey findings relate to areas of San Diego where the CATV systems carry the full schedules of the Los Angeles CBS and NBC stations while Southwestern's system carries only the San Diego CBS and NBC stations. Finally, Southwestern alleges that while Midwest has failed to show that it would be irreparably injured by denial of the temporary relief, Southwestern would suffer irreparable injury, since a grant of temporary relief would dry up Southwestern's financing and cause bankruptcy. As to the request for permanent relief, Southwestern contends that while Midwest has essentially requested the Commission to designate a *Carroll* type issue, it has completely failed to furnish detailed evidentiary material. Accordingly, Southwestern requests that it be severed from the other respondents and that the petition and supplement, in so far as they relate to it, be denied or dismissed.

11. Rancho Bernardo, in its opposition, states that it operates a system in northern San Diego under a franchise from the city of San

[7] Mission submitted a map with its opposition showing the area of each franchise; the portion of each franchise receiving service prior to Feb. 15, 1966; the portion of each franchise receiving service after Feb. 15, 1966; and the portion of each franchise which was "fielded" and/or under construction as of Apr. 12, 1966.

[8] Southwestern also filed a statement of position which is being treated in connection with the petitions for reconsideration of the second report and order.

Diego and that the system is part of a housing development of 5,400 acres, approximately 400 acres of which have been developed. The system is designed to serve only the residential community and there is no intention of extending beyond those boundaries. Rancho Bernardo states that there are now approximately 1,000 subscribers to the system or 99 percent of the occupied housing units, and service is expanding in an orderly fashion to serve all the new residential units, with the timing of service extension being determined solely by the sales of residential units. Rancho Bernardo contends that the area receives unsatisfactory off-the-air television reception, is not within the grade A contour of KFMB–TV, and may be within the grade B contours of some Los Angeles stations. Rancho Bernardo denies that it degrades the KFMB signal and alleges that a grant of temporary relief would irreparably injure it because it would impede the sales of homes and would not help KFMB, since it would make its signal unavailable in the area. Rancho Bernardo requests denial of the temporary and permanent relief and asks that it be dismissed from the proceedings.

12. In its responsive pleadings, Midwest points out that there is no factual dispute as to Mission's and Southwestern's intentions to continue expansion throughout the various geographic areas covered by their franchises. Midwest contends that temporary relief is necessary to prevent this great expansion of these major market systems until resolution of the public interest questions presented. Midwest alleges that, similarly, with limited exceptions, there is no real dispute as to the regional and specific geographic areas described by it; that since respondents have not wired up all of the homes within the specific geographic areas designated, restriction to such areas, pendente lite, would not prevent normal wiring operations; and that, therefore, there is no showing by respondents that an interim stay would impair the ability of the systems to continue operations. Midwest alleges that Mission makes no claim that its viability would be impaired and that Southwestern's claim of irreparable injury assumes a total prohibition against new subscribers; Southwestern does not claim that if it were limited to new subscribers within the specific geographic areas designated as of February 15, 1966, it would be irreparably injured.

13. Specifically, with respect to Mission, Midwest alleges that it has offered no factual information to refute the allegations of rapid line expansion; that Mission's map, in large part confirms the boundaries specified by Midwest and, with one exception, Midwest will accept it as showing where Mission's systems were operating on February 15, 1966; that Mission's arguments regarding need for CATV service are invalid because (1) the entire public will lose if the local stations are forced off the air or required to curtail operations, and (2) over 94 percent of the Los Angeles stations' programs have been, are, or will be essentially duplicated by the programing of the San Diego stations; and that irreparable injury to Mission's systems has not been demonstrated since (1) there has been no showing that Mission's systems were not viable as of February 15, 1966; (2) there has been no showing that its franchises or contracts will expire or be forfeited if interim relief is granted (Midwest points out that the franchises do not require carriage of the Los Angeles stations and that the systems could expand

without restriction, carrying only San Diego signals); and (3) employee layoff would occur only if respondents were ordered to halt all normal wiring and hookup of new subscribers, but this has not been requested. Mission's countywide grandfathering argument, contends Midwest, completely ignores the meaning of paragraph 149 of the second report and order.

14. Midwest alleges, in response, that Southwestern does not challenge Midwest's designation of appropriate geographic areas and that since there are thousands of residents in these areas not yet on the cable, a grant of temporary relief as to Southwestern would not halt its normal wiring activities (Southwestern claims about 900 subscribers at present). Further, Midwest alleges, Southwestern's argument as to being grandfathered in the entire franchised area, because it was serving 350 subscribers on February 15, 1966, completely ignores the import of the second report and order; Southwestern's attempt to show that its franchised area receives grade B signals from Los Angeles is completely inadequate from an engineering standpoint and its market survey techniques are defective and its conclusions unsupported.[9] Finally, Midwest contends that while Southwestern's allegations concerning impact relate to the short-run benefits to UHF of carriage on CATV, these benefits decrease as penetration of all-channel receivers increases, and that Southwestern has set forth no basis for being treated differently than the other respondents in this proceeding.[10] As to Rancho Bernardo, Midwest states that in light of the representations as to extension Midwest will not press its request for temporary relief. However, Midwest contends that no basis has been shown for dismissal of Rancho Bernardo from the proceeding; that dismissal of Rancho Bernardo would have the effect of grandfathering an area 1,350 percent larger than the area in which service is presently being rendered; and that no allegation has been made that Rancho Bernardo's participation would constitute a hardship to it or cause it damage.

15. With respect to its request for permanent relief, Midwest states that the real issue is whether CATV should be allowed to import distant signals which would result in impairing the service capabilities of network stations and threaten the continued existence or commencement of UHF stations; that carriage provides only short-run benefits to UHF stations; and that same day nonduplication is insufficient because it has little relevance to nonnetwork programs. In conclusion, Midwest requests that the Commission set the matter for hearing on the issues raised in the petition for permanent relief; that pending final disposition, the respondents be directed not to extend the Los

[9] Midwest points out that while cable subscribers interviewed had two UHF stations available to them (channel 28, Los Angeles, and 39, San Diego) the Los Angeles UHF is not available off the air, and the survey only proves, at most, that viewers with two available UHF stations to watch will view UHF 1.77 times as much as viewers with one, and that, if UHF viewing by cable subscribers is divided equally between the two stations, channel 39 is viewed 11 percent fewer times in cable homes than in noncable homes. Midwest also pointed out that the survey proved nothing as to reception quality on cable, since no distinction was made between channels 28 and 39 and it was not determined whether the noncable homes surveyed had UHF antennas.

[10] Southwestern, in its responsive pleadings, repeats its allegations that its franchise area does receive grade B signals from Los Angeles and that its system does not degrade the signals of KFMB-TV. It also attached a supplementary economic report purporting to show that CATV carriage does help UHF generally and channel 39 specifically.

Angeles stations' signals beyond the boundaries previously specified; and that Southwestern's motion to dismiss the petition for temporary relief and Rancho Bernardo's petition to be dismissed from the proceeding be denied.

16. We think Midwest 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. At paragraph 149 of the second report and order (2 F.C.C. 2d 725), after stating our policy with respect to grandfathering the existing operations of CATV systems, we stated:

> We turn now to the question whether systems extending signals beyond their grade B contour on February 15, 1966, into one of the top 100 markets, are to continue to add subscribers in new geographic areas. Such systems, which may recently have gone into operation without regard to the Commission's explicit notice of the pendency of the paragraph 50 proposal, may have relatively few subscribers. In view of the public interest considerations upon which our policy is based, we do not believe that such a system should be allowed to expand from a few thousand subscribers in one part or suburb of a community to the potential of hundreds of thousands throughout the entire community, until there has been resolution of the serious issues presented (in an evidentiary hearing). While there may be a disruptive factor in halting CATV growth in the particular circumstances which should, of course, be taken into account, we believe that if at all practicable, appropriate geographical areas should be delineated, with the CATV growth limited to such areas until resolution of the issues. The problem calls for case-by-case judgment in the particular community as to the feasibility of action along the foregoing lines and the appropriate geographical area or areas. Our judgment will, therefore, be made upon the petition, if any, of the local broadcaster(s) objecting to the geographical extension of the CATV system to new areas and responses thereto. The petition may also request temporary relief in the event an evidentiary hearing is found to be appropriate; the Commission will determine, upon the basis of the showing and response in the particular case, whether such temporary relief is called for, and, if so, its nature.

This case falls squarely within the terms of the policy stated above. There is considerable UHF activity currently underway in San Diego with KAAR (d. 39) in operation until November 1965, with an application pending for educational channel 15, with an outstanding construction permit for channel 51 (KJOG–TV) and plans to commence operation in the near future. Several of Mission's systems, and Southwestern's system, commenced operations only some 2 to 4 months prior to the filing of the petition herein. In view of the size of the area involved (approximately 380,000 housing units in San Diego County), while the respondents' systems have relatively few subscribers, pursuant to their franchises, they have the potential for expanding throughout the entire county.

17. In this latter connection, Midwest has pointed out, and respondents have not denied, that there were on February 15, 1966, approximately 17,000 CATV subscribers in the county and within KFMB–TV's grade A contour, of which approximately 6,500 were located in San Diego. It was further pointed out that while this constitutes only 4.6 percent of the county homes within the station's grade A contour, there are approximately 294,000 homes in the communities within this contour in which CATV systems carrying Los Angeles signals have begun to operate and that this represents approxi-

mately 78 percent of all homes in the county within the station's grade A contour. Approximately 90 percent of all homes in the county within the station's grade A contour are located in areas covered by CATV franchises. Mission states that construction in unincorporated communities in San Diego County has proceeded to the point where approximately 70 percent of the populated area adjacent to metropolitan San Diego has been wired and 30 percent of the homes in the wired area have subscribed. Thus, it clearly appears that a hearing is required with respect to the overall question of whether such potential expansion in this major market is consistent with the public interest. Further, unless this expansion is appropriately limited pending resolution of the issues, within a very short period of time the systems could wire up thousands of new subscribers. We have made clear in the second report the impracticability of withdrawing service, once established, because of its disruptive effect. We have also made clear the strong public interest considerations which should be resolved before the establishment or entrenchment of CATV substantially throughout an area such as San Diego is permitted. Accordingly, interim relief appropriately limiting further expansion until resolution of the public interest issues is called for.

18. A hearing is also appropriate here because of the number of unresolved issues present. For instance, there is disagreement as to whether some of respondents' systems are operating within the predicted grade A contour of KFMB–TV; there is controversy as to whether some of the respondents' systems operate within the grade B contour of some of the Los Angeles stations carried on the system (but in this respect, see also par. 19, infra); there is a serious question as to whether respondents' systems degrade the San Diego signals carried and particularly the signals of KFMB–TV; the degree of CATV penetration of the market is contested; and, of course, there is controversy as to whether carriage on the systems will help or hurt new or prospective UHF stations in San Diego. These issues are all particularly appropriate for resolution in an evidentiary hearing. We wish to stress that, in view of the importance and novelty of the matters raised, we think considerable latitude should be afforded as to the introduction of evidence on all of these matters.

19. Some of the respondents have alleged that since their systems operate within the predicted or measured grade B contours of the Los Angeles stations carried on their systems, the provisions of paragraph 149 of the second report, supra, which relate generally to extension of beyond grade B signals, do not apply to their systems and that they may, therefore, continue to expand without hindrance. This contention, however, misconceives the main thrust of our major market policy. The Commission's primary concern with respect to CATV operations in the major markets importing distant television signals was whether such operation "may be of such nature or significance as to have an adverse economic impact upon the establishment or maintenance of UHF stations or to require these stations to face substantial competition of a patently unfair nature" (second report, par. 139). We defined distant signals as those signals extended or received beyond the grade B contours of those stations. While this standard will generally

106–505—66——8

encompass our main area of concern (i.e., the importation of signals not allocated to the area), it is by no means a fixed and immutable standard to which we will blindly adhere. As we pointed out in the second report, CATV activity which does not involve extension of a signal beyond the grade B contour may continue, "* * * with possibly only the rarest exception * * *" (second report, par. 151). This exception involves a situation where, for instance, two major markets fall within one another's grade B contours, and the importation of signals of the stations in one market into the other would equalize the quality of the distant signals, possibly change the viewing habits of the latter community, and affect the development of independent UHF stations there. Assuming, arguendo, as respondents contend, that their systems are within the predicted or measured grade B contours of the Los Angeles stations, this is exactly the situation presented here. The Los Angeles stations are located more than 100 miles from the San Diego main post office and, while they may provide service to some parts of San Diego, the issue is what kind of service as compared to that of the local San Diego stations, and what is the effect on the latter of CATV which equalizes the technical quality of the local San Diego signals and the more-than-100-mile-distant Los Angeles stations. Thus, the problem is not resolved merely by a showing that the Los Angeles stations do provide grade B signals to parts of San Diego County.

20. It is clear, therefore, that a hearing is necessary with respect to the overall question of CATV expansion in this major market and that some form of temporary relief is necessary and appropriate "before consequences possibly adverse to the public may develop." Before discussing the nature and form of the temporary relief to be prescribed, there are three matters raised by respondents which we will briefly discuss.

21. First, respondents Mission and Southwestern contend that the Commission lacks authority to furnish the temporary relief requested by Midwest, primarily on the ground that the cease and desist provisions of section 312 of the Communications Act constitute the only basis for any sort of interim action pending a hearing. However, we have determined in the second report that we have jurisdiction over CATV systems, and the statute gives us authority to perform "any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of [our] functions." Section 4(i). See also sections 303 (f) and (r). The provisions for temporary relief in situations of this sort which are contained in sections 74.1107 and 74.1109 of our rules constitute the exercise of such authority. Without this power to fashion our rules and orders to the practical necessities of the situation, we could not carry out the provisions of the act. The only alternative would be to seek an immediate injunction in court in order to preserve our jurisdiction to enter an effective order after a hearing; see *Federal Trade Commission* v. *Dean Foods Co.*, —— U.S. ——, decided June 13, 1966. Such action would not permit the initial consideration of the matter by the Commission, followed by judicial review which is preferable to immediate resort to the courts on a subject warranting

the primary exercise of jurisdiction by the Commission. We believe we have the authority for interim action contemplated by our rules, in view of the broad mandate of the Communications Act and the established principle that all authority of an agency need not be found in the explicit language of the statute where the agency is created to deal with a host of problems whose exact nature is unforeseen. See *Public Service Commission* v. *Federal Power Commission*, 327 F. 2d 893, 896–897 (C.A.D.C., 1964). Second, respondents Mission and Southwest contend that their systems are grandfathered to the limits of their franchises. We reject this position, since it is totally inconsistent with the policy expressed in paragraph 149 of the second report (see, also, *Letter to Telerama, Inc.*, 3 FCC 2d 585). Finally, respondents contend that a grant of temporary relief will cause them irreparable injury.[11] Mission's showing in this regard, however, is speculative, unsubstantiated, and proceeds on a mistaken understanding of the nature of the relief requested. Southwestern furnished an affidavit from a vice president of the bank which has financed, and is committed for further loans to finance, the continued operations of Southwestern's CATV system. The affidavit states, in essence, that additional loans will not be made, pendente lite, if temporary relief is granted. This statement, however, refers to a stay against extension of service to additional subscribers, and while the petition originally requested relief in those terms, Midwest subsequently revised its request for temporary relief. The affidavit also states that the bank will not advance the remainder of the funds committed unless Southwestern is legally free to continue to add subscribers in the area covered by its existing pole attachment agreements. But Southwestern has not alleged or shown that the temporary relief now requested would prevent it from adding subscribers in these areas. As Midwest pointed out, and Southwestern did not deny, since Southwestern claimed only 900 subscribers and there are thousands of residents in the specific geographical areas designated by Midwest, the temporary relief requested would not halt normal wiring activities and the addition of many new subscribers pending final disposition. This same observation also applies to Mission and, additionally, under the temporary relief requested, neither Mission nor Southwestern would be prevented from extending their systems throughout their franchise areas if they limited their operations to the carriage of the San Diego signals. Accordingly, we find that neither Mission nor Southwestern has demonstrated that they will be irreparably injured if some form of temporary relief is ordered.[12] We also specifically provide that if some form of irreparable injury not here shown or anticipated should develop during the pendency of the hearing, Mission and Southwestern may bring such new developments to our attention and we shall afford expedited consideration.

22. The question now is the nature and form of the temporary relief to be afforded. In its petition, and particularly the supplement

[11] Midwest has withdrawn its request for temporary relief as to Rancho Bernardo.

[12] We have considered Mission's request for oral argument with respect to the issue of temporary relief and do not believe that it would serve any useful purpose. Accordingly, the request will be denied. Other arguments advanced by respondents have also been considered and rejected.

thereto, Midwest specified with great particularity and precision "eight separate and discrete islands of CATV subscriber service as of February 15, 1966," alleging that these "islands" were located in recognized geographical areas in San Diego and that the islands were further circumscribed by recognizable and known geographical areas. These latter areas were also described with great precision and it was alleged that from the eight islands, as they existed on February 15, 1966, the respondents have extended and are continuing to extend their lines and service beyond the boundaries within the geographical areas which they partially occupied and, also, into new geographical areas. Midwest asks, essentially, that pending final disposition, respondents be ordered to confine delivery of Los Angeles signals to subscribers located within the geographical boundaries inside of the eight general areas which circumscribe the areas where the systems were operating on February 15, 1966.[13]

23. Neither Mission nor Southwestern has factually challenged Midwest's description and specification of the geographic areas and their boundaries. Rather, they take the position that their franchise areas constitute the appropriate geographic limitations. We have, however, rejected this contention (see par. 21, supra). Mission, with its opposition, submitted a detailed map which, in part, indicates for the entire area where systems were operating on February 15, 1966. Midwest states in its reply that the map, in large part, confirms the boundaries specified by it in its supplement and that, with one exception, Midwest will accept it as showing where Mission's systems were operating on February 15, 1966. We have also reviewed the map and compared it with the specific boundaries detailed in Midwest's supplement and it appears that, with the exception of the Chula Vista area, the parties are largely in agreement as to the boundaries of the areas where Mission was operating on February 15, 1966.

24. Accordingly, we will grant temporary relief, pending final disposition of this proceeding, in the form of an order requiring Mission to confine delivery of the Los Angeles signals carried on its systems to subscribers within those areas where Mission indicated in its map (appended as attachment G to its opposition) it was operating on February 15, 1966. We will also accept Mission's map designation with respect to the Chula Vista area, provided, however, that our action with respect to Chula Vista is without prejudice to any further showing Midwest may present to support its position as to the geographic boundaries, as of February 15, 1966, of the area served by Mission's Chula Vista system. Upon an appropriate showing, we will give further consideration to Midwest's request to further restrict the Chula Vista system pending final disposition of this proceeding.

25. As to Southwestern, we have previously noted that it has not challenged Midwest's designation of the general and specific areas within which it was operating on February 15, 1966. Accordingly, we will grant temporary relief, pending final disposition of this proceeding, in the form of an order requiring Southwestern to confine

[13] Midwest has indicated in a subsequent pleading that it does not object to dismissing Poway Cable TV from the proceeding and that it is not pressing its request for temporary relief as to Rancho Bernardo. Accordingly, we are only concerned with framing temporary relief as to Mission's and Southwestern's systems.

delivery of the Los Angeles signals carried on its system to subscribers within those areas specified by Midwest in its supplemental petition (pars. (A)(1) and (B)(1), pp. 10 and 12, respectively, and affidavit, par. 5(1), pp. 2 and 3), appended thereto. This action will be subject to any further showing Southwestern may wish to present to show that the geographic boundaries of the area in which it was operating as of February 15, 1966, differ from those specified by Midwest. Upon an appropriate showing and request, we will give further consideration to the question of appropriate February 15, 1966, boundaries of Southwestern's systems.

26. It should be noted with respect to the temporary relief described above that both Mission and Southwestern are free to continue to construct lines and add new subscribers, and to carry the Los Angeles signals within the specific geographic areas described above. As indicated, it would appear that there are substantial numbers of potential new subscribers located in those areas. Further, Mission and Southwestern may continue to expand their systems within their franchised areas so long as the expansion is confined to the carriage of the San Diego-Tijuana signals. And, finally, respondents may continue their present service to any persons who began receiving service, or who had signed and submitted an accepted subscription request, between February 15, 1966, and the date of this order. As indicated in the second report, we have no desire to cause disruption of existing service and we do not, in any event, believe that a rollback is either practical or necessary. While we recognize that the temporary relief which we are ordering may, to some extent, discommode respondents' operations, we do not think that it will cause respondents either substantial hardship or irreparable injury. To the extent that there is some disruption of existing operations and future plans, we find that it is necessary in the public interest.

27. Accordingly, in view of the above, and pursuant to sections 74.1109 and 74.1107 (a) and (d) of the Commission's rules, *It is ordered*, That this proceeding is hereby *Designated for hearing*, at a time and place to be specified in a further order, upon the following issues:

1. To determine the locations of trunk and feeder lines (both energized and unenergized) and the location and number of subscribers per half mile (or other comparable convenient unit of measure) of cable to respondents' respective CATV systems as of February 15, 1966, March 17, 1966, and the date of this order, and the locations of the predicted grade A contours of the San Diego television stations and predicted grade B contours of the Los Angeles television stations.

2. To determine whether the signals of any of the San Diego television stations are degraded on any of respondents' respective CATV systems and, if so, the cause, extent, and nature thereof.

3. To determine the present actions and plans for the future of respondents with respect to the initiation of pay-TV operations based upon or in connection with their respective CATV operations.

4. To determine the present penetration of CATV service by CATV systems in the San Diego market area and the potential penetration of CATV service under conditions of unlimited expansion.

5. To determine the effects on the audiences of existing, proposed, and potential San Diego television stations of present penetration and of potential penetration under conditions of unlimited CATV expansion.

6. To determine the effects of present service and of unlimited expansion of service by CATV systems, generally, on off-the-air television service from the San Diego television stations and, particularly, on existing, proposed, and potential UHF television service in the area.

7. To determine whether any conditions of future import should be placed on the present operations of respondents' CATV systems and, if so, the nature thereof.

8. To determine whether expansion of any of respondents' CATV systems should be limited and, if so, the appropriate conditions thereof.

9. To determine, in light of the foregoing, whether respondents' present or planned CATV operations are consistent with the public interest and what, if any, action should be taken by the Commission.

It is further ordered, That Midwest Television, Inc., the Chief, Broadcast Bureau, Mission Cable TV, Inc., Southwestern Cable Co., Pacific Video Cable Co., Inc., Trans-Video Corp., Rancho Bernardo Antenna Systems, Inc., and Jack O. Gross are made parties to this proceeding.

It is further ordered, That respondents have the burden of proceeding and the burden of proof with respect to issue 1; that with respect to issue 2, petitioners have the burden of proceeding and the burden of proof; that respondents have the burden of proceeding and the burden of proof with respect to issue 3; that respondents have the burden of proceeding and the burden of proof with respect to issue 4 in so far as it relates to respondents' respective CATV systems, and that petitioner has the burden of proceeding and the burden of proof with respect to issue 4 in so far as it relates to CATV systems other than those of respondents; that petitioner has the burden of proceeding and the burden of proof with respect to issues 5 through 8.

It is further ordered, That, pending the outcome of this proceeding, respondents Mission Cable Television, Inc., Southwestern Cable Co., Pacific Video Cable Co., Inc., and Trans-Video Corp. *Are directed to limit* the operations of their respective CATV systems as set forth in paragraphs 24–26, supra.

It is further ordered, That the motion to dismiss filed by Poway Cable Television *Is granted* and it *Is dismissed* as a party to this proceeding.

It is further ordered, That the motion to sever and the motion to dismiss filed by Southwestern Cable Co. and the petition to be dismissed filed by Rancho Bernardo Antenna Systems, Inc., *Are denied*.

It is further ordered, That the request for oral argument of Mission Cable Television, Inc., Pacific Video Cable Co., Inc., and Trans-Video Corp. *Is denied*.

It is further ordered, That the petition filed by Midwest Television, Inc., and the supplement thereto, to the extent indicated above, *Is granted*, and, in all other respects, *Is denied*.

It is further ordered, That, to avail themselves of the opportunity to be heard, the parties herein, pursuant to section 1.221(e) 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 their 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 ruling as to temporary relief shall be effective on the third day, not counting Saturdays, Sundays, and holidays, after the day of release of this opinion, provided that the ruling on temporary relief shall not be effective until judicial determination of the motion for a stay in the case of any respondent which notifies the Commission within 2 days that it intends to seek judicial review and which seeks judicial review and a judicial stay within 14 days of the day of release of this opinion.

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

FCC 66-694

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of CEASE AND DESIST ORDER TO BE DIRECTED AGAINST TELESYSTEMS CORP., OWNER AND OPERATOR OF A COMMUNITY ANTENNA TELEVISION SYSTEM AT SPRINGFIELD TOWNSHIP, PA.	Docket No. 16666

APPEARANCES

Jay E. Ricks (Hogan & Hartson), on behalf of TeleSystems Corp.; *Benedict P. Cottone* and *Joseph A. Fanelli* (Cottone & Fanelli), on behalf of Philadelphia Television Broadcasting Co.; *Robert W. Coll* (McKenna & Wilkinson), on behalf of Westinghouse Broadcasting Co., Inc.; and *Joseph Chachkin*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted July 27, 1966)

COMMISSIONER COX FOR THE COMMISSION: COMMISSIONERS BARTLEY AND LOEVINGER DISSENTING AND ISSUING STATEMENTS; COMMISSIONER JOHNSON NOT PARTICIPATING.

1. This proceeding was initiated by an order to show cause, FCC 66-477, 3 F.C.C. 2d 830, released May 27, 1966, directing TeleSystems Corp. (hereinafter TeleSystems) to show cause why it should not be ordered to cease and desist from further operation of a community antenna system (hereinafter CATV) in Springfield Township, Pa., in violation of sections 74.1105 and 74.1107 of our rules. Since expeditious resolution of this matter was deemed essential, we further ordered that, immediately after closing, the record be certified to the Commission for final decision and that the parties file their proposed findings of fact and conclusions of law within 7 days after the date the record is closed.

2. A prehearing conference was held before Hearing Examiner David I. Kraushaar on June 15, 1966, and an informal conference of counsel for all parties was held at the examiner's office on June 17, 1966. At the former conference, the examiner granted the motions for leave to intervene filed by Philadelphia Television Broadcasting Co., licensee of station WPHL on channel 17 at Philadelphia, Pa. (WPHL), and by Westinghouse Broadcasting Co., Inc., licensee of station KYW-TV on channel 3 at Philadelphia, Pa. (KYW-TV). The examiner formalized that ruling by an order, FCC 66M-846, released June 15, 1966.

3. The evidentiary hearing was held and the record was closed on July 1, 1966. As directed by the order to show cause, the examiner corrected the transcript of the hearing in certain respects and certified the record to us by an order, FCC 66M–930, released July 5, 1966. Proposed findings of fact and conclusions of law were filed by TeleSystems, WPHL, KYW–TV, and the Broadcast Bureau on July 8, 1966. In addition, on the same date, a brief in support of its proposed findings and conclusions was filed by TeleSystems.

4. Rules governing the regulation of all CATV systems were adopted by our second report and order in dockets Nos. 14895, 15233, and 15971, 2 F.C.C. 2d 725, released March 8, 1966; and these rules were published in the Federal Register on March 17, 1966 (31 F.R. 4540). A CATV system is defined by section 74.1101(a) of the rules as:

> [A]ny facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

Each of the parties in this proceeding has stipulated that the facility operated by TeleSystems in Springfield Township, Pa., is a community antenna television system as defined by section 74.1101 of the rules.

5. Sections 74.1105 and 74.1107, which are the bases for the charges in the order to show cause issued in this proceeding, were made effective immediately upon publication. Section 74.1105 provides, in part, that effective March 17, 1966, no CATV system shall commence operation, or begin supplying to its subscribers the signal of any television station carried beyond the grade B contour of that station, unless the CATV system has given prior notice of the proposed new service to the licensee or permittee of any television station within whose predicted grade B contour the CATV system operates or will operate. The portions of section 74.1107 pertinent to this proceeding provide as follows:

> (a) No CATV system operating 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. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.
>
> (b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their grade B contours, and the specific reasons why it is urged that such exten-

4 2d

sion is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within 30 days after such public notice. A reply to such responses or statement may be filed within a 20-day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

* * * * * * *

(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date; * * *.

6. The basic facts in this proceeding are not in dispute, having been stipulated by the parties. TeleSystems is the owner and operator of a CATV system located wholly within Springfield Township, Montgomery County, Pa. TeleSystems commenced service to its CATV subscribers on May 18, 1966, carrying the signals of the following 11 television stations:

WNEW-TV (channel 5)	New York, N.Y.
WOR-TV (channel 9)	New York, N.Y.
WPIX (channel 11)	New York, N.Y.
KYW-TV (channel 3)	Philadelphia, Pa.
WFIL-TV (channel 6)	Philadelphia, Pa.
WCAU-TV (channel 10)	Philadelphia, Pa.
WPHL-TV (channel 17)	Philadelphia, Pa.
WIBF-TV (channel 29)	Philadelphia, Pa.
WUHY-TV (channel 35)	Philadelphia, Pa.
WHYY-TV (channel 12)	Wilmington, Del.
WKBS (channel 48)	Burlington, N.J.

7. Springfield Township is within the predicted grade A contour of each of the six Philadelphia, Pa., television stations listed above. Philadelphia is ranked by the American Research Bureau as the fourth largest television market based on net weekly circulation figures for 1965. TeleSystems' CATV system therefore comes within the provisions of section 74.1107 as one operating within the predicted grade A contour of a television station in the top 100 markets and as one which may not extend the signal of a television station beyond that station's grade B contour without our approval. Since Springfield Township is located within the predicted grade B contour of each of the Wilmington, Burlington, and Philadelphia television stations, no violation of that rule results from the distribution of any of those television signals on the CATV system, and carriage of those television stations by the CATV system is permissible. See *Buckeye Cablevision, Inc.*, 3 F.C.C. 2d 798 (1966), *Mission Cable TV, Inc., and Trans-Video Corp.*, FCC 66–548, released June 22, 1966, and *Booth American Company*, FCC 66–625, released July 18, 1966.

8. On the other hand, no part of Springfield Township is located within the predicted grade B contours of New York television stations WNEW-TV, WOR-TV, and WPIX. Notwithstanding its commencement of service on May 18, 1966, and the carriage of the New York stations since that date, TeleSystems has not given the notification required by section 74.1105 of the rules to the Wilmington, Burlington, and Philadelphia television stations. In addition, TeleSys-

tems has not requested permission to extend the signals of these New York television stations pursuant to section 74.1107 of the rules; nor have we granted such permission. Since TeleSystems' CATV service was instituted after February 15, 1966, it was required to obtain such permission under section 74.1107. Thus, the record establishes that the signals of three New York television stations are being extended beyond their grade B contours in violation of the provisions of section 74.1107. Therefore, the only issue presented in this proceeding is whether the foregoing facts require the issuance of an order directing TeleSystems to cease and desist from further operation of its CATV system in violation of our rules.

9. TeleSystems asserts that we have no jurisdiction over nonmicrowave CATV systems located wholly within a single State, that we have no jurisdiction to limit or control the reception of available off-the-air television signals, that our rules which limit the right of a CATV system to distribute certain off-the-air television signals are in violation of the first amendment to the U.S. Constitution, and that our rule restricting the operation of CATV systems in the top 100 television markets was adopted on an inadequate record and is unreasonable and discriminatory. With respect to our jurisdiction, and the validity of our rules, our position was set forth in the second report and order, 2 F.C.C. 2d 725, at 729–734 and 793–797. We adhere to the views therein expressed; thus there is no necessity to repeat them here.

10. During the course of this hearing TeleSystems sought to adduce evidence concerning its expenditures and commitments in connection with the construction and operation of its Springfield Township CATV system and concerning forfeiture clauses which will take effect if construction of the CATV system does not proceed within specified periods of time. TeleSystems urges that this evidence is relevant and must be considered in determining whether the cease and desist order should be issued, citing *C. J. Community Services, Inc.* v. *Federal Communications Commission*, 100 U.S. App. D.C. 379, 246 F. 2d 660 (1957). This question was fully considered in *Booth American Company*, supra, paragraphs 14–17, where we held that this type of proceeding would as a general rule be limited to determining whether there was a violation of our rules, with other matters (such as hardship) going to possible waiver of our rules being considered in separate proceedings following the filing of an appropriate petition for waiver (and compliance, in the meantime, with our rules) or hearing. For the reasons stated therein, we conclude that the hearing examiner properly excluded the proffered evidence. See also *Buckeye Cablevision, Inc.*, 3 F.C.C. 2d 798, at 804, and 3 F.C.C. 2d 808, at 810–811, where we rejected respondent's request to consolidate the show cause proceeding with the application for permission to carry the distant signals so that evidence similar to that offered by TeleSystems could be introduced and considered by the Commission as a basis for granting a waiver in lieu of issuing a cease and desist order.

11. We believe it important here to emphasize again our reasons for refusing to treat a cease and desist proceeding as including issues appropriate to the adduction of evidence such as that proffered by TeleSystems. First, it is patently bad practice to permit a party know-

ingly to violate a rule, and to continue to do so while a subsequent request for a waiver or other relief is considered. Such a practice would encourage violation of the rule rather than compliance. In this situation, the results would be more serious than with some other types of rules, since violation involves increasing magnification of the problem—the CATV system grows while the issue remains undecided.

12. Second, allowance of such a practice would be manifestly unfair to other parties who are obeying the rule while they proceed through hearing or await action on waiver requests. Three such requests were granted on June 29, 1966.[1] The orderly processing line created to deal with waiver requests would disintegrate if the course chosen by TeleSystems were permitted. We see no equity and no public interest in elevating defiance of any rule to a place of precedence over the presentation of arguments through reasonable processes created for the sole purpose of considering them. For the reasons stated above and in *Booth American Company* and in *Buckeye Cablevision, Inc.*, supra, we are persuaded that, where a violation of section 74.1107(a) of the rules has been established, no consideration should be given to the withholding of a cease and desist order because of claimed facts peculiar to the case under consideration but relevant only to the possible waiver of the rule.

13. In summary, the record in this proceeding establishes: (*a*) That TeleSystems owns and operates a CATV system, as defined by section 74.1101(a) of the rules, in Springfield Township, Pa.; (*b*) that TeleSystems' CATV system operates within the grade A contours of television stations in the Philadelphia, Pa., market, which is the fourth largest television market; (*c*) that TeleSystems' CATV system began operation after February 15, 1966; (*d*) that since May 18, 1966, TeleSystems' CATV system has been extending the signals of three New York City television stations beyond their grade B contours without requesting and obtaining the necessary approval; and (*e*) that TeleSystems has not given notice of the commencement of its CATV service to the licensees and permittees of television stations within whose predicted grade B contours the CATV system is operating.[2] We therefore conclude that TeleSystems is operating its CATV system in Springfield Township, Pa., in violation of sections 74.1105 and 74.1107 of the rules and section 312(b) of the Communications Act.[3] We also conclude, for the reasons stated herein and in *Buckeye Cablevision, Inc.*, supra, *Mission Cable TV, Inc., and Trans-Video Corp.*, supra, and *Booth American Company*, supra, that the public interest

[1] The request of Martin County Cable Co., Inc., Martin County and Stuart, Fla, was filed Mar. 16, 1966; that of Coldwater Cablevision, Inc., Coldwater, Mich., was filed Apr. 26, 1966; and that of Chenor Communications, Inc., Chenango, N.Y., was filed Mar. 29, 1966. See memorandum opinions and orders, FCC 66-568, FCC 66-569, and FCC 66-570, all released July 1, 1966.

[2] The notification violation, insofar as carriage of local signals is involved, might well be of little significance in the circumstances of this proceeding and, on a proper request and showing, could be subject of waiver. No request, however, has been made in this respect; on the contrary, TeleSystems challenges this aspect of our regulations, also.

[3] Sec. 502 of the Communications Act provides as follows: "Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this act, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs."

requires the issuance of an order requiring TeleSystems to cease and desist from the unlawful operation of its CATV system.

14. We shall provide the same timetable for compliance with this decision as was used in *Buckeye Cablevision*, 3 F.C.C. 2d at 805–806. TeleSystems must comply with this cease and desist order within 2 days, excluding Saturdays, Sundays, and holidays, if any, after its release, unless it notifies the Commission during that period of its intention to seek judicial review of this order; in that event, TeleSystems will be afforded an additional 14-day period within which to file its appeal and seek a stay of this order.

15. *Accordingly, it is ordered*, This 27th day of July 1966:

(1) That, within 2 days after the release of this decision, TeleSystems Corp. *Cease and desist* from the operation of its community antenna television system at Springfield Township, Pa., until 30 days after notice is given to the licensees and permittees of all television broadcast stations within whose predicted grade B contours TeleSystems' CATV operates as required by section 74.1105 of the Commission's rules; and

(2) That, within 2 days after the release of this decision, TeleSystems Corp. *Cease and desist* from the operation of its community antenna television system at Springfield Township, Pa., in such a way as to extend the signals of any television broadcast station beyond its grade B contour in violation of section 74.1107 of the Commission's rules, and specifically to cease and desist from supplying to its subscribers the signals of stations WNEW–TV, WOR–TV, and WPIX, New York, N.Y.;

Provided, that, if TeleSystems Corp. notifies the Commission within 2 days of the release of this order that it intends to seek judicial review and seeks judicial review and a judicial stay within 14 days of the date of the release of this order, this order shall not be effective until judicial determination of the motion for a stay.

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

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I concurred in the issuance of the show cause order herein to the extent that it provided a means of obtaining judicial decision on the merits of the case at the earliest possible date as desired by the respondent.

I dissent to the issuance of this cease and desist order against TeleSystems Corp. In the absence of congressional action, I agree with the respondent's contention that the Commission does not have jurisdiction over CATV systems and that, consequently, the rules adopted in the second report and order are invalid. Even assuming, arguendo, that the Commission does have jurisdiction, I believe that section 74.1107 of the rules is invalid because it contravenes section 4(c) of the Administrative Procedure Act, which provides that a substantive rule not be made effective in less than 30 days after required publication except as otherwise provided by the agency upon good cause found and published with the rule.

Section 74.1107 was made effective immediately upon the required publication. A recitation of good cause found was made on the basis of injury to the public from continued implementation of service extending grade B signals.

In my opinion, injury to the public was not supported with any factual indication or showing and was purely unfounded speculation. There appeared to be more indication of benefit, rather than injury, to the public from the extended service in question. Consequently, the recitation of good cause found was, I believe, a nullity under section 4(c) of the Administrative Procedure Act, and the immediate effective date of the rule rendered it invalid.

The February 15 cutoff date of section 74.1107(d) appears in practical operation to be a retroactively applied effective date of the rule itself and, accordingly, a further ground for invalidity of the rule.

Moreover, I believe that section 74.1107 is not valid because adequate notice was not given on the substantive provisions imposed on implementation of service in the top 100 markets. Also, the mandatory hearing requirement seems extremely arbitrary and excessively burdensome on a CATV applicant. A serious question exists as to what kind of possible showing a CATV applicant could make to prevail against the fears expressed by the majority in the second report and order.

A basic fallacy of the CATV rules is the rationale which the Commission used to justify its assertion of jurisdiction in order to effectuate their promulgation. The rationale is on a basis so broad as to appear to encompass any kind of interstate communication, and thus go beyond delegable powers of Congress. Congress can, of course, delegate certain of its powers to the Commission, but inherent in such delegation is specification of adequate guidelines. The CATV rulemaking without congressional delegation of power but under jurisdiction asserted by the Commission was, I believe, so lacking in requisite guidelines as to make it unconstitutional.

Also, I strongly oppose the Commission's policy "of not considering requests for waiver by persons operating in violation of section 74.1107 until the violation has ceased." *Buckeye Cablevision, Inc.*, 3 FCC 2d at 810, paragraph 8. Such policy is tantamount to finding an operator guilty and carrying out punishment before he has been given a trial. Under this policy, the Commission says we think you are operating in violation of the rules but, before we have a hearing to determine the matter, we'll punish you by not acting on your request for waiver. It may well be that if a waiver request were acted upon timely it would be granted and there would be no need for the show cause order.

DISSENTING STATEMENT OF COMMISSIONER LOEVINGER

I dissent because I believe that in the circumstances of this case the Commission lacks jurisdiction for the reasons set forth in my separate opinion accompanying the first report and order in the CATV proceeding.

FCC 66-691

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of CEASE AND DESIST ORDER TO BE DIRECTED AGAINST JACKSON TV CABLE CO., OWNER AND OPERATOR OF A COMMUNITY ANTENNA TELEVISION SYSTEM AT JACKSON AND BLACKMAN TOWNSHIP, MICH.	Docket No. 16711

ORDER

(Adopted July 27, 1966)

BY THE COMMISSION: COMMISSIONERS BARTLEY AND JOHNSON NOT PARTICIPATING; COMMISSIONER LEE ABSENT; COMMISSIONER LOEVINGER CONCURRING IN THE RESULT.

At a session of the Federal Communications Commission held at its offices in Washington, D.C., on the 27th day of July 1966;

1. The Commission having under consideration: (*a*) Its order to show cause (FCC 66-530, released June 20, 1966) in the above-captioned proceeding; (*b*) a petition to modify order to show cause, filed July 19, 1966, by Jackson TV Cable Co.; and (*c*) a statement in support of the petition, filed July 22, 1966, by the Chief, Broadcast Bureau;

2. *It appearing*, That the order to show cause is directed only against operation of Jackson TV Cable Co.'s community antenna television system at Jackson, Mich.; that Jackson TV Cable Co. states that it is also operating a CATV system at Blackman Township, Mich.; [1] and that to avoid a possible second and separate proceeding against the latter operation, Jackson TV Cable Co. requests that the order to show cause be modified to include such operation as well;

3. *It further appearing*, That the Chief, Broadcast Bureau, supports the instant petition, urging that grant thereof is appropriate, and that no legal impediment exists to such grant;

4. *It further appearing*, That the public interest would be served by grant of the relief requested by Jackson TV Cable Co.;

5. *It is ordered*, That the petition of Jackson TV Cable Co., filed July 19, 1966, to modify order to show cause *Is granted;* and

6. *It is further ordered*, That the order to show cause (FCC 66-530) in the above-captioned proceeding, released June 20, 1966, *Is modified* so that wherever "Jackson" or "Jackson, Mich.," appears it shall read "Jackson and Blackman Township, Mich."; and to indicate that

[1] Jackson TV Cable Co.'s CATV system in Jackson and Blackman Township, Mich., began operation subsequent to Feb. 15, 1966. The system is asserted to be an integrated one, with the head-end and some of the coaxial cables in Blackman Township and the remainder of the cables in the city of Jackson. Service is being provided to residents in both Jackson and Blackman Township pursuant to franchises.

Jackson TV Cable Co. *Is directed to show cause* why it should not be ordered to cease and desist from further operation of a CATV system in Blackman Township, Mich. (as well as such a system in Jackson, Mich.), which extends the signals of television stations beyond their grade B contours in violation of section 74.1107 of the Commission's rules and regulations; and

7. *It is further ordered*, That the Secretary of the Commission shall send copies of the order by certified mail—return receipt requested to Jackson TV Cable Co.

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

FCC 66R-292

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

MEMORANDUM OPINION AND ORDER

(Adopted July 28, 1966)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. The above-captioned applications were designated for hearing by Commission memorandum opinion and order, FCC 66-281, released April 11, 1966. H. H. Huntley, an applicant in this proceeding, relied upon a loan from the Yoakum National Bank of Yoakum, Tex., to support the financing of his proposed station in the amount of $25,000. This loan was to be secured by 11 Yoakum businessmen who jointly deposited the sum of $25,000 in a savings account in the Yoakum National Bank. The savings account was then pledged as security for the loan to Huntley. Cosmopolitan Enterprises, Inc. (Cosmopolitan), seeks an issue to determine whether some of the collateral supporters of Huntley's loan have now withdrawn, and in the light of our findings with respect to that issue to determine whether Huntley has fully revealed all facts and information relevant to his proposal to the Commission, and to determine in the light of the facts thereby disclosed whether Huntley possesses the requisite qualifications to be a licensee of this Commission.[1]

2. In support of its requested issues, Cosmopolitan relies upon an affidavit of one William A. McCaskill, of Victoria, Tex. McCaskill is the general manager of radio station KTXM-FM, Victoria, Tex., and is a stockholder of Cosmopolitan. In his affidavit, he alleges that Mr. Carruth Palmer, one of the collateral supporters of Yoakum's loan, has advised him that he, Palmer, and Mr. G. H. Witte, had withdrawn their financial support of the Huntley application about 6 months previously. Section 1.229(c) of the Commission's rules specifies that petitions to enlarge issues must be supported by affidavits of persons having actual knowledge of the facts alleged in support of the petition. The affidavit of McCaskill does not comply with this requirement. McCaskill is an adversary party and his allegations can be regarded as no more than pure hearsay. Furthermore, H. H.

[1] The Board has before it for consideration a petition to enlarge issues filed by Cosmopolitan Enterprises, Inc., June 29, 1966; an opposition to petition to enlarge issues, filed by H. H. Huntley, July 12, 1966; response of Broadcast Bureau to petition to enlarge issues, filed July 12, 1966; and a reply filed by Cosmopolitan Enterprises, Inc., July 22, 1966.

106-506—66——1

Huntley in his opposition denied that any of his 11 financial backers had withdrawn their support. Huntley's statement is corroborated by the affidavits of Mr. G. H. Witte, who denied that he had withdrawn his collateral support of the Huntley loan, and an affidavit from Mr. F. C. Schiege, president of the Yoakum National Bank of Yoakum, Tex., to the effect that the $25,000 collateral savings account was, as of July 7, 1966, on deposit in the Yoakum National Bank and that none of the individuals participating in the project had withdrawn their funds, nor would the bank permit them to do so. In view of these circumstances, the petition to enlarge issues filed June 29, 1966, by Cosmopolitan will be denied.

Accordingly, it is ordered, This 28th day of July 1966, that the petition to enlarge issues filed June 29, 1966, by Cosmopolitan Enterprises, Inc., *Is denied.*

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

FCC 66R-293

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

MEMORANDUM OPINION AND ORDER

(Adopted June 28, 1966)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING; BOARD MEMBER SLONE CONCURRING BUT VOTING FOR A STAFFING ISSUE.

1. The above-captioned mutually exclusive applications were designated for hearing by Commission memorandum opinion and order, FCC 66-281, released April 11, 1966. Cosmopolitan Enterprises, Inc. (Cosmopolitan), on April 29, 1966, filed a petition to enlarge issues [1] with respect to H.H. Huntley, as follows:

> (1) To determine whether H. H. Huntley is financially qualified to construct and operate the proposed station until revenues equal expenses.
> (2) To determine whether there are real parties in interest to the H. H. Huntley application, other than the aforenamed individual, and, if so, the identity of each and the relationship of each to the financing, ownership, and operation of the proposed station.
> (3) To determine whether there are any unrevealed understandings between Huntley pertaining to the station, and, if so, their terms, and whether Huntley recklessly failed to disclose these understandings to the Commission.
> (4) To determine whether Huntley can implement his proposal in view of his failure to make a showing as to staff.
> (5) To determine whether Huntley has engaged in illegal transfers of control of broadcast stations or in trafficking.
> (6) To determine whether Huntley possesses the requisite character to be a Commission licensee.

2. To support its request for issues 1, 2, and 3, Cosmopolitan relies basically upon an analysis of facts set forth in Huntley's application. Thus, Cosmopolitan states that according to Huntley's estimates, he will require $76,116 to construct his station and operate for the first year. To meet these expenses, Huntley has available $71,590 and he expects revenue of $45,000 in his first year of operation. Cosmopolitan notes that Huntley's anticipated construction and first year's operating expenses exceed his available funds by $4,526. This being so, it is Cosmopolitan's contention that a financial qualification issue must be

[1] There is also before the Review Board: Broadcast Bureau's response to petition to enlarge issues, filed May 24, 1966; opposition to petitions to enlarge issues, filed by H. H. Huntley, May 24, 1966; and reply, filed by Cosmopolitan Enterprises, Inc., June 15, 1966.

added. Moreover, Cosmopolitan argues that Huntley's estimates as to the first year's operating expense neglect to consider certain essential items and as to other matters are unrealistically low. The petitioner also contends that some of the financing upon which Huntley relies may not be available to him. Particularly, he questions Huntley's personal finances (no balance sheet more recent than December 1964); the loan from V. J. Hermanson (total current assets do not exceed total current liabilities by $10,000); the $20,000 loan from the First National Bank of Post, Tex. He argues that in view of all of these circumstances, a financial qualifications issue with respect to H. H. Huntley must be added to the proceeding. Furthermore, Cosmopolitan contends that since Hermanson is advancing more funds than Huntley, a question is raised as to whether Huntley is in fact the real party in interest, and that a real party in interest issue must be included. Cosmopolitan also postulates that "since Huntley is to be lent money, it is apparent that various understandings concerning the loans must exist," and that since they have not been reported to the Commission, an appropriate issue should be added to this proceeding.

3. With respect to the foregoing, we note that all of the facts upon which Cosmopolitan relies were before the Commission at the time this matter was designated for hearing. Cosmopolitan has alleged no new facts supported by affidavits of persons having actual knowledge of the facts [2] nor do the self-serving declarations, speculations, and inferences of Cosmopolitan provide a basis "to undo what [the Commission has] done." [3] For, in this case, not only were the facts upon which Cosmopolitan would rely in the file, they were specifically considered by the Commission at the time it declined to include an issue with respect to Huntley's financial qualifications in this proceeding.[4] The petitioner's request with respect to issues 1, 2, and 3 will, therefore, be denied.

4. Cosmopolitan then argues that, though Huntley has allocated $15,000 for staffing his proposed station, he has not told us how many employees he proposes or what their duties might be, and that therefore an issue to determine whether Huntley can implement his proposal should be included in the hearing. In his opposition, Huntley stated that his failure to show the details of his proposed staffing was the result of an oversight and that he would amend his application to show that the station would be staffed as follows:

> One station manager—H. H. Huntley, one engineer announcer, one engineer salesman, one announcer salesman, and one part-time secretary-bookkeeper—Mrs. H. H. Huntley.

The proposal is obviously a "family operation" with a minimum of outside staff. It is apparent that successful operation of even a daytime-only station utilizing a directional antenna with the staff proposed by Huntley will be somewhat of a challenge to his managerial skills. However, since both Huntley and his wife will be involved in the day-to-day operation of the station, in the absence of some specific showing that Huntley will be unable to carry out his proposal, we will assume

[2] See sec. 1.229(c) of the rules and regulations, Federal Communications Commission, 47 CFR 1.229(c).
[3] *Fidelity Radio, Inc.*, 1 FCC 2d 661, 6 R.R. 2d 140 (1965).
[4] See memorandum opinion and order designating this matter for hearing, supra.

that he will be able to execute his plan. Issue 4 will, therefore, be denied.

5. The petitioner also requests an issue to ascertain whether Huntley has engaged in illegal transfers of control of radio stations and in trafficking in radio station licenses. As was the case with issues 1 through 3, the petition relies upon facts which are in the Commission files and which have been subject to Commission consideration on one or more previous occasions. In the absence of some new factual allegations supported by appropriate affidavits, further inquiry into those matters in this proceeding is not warranted. Issue 5 will, therefore, be denied. Proposed issue 6 seeks to determine whether Huntley possesses the requisite character qualifications to be a Commission licensee. It is contingent upon the outcome of issues 1 through 5, and will also be denied.

Accordingly, it is ordered, This 28th day of June 1966, that the petition to enlarge issues, filed April 29, 1966, by Cosmopolitan Enterprises, Inc., in the above-captioned proceeding, *Is denied.*

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

FCC 66-703

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of MAURICE J. WEBER, EDWARD H. WEINBERG, AND SIDNEY J. GOLDSTEIN, COPARTNERS, D.B.A. Z–B BROADCASTING CO. For Additional Time To Construct a New Standard Broadcast Station at Zion, Ill. (WZBN)	File No. BMP–11701

MEMORANDUM OPINION AND ORDER

(Adopted July 27, 1966)

BY THE COMMISSION: COMMISSIONER BARTLEY VOTING TO GRANT PETITION FOR RECONSIDERATION; COMMISSIONER JOHNSON NOT PARTICIPATING.

1. The Commission has for consideration a petition for reconsideration (filed May 12, 1966) of its action of April 7, 1966,[1] granting the above-captioned application for additional time to construct radio station WZBN, Zion, Ill. (1500 kc/s, 250 w, DA, day). The petitioner is Service Broadcasting Corp., licensee of station WAXO–FM, Kenosha, Wis. An opposition brief was filed May 25, 1966.

2. Z–B Broadcasting Co. (Z–B herein) received the original construction permit on September 2, 1964 (BP–15458), after a comparative hearing in which Service Broadcasting Corp. (Service herein) was the unsuccessful applicant. Two extensions of time to complete construction were subsequently granted. A third was granted through October 1, 1966. Although the application for the third extension was filed February 10, 1966, it was not granted until April 7, 1966, for which public notice was given on April 12, 1966. Coincident therewith, a cautionary letter was directed to the applicant, stating in effect that as obstacles to completion of construction appeared to have been removed, Z–B was expected to proceed diligently with the construction authorized and that no further extension of time was contemplated absent full justification under the provisions of section 319 of the act. Unknown to the Commission, applicant was on that date, as set forth below, actively negotiating for the assignment of the construction permit.

3. Service pleads standing to prosecute its petition on two grounds: First, that of economic hardship (Kenosha being some 7 miles distant from Zion); and, second, as the losing applicant in the hearing (dockets 14794 and 14795) noted in paragraph 2 above, which it alleges was decided solely on section 307(b) considerations. It requests the

[1] By Chief, Broadcast Bureau, under authority delegated in sec. 0.281(z) of the rules.

Commission to reconsider its action granting the above-captioned extension and set the same for hearing; and, further, to recognize Service's equitable claims by permitting it to reinstate its application for the construction permit in the event it is determined that the existing permit to Z–B should not be extended.

4. We recognize Service's standing as a party in interest because of its competitive position. *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940). However, we must reject its theory that it retained any equitable interest in the existing construction permit by virtue of having been an unsuccessful applicant for that authority. We will accordingly proceed to examine the issues raised by Service as a person aggrieved on economic grounds.

5. In support of its petition Service alleges: That Z–B has misrepresented its reasons for being unable to complete construction in each of the extension applications above noted; that Z–B had formed an intention not to proceed with construction while its latest extension of time request was still pending; and that Z–B actively negotiated for a sale of the construction permit during this period. Service further alleges that Z–B had negotiated with Service in bad faith for the sale of the construction permit, particularly so in view of the equitable interest previously asserted.

6. Bearing on the question of alleged misrepresentations in securing the first two extensions, it is convenient to examine the reasons set forth in Z–B's opposition. The first extension request stated that winter weather had prevented any work on the site, but that applicant had completed the purchase of a tract of land for the transmitter and had contracted for the necessary equipment. Negotiations were underway for the purchase of the towers. The second extension request stated that construction had been delayed by unanticipated zoning problems, which, although progressing favorably, would throw the construction program again into the winter season. Affidavits and copies of correspondence attached to Z–B's opposition amplify and support these representations. The original equipment supplier's proposal was revised on June 25, 1965, and a final order in the sum of $24,863.11 was acknowledged on August 14, 1965, including a downpayment and trade-in allowance totaling $2,471.38. Z–B first became aware that a zoning permit was necessary on or about May 1, 1965, and actively pursued meetings and hearings on this matter until approximately October 1965. At this time it advised a Gates Radio representative that the necessary permit had been obtained and that it desired to open negotiations with that company to undertake the construction and installation necessary to complete the station. The district sales manager of Gates Radio stated under oath that he recommended that construction be postponed until late April or May 1966, because of the risks of inclement weather during the winter months in the northern Illinois area. This affiant further states that it was not until April 1, 1966, that he was advised that construction would have to be indefinitely postponed because of problems connected with the Z–B partnership.

7. Although it is clear from the foregoing that there was no misrepresentation present in the first two extension applications, the question

of the third extension, reconsideration of which is now requested by Service, requires closer attention. Service has alleged that while this application was pending an intention was formed to abandon the construction program and assign the construction permit. This is contradicted by the known facts. To begin with, the application was filed February 10, 1966, and must necessarily speak as of that date, unless circumstances occurring thereafter clearly show a change in the intention of the parties. On that date, applicant announced that it had secured its building permit, that all necessary equipment was ready for delivery, and that negotiations for the construction of the transmitter house were underway. The winter weather, it was claimed, had prevented commencement of construction prior to this time. On March 9, 1966, a written proposal for supervision of construction and employment of construction personnel, with detailed divisions of responsibility and authority, was submitted to Z–B by an employee of Gates Radio, who was engaged to oversee and direct construction operations until proof of performance was completed. A contract was negotiated with the Associated Press for service to commence not later than May 1, 1966. It was not until the first week in April 1966, and after the application for extension had been on file with the Commission for almost 2 months that Z–B first looked about to find a purchaser for its construction permit. Why it ultimately did so is evident from the affidavits in its opposition, discussed below, but there is no evidence that Z–B abandoned its intention to build prior to April 1, 1966.

8. Specifically, on April 5, 1966, Edward Goldstein, one of the partners of Z–B, approached Service to explore its interest in acquiring the construction permit.[2] One or more conferences were held. Both parties agree that while initially the figure of $16,000 (subject to Commission audit) was acceptable as representing the out-of-pocket expenses of Z–B in obtaining and prosecuting the construction permit, there was a difference as to the value of the land for the transmitter site, which, though not partnership property as such, was to be included in the proposed transaction. This tract had been acquired subsequent to the grant of the construction permit, and was held by a Chicago bank in trust for the three individuals comprising Z–B. In any event, after a phone conversation between the principals on April 19, 1966, Service addressed a communication to Z–B in which the original terms discussed ($16,000, out-of-pocket expenses; $14,000, land) are set forth. This communication, signed by an appropriate officer of Service, appears on its face to be an offer to purchase, though some of its language indicates that it is a written confirmation of an agreement already arrived at verbally. Z–B elected to treat it only as an offer and took no action of any kind following its receipt. On April 28, 1966, Service was informed by letter that other arrangements had

[2] It appears that for many months Goldstein and Weinberg had been attempting to replace Weber in the partnership framework but without success. In addition to the financial qualifications required, it was necessary to find someone professionally equipped to take on the active supervision of construction immediately, and the subsequent managerial responsibilities of the station when completed. This role had been assigned to Weber in the original partnership planning, but in the years that elapsed before the construction permit was finally granted he acquired new business interests that in the end precluded him from fulfilling these expectations. When it became apparent that the situation was beyond the hope of saving, the partners cast about to find new parties to go forward with the station. It nowhere appears that this decision antedated filing of the third request for extension.

been made for WZBN. In point of fact, on April 27, 1966, Z–B entered into an agreement with one W. J. Bicket, of Zion, Ill., for sale of the construction permit on substantially the same terms as discussed with Service. This transaction is now before us but is, of course, ungrantable until a decision is reached on the contested extension application.

9. The contractual obligations, if any, assumed by Z–B as a result of the train of events noted above are beyond our reach. An appropriate local forum is available to Service to assess such damages as may be present. Nor do we find any equitable basis for the relief Service has requested. It is significant, perhaps, that no question was raised by Service as to the extension of time granted Z–B or its proposed assignment until Service discovered that it would not benefit from either. Even the suggestion of trafficking, which although not specifically alleged is at the least implied, did not appear to bother Service until events had moved to put the permit beyond its grasp.

10. Inasmuch as Z–B has shown good faith and reasonable diligence in attempting to proceed with the construction of WZBN, the relief requested by Service must be denied. Moreover, since Z–B's abandonment of intent to build the station occurred sometime after April 1, 1966, the requirements of section 1.65 of the rules (concerning the amendment of applications to reflect changed circumstances) did not come into play.

Accordingly, *It is ordered*, That the above petition for reconsideration *Is denied*, and the earlier grant of the above-captioned application *Is affirmed*. In so doing, however, we take no position on the merits of the pending assignment application (file No. BAP–730), which will be reached and decided in due course.

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

FCC 66-701

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of CITY OF CAMDEN (ASSIGNOR) AND L & P BROADCASTING CORP. (ASSIGNEE) For Assignment of License of Station WCAM, Camden, N.J.	Docket No. 16792 File No. BAL-5702

MEMORANDUM OPINION AND ORDER

(Adopted July 27, 1966)

BY THE COMMISSION: COMMISSIONER WADSWORTH DISSENTING; COMMISSIONER JOHNSON NOT PARTICIPATING.

The Commission has before it the above application; a petition to deny or designate for hearing filed by Max M. Leon, Inc., licensee of station WDAS, Philadelphia, Pa., and responsive pleadings.

1. The petition to deny is directed at the assignment application of station WCAM, Camden, N.J., from the city of Camden to L & P Broadcasting Corp. Petitioner WDAS is a 5 kw, D, 1 kw, N, D-A Philadelphia station. According to its statement, WDAS derives its revenues "from Philadelphia primarily and to a lesser extent from Camden, Wilmington and Chester, New Jersey, and from the rapidly emerging southern New Jersey area."

WDAS further alleges that "for over 15 years * * * it has primarily directed its service and programing to the vast Negro population in the Philadelphia, Pa., area * * *." WDAS alleges that it has standing because it "will suffer direct, substantial, and drastically increased economic injury in the event Commission approval is given the above application and it, therefore, has the necessary standing to file this petition, particularly in view of the facts, as developed herein, that station WCAM will not compete fully and directly in the Philadelphia market." The petitioner challenges the adequacy of the assignee's program survey; argues that "L & P (assignee) has every intention of drastically changing the present services and format of station WCAM to services and programing that will appeal to the Philadelphia market, and particularly to the Negro community thereof"; that the assignee has "already been searching for studio and office space at Six Penn Center, in the heart of downtown Philadelphia, for the purpose of moving WCAM to Philadelphia"; and asserts that the plans and intentions of L & P * * * are nowhere spelled out in the application * * *." Finally, WDAS quotes the assignee's statement: "It is anticipated that only approximately 10 percent of the records produced by the corporate principal's business

will be broadcast over the station" and contends "that this raises questions as to the policies and practices, if any, about L & P has or will establish to control program content and prevent payola and plugola practices at station WCAM." WDAS asks that the Commission either deny or designate the application for hearing.

2. In its opposition the assignee contends that under section 309(d) of the Communications Act, WDAS has failed to show that it is a party in interest because "the only affidavit of substance" which accompanied the petition does not contain a verification of personal knowledge; that the allegations to show WDAS' legal status are speculative, and that WDAS has not shown how it will be aggrieved by a grant of the application.

3. From a reading of the petition alone, it is a close question as to whether WDAS is a party in interest, but on the basis of all the pleadings before us, including the opposition and the reply, the Commission finds that WDAS is such party. Since WDAS with its 5-kw power covers both Philadelphia and Camden, and as it alleges directs "its service and programing to the vast Negro population in the Philadelphia, Pa., area * * *," and since WCAM which reaches portions of Philadelphia with its signal has conceded in its opposition "* * * there was a persuasive need to direct a major part of its proposed programing to the minority Negro groups," it is apparent that the injury WDAS could suffer from the WCAM assignment and planned programing is reasonably certain and definite. *FCC* v. *Sanders Bros.*, 309 U.S. 470 (1940); *Washington Broadcasting Company*, 1 FCC 2d 25, July 12, 1965. Accordingly, we find that WDAS has standing as a party in interest.

4. As stated in paragraph 1, WDAS has made numerous contentions. We find that there are three present problems that cannot be resolved by either the application or the pleadings. WDAS has challenged the adequacy of the assignee's program survey; argues that "L & P (assignee) has every intention of drastically changing the present services and format of station WCAM to services and programing that will appeal to the Philadelphia market and particularly to the Negro community thereof" and asserts that "the plans and intentions of L & P * * * are nowhere spelled out in the application * * *."

5. By way of response to the WDAS challenge on the survey, the assignee appended an exhibit (a) to its opposition which discloses the names and comments of some 30 contacts made prior to the filing of the application. Analysis of the attachment shows that 11 thought that there was a need for Negro programing on WCAM, but, of these 11, 4 showed Philadelphia addresses. The views of the remaining 19 were, at best, inconclusive. In sum, the assignee's survey shows that seven Camden people thought that there should be this change in the WCAM programing.

6. In the *Report and Statement of Policy re: Commission En Banc Programing Inquiry*, 20 R.R. 1901, the Commission stated the need for "documented program submissions prepared as the result of assiduous planning and consultation covering two main areas: First, a canvass of the listening public who will receive the signal and * * * second, consultations with leaders in public life, public officials, edu-

cators, religious and entertainment media, agriculture, business, labor, professional and eleemosynary organizations, and others who bespeak the interests which make up the community." It appears that the assignee's survey is something less than the Commission contemplated in its statement. In this regard, we note the following population figures for Philadelphia-Camden (1960 census):

Population of Philadelphia	2,002,512
Population of Camden city	117,159
Population of Camden County	373,977
Negro population of Camden County	35,297
Negro population of Philadelphia	529,240

Station WCAM is the only full-time AM station licensed to Camden. Its signal does cover Philadelphia. But WCAM's primary responsibility is to program for its principal community, Camden. Since WCAM is the only full-time AM station in Camden and in light of the population figures set forth above, we find it difficult to conceive how the survey could conclude "* * * there was a persuasive need to direct a major part of its proposed programing to the minority groups," unless the assignee's proposed programing is intended for Philadelphia. This is a material and substantial question of fact which is not resolved by the pleadings.

7. Moreover, proposed programing for minority groups involves sociological questions that are not touched on by the assignee. In *Essaness Television Associates*, 25 R.R. 479, the applicant proposed programing designed to meet the needs and interests of significant minority groups in the Chicago area, including particularly the Negro community. The Commission granted the application and thereafter addressed the following letter to the applicant:

> Your proposed programing is a specialized proposal designed to serve the needs and interests of significant minority groups in the Chicago area, including, particularly, the Negro community. In considering your application, the Commission has noted your representations concerning the ultimate objectives of such a programing policy.
>
> You state, in essence, that your programing will not emphasize racial differences, and that neither your programing nor advertising will be designed or used in such a manner as to exploit or demean the Negro audience. You also state that the ultimate purpose of your station's programing is to create a nonsegregated society in which there will be cultural, intellectual, and economic conditions of complete equality for the races in the Chicago area, so that there will no longer be any need for specialized programing of the kind which you propose.
>
> Your application also discloses the manner in which you ascertained the needs and interests of the Chicago areas for the type of programing proposed, and that the principals of the applicant have had a lifelong acquaintance with the city. In view of the foregoing, the Commission has concluded that grant of your application would serve the public interest, convenience, and necessity, and on May 15, 1963, granted your application.

No such statement has been received from the assignee.

8. There is an additional reason which prompts us to grant the WDAS petition. In its application, the "applicant proposes a format of top 40 music, rhythm and blues, and gospel. Approximately 65 percent of time per week will be devoted to this format." The application also contains this statement "* * * also, the applicant, through its overall program format, will enhance and further the interests and

activities of minority groups within the station's service area." For the first time, in its opposition pleading the assignee stated: "L & P determined that there was a persuasive need to devote a major part of its proposed programing to the Negro minority groups." The assignee's exhibit containing illustrative programs does not reflect this proposal and absent the WDAS petition, the Commission would not have been aware of the assignee's programing intentions.

In view of these questions, the Commission is unable to find that a grant of the above application would serve the public interest, convenience, and necessity and must, therefore, grant the petition and designate the application for a hearing. Except as indicated by the issues specified below, the applicant is legally, technically, and financially qualified to operate station WCAM.

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

1. To determine the nature and adequacy of the assignee survey of the needs and interests of the residents of Camden, N.J.;
2. To determine whether the assignee program proposals will meet the needs and interests of the residents of Camden, N.J.;
3. To determine whether the assignee failed to apprise the Commission adequately of its program plans.
4. To determine, in light of the evidence, whether the public interest, convenience, and necessity would be served by granting approval of the application.

It is further ordered, That WDAS is made a party to this proceeding;

It is further ordered, That to avail itself of the opportunity to be heard, the applicant 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 set for the hearing and present evidence on the issue specified in this order;

It is further ordered, That the applicant shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594(a) 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.*

FCC 66-702

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of CENTRAL CONNECTICUT BROADCASTING CO., NEW BRITAIN, CONN. Requests: 100.5 Mc, No. 263; 10 kw; 391 Feet	File No. BPH-5489
HARTFORD COUNTY BROADCASTING CORP., NEW BRITAIN, CONN. Requests: 100.5 Mc, No. 263; 20 kw; 135 Feet For Construction Permits	File No. BPH-5488

MEMORANDUM OPINION AND ORDER

(Adopted July 27, 1966)

BY THE COMMISSION: COMMISSIONER JOHNSON NOT PARTICIPATING.

1. The Commission has before it for consideration (*a*) the above-captioned and described applications which have been tendered for filing; (*b*) petition for reconsideration and alternative relief filed by Hartford County Broadcasting Corp. (Hartford County) on October 27, 1965; (*c*) opposition of the Central Connecticut Broadcasting Co. (Central Connecticut) to petition for reconsideration and alternative relief filed on November 8, 1965; (*d*) motion to strike filed by Hartford County on November 22, 1965; (*e*) petition for waiver of section 73.207 of the Commission's rules to permit acceptance of the Central Connecticut application; (*f*) Hartford County's opposition to petition for waiver of section 73.207 of the Commission's rules filed February 8, 1966; and (*g*) Central Connecticut's reply to opposition, filed February 17, 1966.

2. Hartford County, licensee of standard broadcast station WRYM in New Britain, Conn., had been permittee of station WRYM-FM on New Britain's only channel from December 8, 1961, until the Review Board's May 6, 1965, denial (38 FCC 847, 5 R.R. 2d 284) of its fifth application for extension of authority to construct. Its application for review was denied on August 21, 1965. Hartford County then on September 15, 1965, tendered the subject application for a new construction permit which, on September 27, 1965, was rejected as unacceptable for filing as inconsistent with sections 1.519(a) and 73.207 of the Commission's rules which bar acceptance of repetitious and short-spaced applications, respectively.

3. In its petition seeking reconsideration of the rejection of its application, Hartford County pointed out that, since other applicants had not come forward to apply for a permit on this channel, its pro-

posals represented New Britain's only hope of obtaining a local FM service. Although Hartford County did not accept the view that the application violated either of the Commission's rules which were cited for its rejection, it contended that New Britain's needs were such as to provide ample justification for granting any waiver the Commission considered to be necessary. Specifically, Hartford County asserted that section 1.519(a) of the Commission's rules, which precludes the filing of repetitious application, is inapplicable to the present situation in which a new application is filed within 12 months after denial of an extension application, for such application was neither a "new application" nor an application "for any modification of service or facilities" to which the rule applied. Regarding the second basis for rejection, Hartford County contended that the "grandfather" protection given to the New Britain channel when the FM table was adopted continued because of that channel's retention in the table; hence, the shortspacing was no impediment to acceptance. Alternatively, it argued that, since New Britain's needs were at least as compelling as those of other communities where waiver was granted, waiver here clearly would be justified. Finally, lest there be any doubt about its bona fides, Hartford County indicated its willingness to accept a grant conditioned upon completion within 120 days.

4. Central Connecticut opposed the petition, arguing that Hartford County had not met the requirements of section 1.106 of the Commission's rules regarding petitions for reconsideration and that, in any event, the application violated section 1.519. Waiver of these provisions was said to be unnecessary, since it would soon file an application to provide service to New Britain.

5. Hartford County moved to strike, arguing that as a prospective applicant Central Connecticut had no standing to oppose the application. In addition, it raised a number of questions about Central Connecticut's conduct as a licensee, particularly as it related to Central Connecticut's intention to construct and operate the station. These contentions, however, are relevant to grant of an application, not its acceptance. Similarly, in view of our determination regarding acceptance of the applications, Hartford County's allegations regarding our diversification policy properly relate only to comparative consideration of the applications.

6. Shortly after Hartford County filed its motion to strike, Central Connecticut tendered its application and requested waiver to permit its acceptance. Hartford County responded by opposing the waiver petition on essentially the same grounds it advanced in the motion to strike, arguing that, in any event, Central Connecticut should not be given preferential treatment in the granting of waiver.

7. Central Connecticut, in its reply, responded to the questions Hartford County had raised concerning its qualification and disputed Hartford County's view regarding the significance our diversification policy would have in this context.

8. We believe that adequate justification has been provided for retention of the channel for use in New Britain. Although short spaced, no other preferable class B channel is available for use in

New Britain to serve its more than 80,000 residents. We believe that the needs of New Britain are sufficiently great to outweigh the short spacing involved, particularly since the channel could not be used elsewhere. Accordingly, we must now consider the specific objections which have been offered to each of the applications. Hartford County's allegations regarding Central Connecticut are neither verified nor documented, and, as we pointed out, such questions, even if valid, would be relevant to grant of the application, not acceptance of it. To deny acceptance on such a basis would be to deny the applicant its right to be heard in an evidentiary hearing. Hartford County's assertion regarding our diversification policy provides no warrant for taking the extreme position that if the Central Connecticut application is accepted (as we have determined it should be) our diversification policy requires the acceptance of the Hartford County application regardless of its deficiencies. Hartford County's application must, of course, be judged on its own merits.

9. In our initial rejection of the Hartford County application, we took the view that it also violated section 1.519(a) of our rules. We continue to adhere to the view that the filing of this application is barred by section 1.519(a). Nevertheless, to insist on the strict provisions of the rule and deny waiver would serve no useful purpose, since the Hartford County application would be eligible for acceptance as a matter of right before expiration of the 30-day statutory waiting period on the Central Connecticut application. Accordingly, we will waive the provisions of section 1.519 to permit the acceptance of the Hartford County application.

Consequently, *It is ordered*, That the Hartford County Broadcasting Corp. application *Is accepted* for filing, and the relief requested in its petition for reconsideration and alternative relief and motion to strike *Is granted* to the extent indicated and *Is denied* in all other respects.

It is further ordered, That the request for waiver filed by Central Connecticut Broadcasting Co. *Is granted* and its application *Is accepted* for filing.

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

FCC 66R-296

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of WDIX, INC., ORANGEBURG, S.C.	Docket No. 16623 File No. BPH-4554
RADIO ORANGEBURG, INC., ORANGEBURG, S.C. For Construction Permits	Docket No. 16624 File No. BPH-4642

ORDER

(Adopted August 1, 1966)

BY THE REVIEW BOARD: BOARD MEMBER SLONE CONCURRING WITH STATEMENT.

The Review Board having before it a joint request for approval of agreement, filed June 7, 1966, by WDIX, Inc. (WDIX), and Radio Orangeburg, Inc. (Orangeburg); an additional submission, filed June 13, 1966, by WDIX; an opposition, filed June 22, 1966, by the Broadcast Bureau; and a joint reply, filed June 30, 1966, by WDIX and Orangeburg;

It appearing, That by the terms of the agreement, WDIX would reimburse Orangeburg upon the dismissal of Orangeburg's application in the amount of $2,048.73 for expenses incurred in the prosecution of its application, that these expenses have been adequately substantiated, and that the agreement complies with section 311(c) of the Communications Act and section 1.525 of the rules in all other respects; and

It further appearing, That the Broadcast Bureau, in its opposition, contends that the agreement is not in the public interest because WDIX is the licensee of the only existing full-time standard broadcast station in Orangeburg, S.C.,[1] and because WDIX proposes more duplication of its existing AM station than does Orangeburg;[2] and

It further appearing, That, in three other cases involving similar circumstances (*Capital Broadcasting Corporation*, 3 FCC 2d 285, 7 R.R. 2d 226 (Rev. Bd. 1966), review denied, FCC 66-692, released July 29, 1966; *Clay County Broadcasting Company*, 3 FCC 2d ——, 7 R.R. 2d 561 (Rev. Bd. 1966); and *Richard O'Connor*, 3 FCC 2d 907 (Rev. Bd. 1966)), the Review Board rejected the Bureau's contention that the agreements were not in the public interest, and that

[1] Orangeburg is the licensee of station WORG (1580 kc, 1 kw, day, class II) located in Orangeburg, S.C. Station WTND (920 kc, 1 kw, day, class III) is also located in Orangeburg.

[2] In the designation order, FCC 66-410, released May 6, 1966, the Commission indicated that because of this difference in proposed duplication, programing evidence would be admissible under the standard comparative issue.

106-506—66——2

these cases are dispositive of the arguments made by the Bureau here; [3] and

It further appearing, That approval of the agreement would be in the public interest in that it would expedite the inauguration of FM service to the community, that with dismissal of Orangeburg's application no issues remain, and that WDIX has been found to be qualified in all respects;

It is ordered, This 1st day of August 1966, that the joint request for approval of agreement, filed on June 7, 1966, by WDIX, Inc., and Radio Orangeburg, Inc., *Is granted;* that such agreement *Is approved;* that the application of Radio Orangeburg, Inc. (BPH–4642), *Is dismissed* with prejudice; and that the application of WDIX, Inc. (BPH–4554), for a construction permit for a new FM broadcast station at Orangeburg, S.C., *Is granted*, subject to the following condition; and that this proceeding *Is terminated:*

> Section 73.210(a)(2) of the Commission's rules is waived to permit the establishment of the main studio 1.8 miles northwest of the city limits of Orangeburg, S.C., on U.S. 178.

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

CONCURRING STATEMENT OF BOARD MEMBER SLONE

On March 30, 1966, I dissented to the action of the Review Board in adopting a memorandum opinion and order, approving an agreement in the proceeding of *Capital Broadcasting Corporation*, 3 FCC 2d 285. The Commission, however, on July 27, 1966 (FCC 66–692), denied an application for review of that memorandum opinion and order, filed by the Chief, Broadcast Bureau. In view thereof, I concur here.

---

[3] Specifically, the Board held that comparative criteria which are applicable (after a full evidentiary hearing) in cases involving competing applicants desirous of prosecuting their respective applications are not applicable in agreement cases involving a dismissing applicant not desirous of prosecuting its application and a remaining applicant; and that the elimination of competition which does not exist but is merely potential and contingent does not preclude a finding that approval of an agreement is consistent with the public interest.

FCC 66R-295

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of CHARLES VANDA, HENDERSON, NEV.	Docket No. 15705 File No. BPCT-3315
BOULDER CITY TELEVISION, INC., BOULDER CITY, NEV. For Construction Permit for New Television Broadcast Station	Docket No. 15707 File No. BPCT-3327

APPEARANCES

Samuel Miller, on behalf of Charles Vanda; *Philip M. Baker*, on behalf of Boulder City Television, Inc.; and *John B. Letterman*, on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted July 27, 1966)

BY THE REVIEW BOARD: BERKEMEYER AND KESSLER; BOARD MEMBER SLONE DISSENTING WITH STATEMENT.

1. Charles Vanda (Vanda) and Boulder City Television, Inc. (Boulder City), are applicants [1] for construction permits for a new television broadcast station to operate on channel 4.[2] Vanda proposes to locate his station at Henderson, approximately 9 miles from Boulder City, whereas Boulder City would locate in Boulder City itself. By Commission order (FCC 64-1075) released November 20, 1964, the above-captioned applications were designated for consolidated hearing on the following issues: Financial qualifications of each applicant; [3] an air hazard issue as to Boulder City; [4] a section 307(b) issue; and a contingent standard comparative issue.

2. On January 10, 1966, Hearing Examiner H. Gifford Irion released an initial decision (FCC 66D-3) in which he recommended

[1] Two other applicants were originally involved in this proceeding: Sovereign Television Corp.'s application was dismissed with prejudice on Jan. 6, 1965 (FCC 65M-20); and Vegas Valley Broadcasting Co.'s application was dismissed with prejudice on Oct. 19, 1965 (FCC 65M-1356), after the closing of the record on Sept. 16, 1965.

[2] Channel 4 is allocated to Boulder City, Nev. (sec. 73.606 of the Commission's rules). Vanda has applied for the use of channel 4 under sec. 73.607(b) of the Commission's rules, which makes available for application "any unlisted community which is located within 15 miles of the listed community." By report and order in rulemaking docket No. 16187, 3 FCC 2d 550, 7 R.R. 2d 1589 (1966), the Commission amended the Table of Television Assignments to substitute channel 5 at Boulder City for channel 4. See footnote 13, infra, for pertinent discussion.

[3] The examiner concluded that both applicants are financially qualified and no exceptions were taken. The examiner's conclusions are accepted.

[4] By letter dated Feb. 19, 1965, the Federal Aviation Agency advised the Commission that Boulder City's antenna would not constitute a hazard to air navigation. The examiner's conclusion, favorable to Boulder City and to which no exception was filed, is accepted.

grant of the Vanda application and denial of that of Boulder City. The examiner concluded that a choice could not be based solely on section 307(b), although Boulder City was given a preference for proposing the more efficient use of the channel. Ultimately, on evaluation of the applicants under the standard comparative issue, the examiner recommended a grant of the Vanda application. Vanda and Boulder City filed exceptions,[5] the latter seeking reversal of the initial decision, arguing, in the alternative, that the section 307(b) issue should be determinative and that Boulder City should be preferred under the standard comparative issue. Boulder City requested oral argument, which was held before a panel of the Review Board on April 14, 1966. The applicants and the Broadcast Bureau participated in the argument, the Bureau supporting the examiner's treatment of the 307(b) question.

3. The Board has reviewed the initial decision in light of the exceptions and arguments, and has concluded that the examiner's decision should be affirmed. Other than as modified by this decision and the rulings on exceptions contained in the appendix, the examiner's findings and conclusions are adopted. As most of the pertinent facts appear in the initial decision, they will not be repeated except where necessary to an understanding of the Board's disposition of the exceptions.

Section 307(b) Considerations

4. Henderson and Boulder City are situated in Clark County, Nev., which has 4 urban communities: Las Vegas (population 64,405), North Las Vegas (population 18,422), Henderson (population 12,525), and Boulder City (population 4,059). Henderson is located 12.5 miles from Las Vegas and Boulder City is located 22 miles from Las Vegas. Generally speaking, Henderson is an industrial community and Boulder City regards itself as a cultural center for the area. Las Vegas is the largest city of the area both applicants propose to serve. Henderson and Las Vegas are located in a valley, while Boulder City is located at a higher altitude on a mesa. A detailed description of the communities appears in paragraphs 4–7 of the initial decision. Boulder City has no standard, FM, or television broadcast station. Henderson has two standard broadcast stations,[6] but no FM or television broadcast station. Both communities receive service from the three Las Vegas television stations.[7] Henderson lies within the grade A contours of the Las Vegas stations; Boulder City lies within the grade A contours of stations KORK–TV and KLAS–

[5] The city of Boulder City, a party to this proceeding, filed a brief urging retention of channel 4 in Boulder City and a grant of the Boulder City application. The Broadcast Bureau filed a reply to the exceptions. The Bureau's position is that sec. 307(b) considerations are not determinative in this proceeding; the Bureau supports the initial decision in so far as it treats the 307(b) issue, but has not participated with respect to the comparative aspects.

[6] KTOO (1280 kc, 5 kw, day, class III) and KBMI (1400 kc, 250 w, U, class IV).

[7] KORK–TV (channel 2) (see discussion, infra), KLAS–TV (channel 8), and KSHO–TV (channel 13). The U.S. Court of Appeals for the District of Columbia Circuit has affirmed (per curiam) the Commission's decision looking toward the termination of operation of KSHO–TV (*Harry Wallerstein, Receiver, Television Co. of America, Inc.*, case No. 19904, decided June 20, 1966).

TV and within the grade B contour of KSHO–TV.[8] Both proposals would provide city grade coverage to Boulder City, Henderson, Las Vegas, and the Las Vegas urbanized area.

5. The pertinent engineering information regarding antenna height, power, transmitter location, and coverage of each of these proposals is set forth in paragraphs 9–12 of the initial decision. On the basis of these findings, the examiner concluded that no decisive preference is warranted under the section 307(b) issue. He awarded Boulder City a comparative preference for proposing a more efficient use of the channel; i.e., greater white area grade B coverage to 1,802 persons, and a slight preference for demonstrating a greater need for a local outlet. Boulder City excepts to the examiner's conclusion that section 307(b) considerations were not decisive, and urges the Board to reverse the initial decision and grant its application. Boulder City contends that because of the greater white area coverage it proposes and its showing of greater need for a local outlet, it should have been granted a determinative section 307(b) preference for both the reception and transmission aspects of its proposal.

6. The Board agrees with the examiner that 307(b) considerations are not controlling. In his conclusions, the examiner weighed the factors relevant and material to this determination. Boulder City argues that the examiner's evaluation is faulty because he failed to take account of the fact that KORK–TV, which was once assigned to Henderson,[9] continues to serve as a transmission outlet for Henderson although now assigned to Las Vegas. This argument cannot be accepted. Despite its assignment to Las Vegas, KORK has continued to be available to serve the local needs of both Henderson and Boulder City. Thus, while the facilities of KORK can be said to be somewhat more accessible to Henderson than to Boulder City, no preference can be granted on the ground that Henderson has a television facility while Boulder City has not. In continuing to serve these cities, KORK is simply carrying out its responsibilities to serve the small communities within its grade A contour. *NTA Television Broadcasting Corp.*, FCC 61–1281, 22 R.R. 273; *Petersburg Television Corp.*, 10 R.R. 567 (1954).

7. Both proposals here are clearly for area-wide operations in which the role of providing a local transmission outlet will be a distinctly minor one.[10] The following facts reflect the area-wide nature of the two proposals: Vanda would supply a city grade signal to 106,660 persons and a grade A signal to an additional 8,450 (115,110 total grade A population); Boulder City would supply a city grade signal to 109,625 and a grade A signal to an additional 4,175 (113,800 total grade A population). The population of Henderson is 12,525, or 11.7 percent of the population within the city grade contour; the population of Boulder City is 4,059, or 3.7 percent of the population

[8] A member of the Boulder City Council testified that, in order to receive the Las Vegas television stations, a booster station has been constructed. There is no other evidence to support a conclusion that off-air television reception in Boulder City is unsatisfactory.

[9] The Commission granted KORK–TV's application to change its station location from Henderson to Las Vegas. See docket No. 14591, FCC 62–1078, 24 R.R. 1530, released Oct. 12, 1962.

[10] Cf. *Jackson Broadcasting and Television Corporation* v. *FCC*, 280 F. 2d 286 (D.C. Cir. 1960).

within the city grade contour. Of the persons served by both proposals, 64,405 reside in Las Vegas, constituting well over 50 percent of the applicants' city grade population. Each proposal would provide a city grade signal to both Henderson and Boulder City as well as Las Vegas. A majority of the revenue of the proposed operations would be derived from nonlocal sources (other than Boulder City or Henderson).[11] In programing, both applicants propose substantial use of Las Vegas talent. Moreover, an examination of the applicants' proposed programing schedules reveals very little that can be identified as being oriented to the particular local needs and interests of the specified community as opposed to the needs and interests of the Las Vegas-Henderson-Boulder City area.

8. Boulder City has no broadcast facility assigned to it, whereas Henderson has two standard broadcast facilities. However, the conclusion that Boulder City's need for a local outlet is greater than that of Henderson would ignore the nature of the facility being applied for and the relative size of the community. As discussed in paragraph 7, supra, the facility being applied for is an area-wide television station. In addition the population of Henderson (12,525) is somewhat over 3 times greater than that of Boulder City (4,059). These two factors reduce the significance of the preference that Boulder City might otherwise be awarded. Aural service is not a substitute for a local television outlet. Cf. *Richmond Broadcasting Co.*, 34 FCC 495, 500, 25 R.R. 181, 187 (1963); *Tupelo Broadcasting Co., Inc.*, 12 R.R. 1233, 1250 (1956). Thus, while the existence of two standard broadcast stations in Henderson must be noted, it does not significantly alter the conclusion that the transmission aspect of section 307(b) is not of decisional significance in this proceeding.

9. Both in its exceptions and its brief, Boulder City maintains that the examiner gave insufficient weight to the coverage differences between the applicants. Especially, argues Boulder City, did the examiner fail to recognize the importance of greater grade B white area service which Boulder City would provide. Both proposals would provide white area grade B service, Vanda to 2,750 square miles in which 4,499 persons reside and Boulder City to 7,695 square miles in which 6,301 persons reside. It is Boulder City's contention that the importance the Commission attaches in television allocation to white area service requires the awarding of a decisive preference to this applicant, because it will bring a first grade B service to 1,802 more persons in a 4,945-square-mile area than will Vanda.

10. Evaluating this argument, it must be said at the outset that area differences, without reference to the number of persons residing in them, provide little or no basis for a decisional preference to the applicant offering the largest geographical coverage. White areas become significant to the extent that there are people residing in them. It is service to people rather than service to square miles which is the better basis of the preference for providing a first service. The soundness of this distinction between service to an area and service to

[11] In the case of Boulder City, sources of revenue are estimated as follows: Between 55 and 60 percent regional advertising; 20 percent from national advertising; and 20 to 25 percent from local (Boulder City and Henderson) advertising.

people is especially apparent in this case. Both the statistics (showing an average population density in Boulder City's exclusive white area of one for every 2+ square miles) and examination of the coverage maps (showing extensive mountainous areas with very few towns and villages in this white area [12]) establish this to be a very sparsely populated area. To award a preference for first service to the larger area, therefore, would be unjustified.

11. The fact that Boulder City will include in its grade B contour more people now without television service than will Vanda could be of substantial significance if the number of persons constituting the difference were large, but here it is not. Considered in the overall pattern of the proposals and in the light of the factors referred to in earlier paragraphs, 1,802 persons is not enough of a difference to be decisive. Thus, the decision must take into account, as the examiner held, the general areas of comparison.

12. Boulder City's argument in its brief for a different application of the 307(b) factors is not persuasive. The Commission's designation order was framed to permit the judgment to be made whether or not a choice between the applicants could be based solely on 307(b), as it has been in other television cases where, despite 307(b) differences, it was concluded that differences under the standard comparative issues would also have to be evaluated. In *Jefferson Standard Broadcasting Company*, 33 FCC 471, 24 R.R. 319 (1962), reconsideration denied 35 FCC 430, 24 R.R. 344 (1963), affirmed sub nom. *High Point Television Co.* v. *FCC*, 118 U.S. App. D.C. 192, 334 F. 2d 582, 2 R.R. 2d 2052 (1964) (per curiam), the Commission, while concluding that two neighboring communities were separate for section 307(b) purposes and that there was a presumptive need for a first television transmission service in one of them, held that since each applicant, including those for the other community, would render a principal-city signal over the city without a television outlet and since each applicant had explored the needs of this city, the 307(b) differences were too small to be considered other than as a part of the comparative evaluation. See also *Huntington Broadcasting Co.*, 5 R.R. 721 (1949), rehearing denied 6 R.R. 569 (1950), affirmed 89 U.S. App. D.C. 222, 192 F. 2d 33, 7 R.R. 2030 (1951); and *Miners Broadcasting Service, Inc.* v. *FCC*, 349 F. 2d 199, 5 R.R. 2d 2086 (1965). With respect to the decisional effect of superior coverage by one applicant, it is clear that it need not be treated in every case as dispositive. *Armin H. Wittenberg et al.*, 30 FCC 417, 420, 19 R.R. 755, 756c (1961). In one situation, the Commission held, in deciding between competing applicants for television facilities, that the superior coverage of one applicant, including grade B service to a white area in which there were 30,000 persons residing, entitled that applicant only to a moderate superiority. *Wabash Valley Broadcasting Corp.*, 35 FCC 677, 1 R.R. 2d 573 (1963). It is difficult to see how Boulder City could be given a decisive preference solely on the basis of providing a first transmission outlet to Boulder City, with a population of less than 5,000, in the face of the situation in *Jefferson Standard*, supra, where

[12] The white area, which only Boulder City would serve, contains no community of sufficient population to be listed in the published U.S. census reports.

it was held that the first local television service factor was not determinative where the city in question was many times larger than Boulder City. Moreover, it is plain that there is no requirement that service to a white area, particularly a small one, be treated as decisive rather than as another aspect of the comparative evaluation. The smallness of the white area here, 1,802 people, and the unlikelihood that this white area will exist for long,[13] reinforce the conclusion that Boulder City's coverage advantage need not be treated as decisive.

Comparative Qualifications [14]

13. The examiner correctly noted that two areas of comparison were given primary importance by the policy statement: diversification of the control of media of mass communications and integration of ownership with management.

Diversification of Mass Media

14. Briefly restating the facts recited in the initial decision, Boulder City is a Nevada corporation owned by Meyer (Mike) Gold and Lester H. Berkson; Gold has subscribed to 66⅔ percent of the corporate stock and Berkson 33⅓ percent. Gold is the president and a director; Berkson is the vice president and a director; and Mrs. Meyer (Sylvia) Gold is the secretary-treasurer and a director of the corporation. In 1962, Gold acquired stations KLUC (AM and FM), Las Vegas, and presently owns and operates those stations. Stations KLUC (AM and FM) represent the only broadcast interests or interests in other mass media owned by the principals of Boulder City. Boulder City, located 22 miles southeast of Las Vegas, is within the 2-mv/m contour of KLUC (AM);[15] Boulder City's proposed television operation would include Las Vegas within its proposed city grade contour. Vanda, an individual applicant, has no ownership interest in broadcast facilities or other media of mass communications. Information concerning the evidence of other broadcast facilities and media of mass communications in the area is detailed in paragraph 8 of the examiner's findings and paragraph 7 of his conclusions. Considering all the pertinent factors, the examiner awarded a preference to Vanda for affording greater diversification of ownership of the mass media in the area to be served.

15. Boulder City does not except to this conclusion but argues that diversification should not be a "most important" factor in view of the numerous media of mass communications in the Las Vegas area. The presence of aural communication service to Boulder City (other than

[13] By report and order in docket No. 16187, 3 FCC 2d 550, 7 R.R. 2d 1589 (1966), the Commission has provided for the assignment of channel 5 to Boulder City in lieu of channel 4, and channel 3 to Las Vegas in lieu of channel 2. The change in the Las Vegas assignment was made specifically to permit KORK-TV to relocate its transmitter on Potosi Mountain. This relocation would permit KORK-TV to serve virtually all of the white area which Boulder City would serve exclusively (see docket No. 16187).

[14] As the examiner held, the Commission's policy statement on comparative broadcast hearings, 1 FCC 2d 393, 5 R.R. 2d 1901 (1965), is applicable to the comparative aspects of this case.

[15] Official notice is taken of fig. 28 of the engineering data included as part of Meyer (Mike) Gold's application, BP-16401 (docket No. 16114), depicting the present coverage contours of station KLUC (AM).

KLUC (AM)) and the presence of other broadcast and communications media affect to some extent the importance of this factor in the general comparative scale. However, since KLUC (AM and FM) are situated in nearby Las Vegas and provide service to much of the area the Boulder City television station would also serve, the importance of this factor cannot be reduced to any substantial degree. The examiner correctly awarded Vanda a preference in this area and, in view of the policy statement,[16] it is an important factor in reaching a comparative determination.

Integration of Ownership With Management

16. Based upon his findings that Vanda and Gold would assume "full command of their respective operations," the examiner concluded that neither proposal warranted a preference for proposing greater integration. Boulder City excepts to this conclusion, and argues that it should have been granted a preference for proposing more meaningful integration because Gold has a greater familiarity with the area to be served, having resided in Las Vegas since 1962; Gold will participate in the day-to-day operation of the station;[17] and Gold's past broadcast record with stations KLUC (AM and FM) should be considered outstanding. Boulder City contends that the integration which Vanda proposes is not comparable to its proposal, since Vanda, who is not and has never been an area resident, has not had previous experience in operating a broadcast facility in an ownership capacity. Vanda also excepts to the examiner's conclusion that no integration preference is warranted, and asserts that such a preference should have been awarded his proposal. Vanda grounds his assertion on the following arguments: Vanda proposes 100 percent integration of ownership and management, while Gold, even if he were to be fully integrated, could achieve integration of only a 66⅔-percent ownership interest in management;[18] there is no evidence of record that Gold will, in fact, be general manager of the proposed Boulder City station (see note 17, infra); in view of Gold's ownership of stations KLUC (AM and FM) and his position as general manager of those stations, there is no reasonable indication that Gold's participation in Boulder City will be on a full-time basis or even of how much time he will devote to the day-to-day operation of the proposed television station; and Gold's past broadcast experience cannot be termed either unusually good or unusually poor.

17. Because a number of exceptions to the examiner's treatment of integration have been filed by both parties, it will be necessary to set out the relevant facts and considerations in some detail. Vanda, serving as general manager of the Henderson station, proposes 100

[16] "Diversification is a factor of primary significance since * * * it constitutes a primary objective in the licensing scheme," 1 FCC 2d at 394, 5 R.R. 2d at 1908.

[17] Boulder City requests official notice be taken of its application to the extent that it shows Meyer (Mike) Gold as proposed general manager of the television station in Boulder City. Although this information was not included in the exhibits which comprised the applicant's direct case and was not elicited on examination of Gold as a witness in the proceeding, the request is granted.

[18] Lester H. Berkson, a 33⅓-percent stock subscriber or Boulder City, currently lives in Zephyr Cove, Nev. (approximately 450 miles north of Boulder City), and will not participate in the day-to-day affairs of the station.

percent full-time integration of ownership with management. Boulder City's proposal calls for Gold to be involved in the day-to-day operation of the Boulder City station. Lester Berkson, the only other principal of Boulder City (33⅓ percent), would participate only in a consultative capacity which, under the policy statement, can be accorded no weight in this aspect of integration. Furthermore, the extent and nature of Gold's own participation in the Boulder City station must be examined closely in light of his continuing commitment to stations KLUC (AM and FM), located in Las Vegas. Boulder City urges the conclusion that Gold will be general manager of the proposed television station and this request has been granted. (See footnote 17, supra.) However, it must be noted that in its application, Boulder City makes no provision for an assistant general manager and, aside from announcers and various technical personnel, provides for only a program director.[19] The situation is further complicated by statements made by Gold in connection with a pending application of KLUC (AM) to change frequency and increase power.[20] In the standard broadcast proceeding, in response to a request for the addition of a staffing issue against Gold (wherein Gold's involvement with the Boulder City television application was cited), Gold, in his opposition, indicated that if the television application were granted, an assistant manager and program director would be hired for the television operation, making it "possible for Mr. Gold to continue to manage KLUC (AM and FM)." The Board concluded[21] that "the fact that the Golds might serve in some types of consultative or management roles at the Boulder City operation (if granted) is not inconsistent with their proposals to devote full time to the Las Vegas stations." In view of the foregoing, it can only be concluded that, although Gold will be general manager of the Boulder City station, it has not been established that he will serve in this capacity full time. The amount of time which Gold will devote to the station on a daily basis is uncertain. Thus, the value of the proposed integration is comparatively diminished. See *Grand Broadcasting Company*, 36 FCC 925, 2 R.R. 2d 327 (1964). Judged solely on the basis of proposed participation and without regard to local residence and experience, Vanda is in a substantially stronger position than Boulder City.

18. Although a single preference is awarded for "integration," this area of comparison is affected by local residence and by past broadcast experience. Under the policy statement, no credit can be awarded for local residence and/or past broadcast experience where the person with such residence or experience will not be involved in the operation of the station; and to the degree that the proposed participation is less than full time, the value of the residence or experience is diminished.

19. Vanda is presently a resident of Beverly Hills, Calif.; in the event that his application is granted, his stated intention is to move to the area. Since 1962, Gold has been a resident of Las Vegas, which is within Boulder City's proposed service area and where he has partici-

[19] In exhibit 2, Boulder City proposes the employment of an individual to serve as program director, production manager, and assistant to the general manager.
[20] BP-16401 (docket No. 16114).
[21] *Circle L, Inc.*, 2 FCC 2d 338, 6 R.R. 2d 795, affirmed as modified 3 FCC 2d 318, 7 R.R. 2d 345 (1966).

pated in civic activities. Therefore, Boulder City's position in terms of integration must be viewed as improved, but this improvement is slight because of Gold's less than full-time participation and because his residence in the area has been of relatively brief duration.[22]

20. As the examiner indicated in his findings (pars. 14–16), Vanda has had extensive experience in the broadcast field but has had no previous ownership interest in a broadcast facility. Vanda's experience, though primarily in program production, has included both radio and television. The examiner found Vanda's experience worthy of slightly greater credit than Gold's. Boulder City excepts to this finding and contends that Gold's experience in operating broadcast stations and the records of those stations (KLUC (AM and FM)) put Boulder City in the better position. Careful study has been made of the facts bearing on experience of the two applicants and the examiner's evaluation thereof. The Board can find no reason to disturb the examiner's conclusion. As to Boulder City's exceptions, they relate to Gold's record as an operator of the AM and FM stations, and it is therefore more appropriate to treat them at the time Gold's past broadcast record is examined, infra.

21. In sum, then, after taking into consideration Boulder City's slightly better local residence background, on the one hand, and the less significant Vanda experience preference, on the other,[23] Vanda's preference for better integration is only slightly reduced and is still substantial.

Broadcast Record

22. As defined in the policy statement, past broadcast record is a factor of substantial importance if it is either unusually good or unusually poor, in which situation it gives some indication of unusual performance. Boulder City insists that Gold's record at KLUC, especially in the area of programing, entitles it to a preference. Consideration has been given both to the facts detailed by the examiner and the additional ones urged by Boulder City, but the Board, while crediting these good points, is unable to agree to the preference because of counterbalancing shortcomings. KLUC's record indicates a disparity between promise and performance of local live programing,[24] and numerous instances of departure from the stated commercial spot announcement policy.[25] Accordingly, even giving Boulder City the

[22] Policy statement, 1 FCC 2d at 396, 5 R.R. 2d at 1910.

[23] Under the policy statement, 1 FCC 2d at 396, 5 R.R. 2d at 1910, previous broadcast experience is not so significant as local residence as an aspect of integration.

[24] In his renewal application for station KLUC (AM) dated July 3, 1962 (BR-3378), Gold stated that his 1962 live broadcasts (commercial and sustaining) amounted to 3.6 percent, and that for the ensuing license period he proposed to devote 17.1 percent of the station's time to live broadcasts (commercial and sustaining). Official notice granted tr. 699. Gold's 1963 and 1964 composite weeks program logs reflect that, in 1963, KLUC broadcast 1.7 percent live sustaining and 0 percent live commercial, and in 1964 the figures were 4.3 percent live sustaining and 0 percent live commercial. Gold testified that the 1963 and 1964 percentages include time devoted to public service announcements as well as local news and other live programs.

[25] In the same renewal application described in footnote 24, supra, Gold stated that his commercial spot announcement policy provided for no more than three spot announcements per 14½-minute segment and no spots exceeding 60 seconds per announcement. However, according to the 1962–63 composite week, KLUC exceeded 3 spots per 14½-minute segment in 97 instances and 68 commercial spot announcements exceeded 60 seconds.

benefit of the doubt and minimizing the record shortcomings, the latter cannot be totally ignored, and we must conclude that Gold's record is between unusually good and unusually bad; i.e., average, which the policy statement says must be disregarded. Therefore, while we reach no negative conclusion regarding Gold's record, we cannot, on the basis of the evidence available to us, conclude that Gold's record at KLUC amounts to the meritorious record which overall would be required for a preference of substantial importance.

Other Comparative Considerations

23. The Commission in its policy statement has indicated that differences between program proposals should be accorded decisional consideration only if they are "material and substantial," demonstrating "superior devotion to public service." In this case, the Board is in full accord with the examiner's conclusion (par. 12) that while each proposal "reveals thoughtful preparation * * * there is no reason for saying one is markedly superior to the other."

SUMMATION

24. Vanda has been shown to merit significant preferences in the diversification of control of the media of mass communications and in the overall category of integration of ownership with management. The applicants have been determined to warrant no preference for superior proposed program service and no preference has been given in the area of past broadcast record. Boulder City has been credited with proposing a more efficient utilization of the frequency. Vanda's superiority in the factors of diversification and integration far outweighs the slightly more efficient utilization of the frequency which a grant of the Boulder City application would provide. Therefore, it is concluded that a grant of the application of Charles Vanda would better serve the public interest, convenience, and necessity, and that the initial decision should, therefore, be sustained.

Accordingly, it is ordered, This 27th day of July 1966, that the application of Charles Vanda (BPCT–3315) for a construction permit for a new television broadcast station to operate on channel 5 in Henderson, Nev., *Is granted* subject to the following condition, and the application of Boulder City Television, Inc. (BPCT–3327), for a construction permit for a new television broadcast station to operate on the same channel in Boulder City, Nev., *Is denied:*

> The licensee shall submit to the Commission by September 1, 1966, all the technical information normally required for the issuance of a construction permit for operation on channel 5, including any changes in antenna and transmission line.

DONALD J. BERKEMEYER, *Member.*

APPENDIX

RULINGS ON EXCEPTIONS TO THE INITIAL DECISION

EXCEPTIONS OF BOULDER CITY TELEVISION, INC.

Exception No.	*Ruling*
1	Granted. The last sentence of par. 5 of the findings of fact of the initial decision is modified to read as follows: "Boulder City had a 1960 population of 4,059; studies indicate that Boulder City's rate of natural increase is somewhat lower than the Clark County average." (Boulder City exhibit 14, p. 14.)
2, 4, 21	Denied as not of decisional significance.
3	Granted. Although it was recognized that terrain considerations might result in some modification of the contour locations, neither Vanda nor Boulder City made a supplemental showing as to such effects with respect to either of the proposals before the Board.
5, 6	Denied. No staffing issue was included in this proceeding. Mr. Bullard is not a principal of the Boulder City applicant and his qualifications are not in issue.
7	Denied. The examiner's findings adequately reflect the evidence of record. As to the examiner's conclusion on experience, see pars. 20 and 21 of the decision.
8, 9	Granted. But see par. 22 of the decision.
10	Granted to the extent indicated in pars. 6 and 12 of the decision and denied in all other respects.
11, 13, 14	Granted to the extent indicated in par. 6 of the decision.
12	Granted to the extent that the finding requested reflects the operating characteristics of KORK–TV, Las Vegas, Nev., prior to the report and order discussed in footnote 13 of the decision.
15	Denied. The two applicants propose, in total, approximately the same number of hours of operation.
16	Granted to the extent indicated in pars. 19 and 21 of the decision and denied in all other respects.
17, 18, 19	Granted in so far as Boulder City is awarded a preference for the more efficient proposal and denied in all other respects. See pars. 9–12 of the decision.
20	Denied for reasons stated in pars. 6–8 of the decision.
22	Denied as lacking in specificity as required by sec. 1.277 of the rules. Boulder City's allegations as to Vanda's motives in applying for Henderson are totally unsupported by the record. Those portions of the exception dealing with coverage are denied for reasons stated in pars. 9–12 of the decision.
23, 26	Denied. See par. 22 of the decision.
24, 25	Granted. But see par. 22 of the decision.
27	Denied. Mrs. Gold is not a principal of the Boulder City applicant and her qualifications are not in issue.
28	Denied. See par. 20 of the decision.
29	Denied in substance for the reasons stated in pars. 16–21 of the decision.
30	Denied for the reasons stated in the decision.

EXCEPTIONS OF CHARLES VANDA

1, 2, 9	Granted to the extent indicated in pars. 16 and 17 of the decision and denied in all other respects.
3, 5, 8	Granted to the extent indicated in par. 22 of the decision and denied in all other respects.
4	Granted and the findings are so amended.
6, 7	Denied as not of decisional significance.
10	Denied. See par. 22 of the decision.
11	Granted to the extent indicated in pars. 16–22 of the decision and denied in all other respects.

DISSENTING STATEMENT OF BOARD MEMBER SLONE

I disagree with the majority as to the weight to be given to various comparative criteria considered in the decision.

First, although I agree with the majority that a decisive 307(b) choice cannot be made between the proposals, I, nevertheless, would place greater weight than the majority has on the larger area and population which would receive a first service exclusively from the Boulder City proposal. Concededly, the population receiving such a first service would be small, but it cannot be contended that the area is small. Boulder City's grade B signal would encompass an area of 14,475 square miles, while Vanda's would encompass 9,467 square miles; of these areas, Vanda's grade B contour would include an area of 2,750 square miles and Boulder City's 7,695 square miles, where there are no other grade B signals available. Thus, Boulder City's white area is nearly 2.8 times that of Vanda's white area.[1] Because of these considerations (white area and population), I believe Boulder City's proposal would better achieve the objectives set out by the Commission in its sixth report and order (see 1 (pt. 3) RR 91:601 at 91:620) than would Vanda's.[2] Accordingly, I would give Boulder City a substantial preference in this respect. In addition I would give a slight preference to Boulder City for its more efficient utilization of the channel.

Further, even if, as the majority assumes, the area (the area which would not gain the grade B signal of Boulder City, should Boulder City's proposal be denied) would not long remain without service because of the proposed future relocation of KORK–TV (see par. 12 of the decision), the Boulder City proposal would still better achieve the allocation objectives of the Commission than Vanda's proposal in that it would provide a choice of grade B signals to that area, fulfilling the third stated objective.

In the proceeding in docket No. 16187 (report and order, 3 FCC 2d 550, 7 R.R. 2d 1589 (1966)), the Commission, among other things, assigned channel 3 to Las Vegas in lieu of channel 2. In discussing the first television service and the larger area which would be obtained by a channel 3 operation at a "very advantageous natural transmitter location," in the Las Vegas area, the Commission stated, in part, that "This would conform to a basic principle in all broadcast allocations and would make a fair and equitable distribution of available facilities as provided in section 307(b) of the Communications Act." I believe that this principle is equally applicable in this proceeding, and that, consequently, it must be given substantial weight, as hereinabove indicated.

---

[1] With respect to the assignment of class II–A stations in the AM field, the Commission's rules specifically provide that consideration will be given to white areas even in the absence of any residents therein. Sec. 73.22(b) states: "No class II–A station 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." (Emphasis supplied.)

[2] In its report and order the Commission stated, as to television assignment principles, that priority No. 1 was "[t]o provide at least one television service to all parts of the United States"; that priority No. 2 was "[t]o provide each community with at least one television broadcast station"; and that priority No. 3 was "[t]o provide a choice of at least two television services to all parts of the United States."

Second, I would award only a slight preference to Vanda in integration. I believe that in considering this factor, Gold's residence in the area, demonstrating knowledge of the area, not attributable to Vanda, a nonresident, warrants greater weight than the majority has given to it. With such greater weight, I, then, would find both applicants almost equal in this category with a slight preference for Vanda.

Third, I agree with the majority with regard to their conclusion on diversification, giving a preference to Vanda in this respect.

In summation, I believe that the preferences thus awarded to Boulder City, with substantial weight being accorded to the 307(b) factors, outweigh those given to Vanda. Therefore, I would grant the application of Boulder City Television and deny that of Vanda.

FCC 66D-3

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of CHARLES VANDA, HENDERSON, NEV.	Docket No. 15705 File No. BPCT-3315
BOULDER CITY TELEVISION, INC., BOULDER CITY, NEV. For Construction Permit for New Television Broadcast Station	Docket No. 15707 File No. BPCT-3327

APPEARANCES

Samuel Miller, on behalf of Charles Vanda; *Philip M. Baker*, on behalf of Boulder City Television, Inc.; and *John B. Letterman*, on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER H. GIFFORD IRION

(Adopted January 7, 1966)

PRELIMINARY STATEMENT

1. This is a proceeding involving two applications for use of channel 4, which is assigned to Boulder City, Nev. The Vanda application proposes a location, however, in Henderson, Nev., which is approximately 9 miles from Boulder City. The Commission designated the applications for hearing on November 18, 1964, on issues to determine the financial qualifications of both Vanda and Boulder City; to determine whether the proposed Boulder City antenna would constitute a hazard to air navigation; and to determine under section 307(b) which of the proposals would best provide a fair, efficient, and equitable service. Lastly, there was a standard comparative issue which was contingent upon a finding that the choice could not be made solely on findings relating to section 307(b). The city of Boulder City was made a party to the proceeding but was not represented by counsel.

2. There was also a third applicant, Vegas Valley Broadcasting Co. (BPCT-3454), seeking the same facilities in Boulder City and this applicant participated in the hearing up until its application was dismissed with prejudice on October 19, 1965 (FCC 65M-1356).[1] Prehearing conferences were held on December 28, 1964, and February 15, 1965. The hearing commenced on February 23 and continued intermittently until the record was closed on September 16, 1965.

[1] Originally there was a fourth application, Sovereign Television Corp. (BPCT-3323), which was dismissed pursuant to its own request on Jan. 6, 1965 (FCC 65M-20).

3. Pursuant to an informal agreement among the parties and with the consent of the hearing examiner, the Broadcast Bureau filed proposed findings on the engineering and financial issues, while the two applicants filed proposed findings on other matters relating to section 307(b) and the comparative issues. Proposed findings were also filed by the city of Boulder City. Reply findings were filed by the two applicants on November 26, 1965. It was also agreed that no findings would be submitted on studios, staffing, or equipment proposals. Consequently, no findings on those subjects will be made in this decision.

FINDINGS OF FACT

The Communities Involved

4. Henderson and Boulder City are both situated in Clark County, Nev. There are only four urban communities in this county, the other two being Las Vegas and North Las Vegas. Las Vegas is by far the largest, with a 1960 population of 64,405. The driving time from Boulder City to Henderson is approximately 15 minutes and they are 9 miles apart. Boulder City is higher in altitude, being located on a mesa, whereas Henderson and Las Vegas are in a valley.

5. Henderson had a 1960 population of 12,525 persons. The area was generally described as follows: Las Vegas is the center of a thriving tourist trade and is principally noted for gambling and entertainment, Henderson is progressing as an industrial community, and Boulder City is attempting to assume the status of the county's cultural center. Boulder City had a 1960 population of 4,059, but it is anticipated that its rate of growth would be less than that of Las Vegas or Henderson.

6. Henderson was founded in 1942 as a result of defense production in the area. Its industries are primarily metal and manufacturing. In 1953 it was incorporated as a city with a mayor and city council. Boulder City was founded in 1931 as a construction camp to house workers at Hoover Dam, which is 7 miles away. It was incorporated in 1960 and now has a city council of five members, one of whom is mayor. A city manager is also employed. Boulder City is situated in an area of 33 square miles, which was deeded to it by the Federal Government. Its charter forbids gambling or the sale of liquor, and these restrictions cannot be altered except by a citizen referendum. Offices of the U.S. Bureau of Reclamation, the National Park Service staff for Lake Mead National Recreation Area, and a Bureau of Mines experimental laboratory are all located in Boulder City. Both Henderson and Boulder City have churches of various denominations, public schools, and the usual municipal institutions, such as fire and police departments.

7. Mr. Andrew J. Mitchell is a city councilman from Boulder City, who was authorized by the council to come east and appear as a witness in this proceeding on behalf of the city. The essence of his testimony was that the council and community leaders of Boulder City urge retention of the television assignment in that community. Emphasis was placed on the fact that it does not permit gambling or the sale of liquor, as distinguished from Henderson and Las Vegas. While Boulder City

106-506—66——3

is attempting to locate a college within its confines, no definite steps have been taken nor commitments made toward that end. Mr. Mitchell testified that the merchants of Henderson have relatively easy access to at least one Las Vegas TV station, whereas the merchants of Boulder City do not. Furthermore it has been found necessary to establish a booster station in order to receive the Las Vegas television signals in Boulder City. The testimony generally indicates that merchants in both Henderson and Boulder City find the rates of the Las Vegas stations excessive for their purposes.

8. There are two standard broadcast stations in Henderson and none in Boulder City. No FM or television stations are located in either community. Boulder City has a weekly newspaper and Henderson has one published twice a week.

Engineering Factors

9. Vanda proposes a transmitter site 2 miles southwest of Henderson and about 10.5 miles west of Boulder City. It will be a directional operation, with an average effective visual radiated power of 11.7 kw and an antenna height above average terrain of 1,133 feet. The maximum radiation of 40.5 kw is directed toward the northwest in the general direction of Las Vegas and its urbanized area. Boulder City will have its transmitter site 2 miles northwest of Boulder City and about 8 miles east of Henderson. The two sites are 8.5 miles apart. Boulder City proposes a nondirectional operation, with effective visual radiated power of 18.73 kw and an antenna height of 1,598 feet above average terrain.

10. Either of these proposed operations would provide city grade coverage to Boulder City, Henderson, Las Vegas, and the Las Vegas urbanized area. The grade A and grade B contours of Vanda's proposal are roughly pear shaped while those of Boulder City are more or less circular. Within the pertinent contours service would be provided as follows:

Contour	Vanda		Boulder City	
	Area (square miles)	Population	Area (square miles)	Population
City grade (74 dbu)	1,005	106,660	1,861	109,625
Grade A (68 dbu)	1,932	115,110	3,504	113,800
Grade B (47 dbu) [1]	9,467	124,692	14,475	126,581

[1] In appraising the value of the relative size of areas encompassed by the respective grade B contours, one note of caution must be made. Evidence was introduced into the record with respect to the Vegas Valley application, which has since been dismissed. That evidence purported to show a retraction of the computed grade B contour of Vegas Valley in certain directions; namely, toward Needles, Calif., and Kingman, Ariz. The expert testimony which was offered on this matter also indicates that because of rugged terrain in the area it would be anticipated that, by applying the Bullington method, which is recognized as an acceptable method in such instances, one would expect to find a retraction of the Vanda and Boulder City grade B contours in the same directions. There is no evidence in the record to show what populations would not be served because of this retraction but the record is clear that outside the populous Las Vegas area the population density is very low.

11. There are in the area only three other television stations,[2] all of which are assigned to Las Vegas. No one of these stations serves all of the areas encompassed by the proposed grade B contours of the two proposals herein. This means that both Vanda and Boulder City would provide grade B service to white areas. Vanda would bring such service to 4,499 persons in an area of 2,750 square miles. Furthermore, Vanda would provide a second grade B service to 5,381 persons in 3,730 square miles. The Boulder City operation would bring a grade B service to a white area of 7,695 square miles, wherein reside 6,301 persons. It would bring a second such service to 5,468 persons in an area of 3,900 square miles.

12. Most of the foregoing areas would be served by either of these two proposals. The Boulder City grade B contour would not encompass an area in the northwestern quadrant of the Vanda grade B service area, but there would be considerable areas to the east of the Vanda grade B contour which would receive grade B service from Boulder City. The area which would receive its first grade B service only from the Vanda operation consists of 715 square miles, wherein reside 248 persons. The areas which would receive their first grade B service from Boulder City but not from Vanda consist of 5,660 square miles with a population of 2,050 persons.

Air Hazard Issue (No. 3)

13. By letter dated February 19, 1965, the Federal Aviation Agency advised the Commission that the antenna structure proposed by Boulder City Television, Inc., would not be a hazard to air navigation.

Charles Vanda

14. Charles Vanda, who is an individual applicant, was born in New York City, where he received his education. Until 1930 he worked in advertising and publicity in New York and then moved to Los Angeles where he continued in the same kind of occupation. In 1935 he joined CBS as a publicity director and ultimately came into charge of the programing with the CBS network in Hollywood. In this capacity he wrote, directed, and produced many nationally known programs.

15. During World War II he served in the Armed Forces and obtained the rank of colonel. With the advent of television after the war, he moved to Philadelphia, where he took charge of television operations at station WCAU–TV. In one season this station originated more live shows to the CBS network than did CBS in Hollywood. At this station he personally won the Variety Award for outstanding showmanship, and the station was given the Dupont Award for a series of special events. Certain shows produced at WCAU–TV won Ohio State, Peabody, and Sylvania awards. From Philadelphia,

[2] KORK–TV (channel 2), KLAS–TV (channel 8), and KSHO–TV (channel 13). The status of the last named is somewhat dubious as of this writing. On July 28, 1965, the Commission adopted a decision looking toward the termination of the operation of KSHO–TV. 1 FCC 2d, 91; —— R.R. ——. In a memorandum opinion and order adopted Dec. 15, 1965 (FCC 65–1104), petitions for reconsideration were denied. An appeal, however, is pending in the U.S. Court of Appeals for the District of Columbia.

106–506—66——4

Mr. Vanda moved in 1958 to join the J. Walter Thompson Agency as vice president in charge of Hollywood television, where he produced new programs. He held a nonsalaried confidential assignment with the Department of Defense from 1959 to 1963 but, in the meantime, he formed a corporation which ultimately was called Vanda of TVI, Inc., in Hollywood. This corporation, which is still active, produces and sells television services, including the sale of film to Japan, Australia, and the United States. If his application is granted, Mr. Vanda proposes to dissolve this corporation and move to the Henderson, Nev., area where he will devote full time as general manager to the channel 4 operation. He now resides in Beverly Hills, Calif.

16. During the years just covered, Mr. Vanda has lectured at various universities, written articles for publication, participated in various phases of labor-management contracts, and engaged in production of many television programs.

17. Mrs. Shirly Vanda, wife of the applicant, is proposed as station manager. Mrs. Vanda has accompanied and assisted her husband in his various radio and television activities. She worked for CBS and a large advertising agency in the area of production, and also assisted in production on the Jack Carson show.

18. Mr. Vanda has no interests in broadcast stations or other mass media of communication. If the present application is granted it is Vanda's intention to form a corporation in which 0.5 percent of the stock will be held by Robert Guggenheim, Jr., who will serve, along with certain residents of the Henderson area, on a program advisory council.

19. Boulder City has attempted to make an issue of Mr. Vanda's connection with the Historical Center of America. This is a nonprofit enterprise which was planned as a repository for microfilm containing all human knowledge. The brochure which describes the historical center states that it is to be the "anatomy of the intellect; the monument of All Mankind." A design was made for a building to house this historical material and it was to be of very considerable dimensions. No building has been erected nor does the center appear to be active at the present time. On the basis of the evidence in this record, the examiner can make no finding either as to the foundation's qualities or its lack thereof. The most that is possible is to draw personal inferences and these, of course, are not proper under the circumstances. Accordingly, it is found that Mr. Vanda's connection with the foundation is not in any way material to the issues.

20. Mr. Vanda first visited Clark County in 1945 and made intermittent visits to the area during the next 18 years. In late 1963 he learned that channel 4, assigned to Boulder City, was available and made inquiries in that city. Shortly thereafter he determined that the station would do better in Henderson because of its larger population and he conducted further inquiries in that community. He talked to numerous persons in the general area during the ensuing months and discussed his proposed programing and policies with them. As a result of some of these talks, Vanda changed the formats of local live programs but did not change the scheduling or classification of them.

Financial Qualifications

21. Vanda's cost of technical equipment will be $235,000. His estimated cost of operation for a 3-month period will be $75,000.[3] In addition, Vanda will have the following preoperation expenses: Transmitter site, $200; transmitter building, $2,983.50, of which $938.50 is deferred ($2,000 cash required); studio lease, $5,000 (prepayment of fifth year's rent); access road to site, $6,840, of which $4,340 is deferred ($2,500 cash required); power lines, $15,000; telephone and utilities, $1,000; promotion and publicity, $2,500; professional fees, $5,000; utility deposit, $3,000; due RCA prior to operation, $4,800; freight and insurance, $4,500; staff salaries prior to operation, $2,600; rent prior to operation, $416; supplies and office furniture rental, $400. These preoperational cash requirements total $48,916. The total cost of construction and initial operation will be $358,916. To meet these costs, Vanda relies on deferred credit of $176,000 and personal assets.

22. Mr. Vanda's balance sheet as of January 15, 1965, lists total assets of $274,000 and liabilities of $11,200. Mr. Vanda testified that he would use $107,000 of the $122,000 cash assets; all listed stocks, amounting to $114,000; $13,000 of $18,000 in bonds. He would not use any of the cash value of life insurance listed at $20,000. The total assets that would be made available are $234,000. Current liabilities of $11,200 (margin debt to H. Hentz & Co.) are shown. The available assets less liabilities total $222,800. This item ($222,800) together with deferred credit of $176,000 comes to $398,000.

Proposed Programing

23. Pursuant to a suggestion from the hearing examiner the applicants in their proposed findings have concentrated on the particular programs which they believe to be exemplary. Detailed findings and statistical analyses of the program schedules will not, therefore, be made.

24. Vanda plans two half-hour news roundups each day. These will also contain editorials, interviews, and special programs. "You and Yours" will be a live weekday show at 2:30 p.m., with some taped segments in which the "Lady From Henderson" will conduct informal discussions on such things as education, fashion, food, and decorating. "Voice of the City" is a program devoted to discussion of local problems. Twice a week there will be a program devoted to local sports activities.

---

[3] On July 2, 1965, the Commission adopted a new standard for determining the financial qualifications of applicants for commercial broadcast facilities. *Memorandum Opinion and Order in Ultravision Broadcasting Company, et al.* (dockets Nos. 15250, 15254–15255, 15323, FCC 65–581), released July 2, 1965. In this order, the Commission stated: "* * * we shall hereafter require all applicants for commercial broadcast facilities, whether AM, FM, VHF–TV, or UHF–TV, to demonstrate their financial ability to operate for a period of 1 year after construction of the station." However, by public notice (FCC 65–595), released July 8, 1965, the Commission clarified its policies in this regard, stating that its new policies would be effective immediately as to all proposals for UHF–TV facilities in markets where three or more VHF stations are presently in operation. With respect to other applications for commercial broadcast facilities (AM, FM, UHF–TV, or VHF–TV), the prior financial qualifications standard would be applied to proposals designated for hearing on or before July 2, 1965. In this instance, the examiner, in accordance with these policies, is using the prior (3 month) criterion in his findings.

25. In the educational classification there are four weekly programs bearing different titles. Two of these are designed to bring together professors and teachers in the area for discussions. "Clark County Chronicle" will be concerned with the history of southern Nevada, and "Father and Son" will be a "speed quiz" format in which a father and son from Henderson will be matched against a similar pair from Boulder City or Las Vegas.

26. Other programs are designed to make use of the varied entertainment talent which frequently appears in Las Vegas and also to audition and encourage new talent. "We Went to Church Today" is a Sunday afternoon religious program with a panel format in which a moderator will conduct a discussion with children of various faiths.

27. One entertainment program on which Vanda has placed particular stress is the "Ghost Rider," which he devised some years ago at station WCAU–TV in Philadelphia. It is a program for children in which the Ghost Rider attempts to stimulate courtesy, obedience, and good domestic conduct among his viewers. "Community Charade" is what its name implies, a charade program in which one team will be Clark County residents and the other will be well-known stars on the Las Vegas strip.

Boulder City Television, Inc.

28. Boulder City Television, Inc. (hereinafter Boulder City), is a Nevada corporation. Meyer (Mike) Gold is president, director, and a subscriber to 66⅔ percent of the voting stock. Lester H. Berkson is vice president, treasurer, director, and a subscriber to 33⅓ percent of the voting stock. Sylvia G. Gold, wife of Mr. Gold, is secretary and a director.

29. Mike Gold was born in Minneapolis, Minn., and was graduated from the University of Minnesota in 1932. For many years he was in the advertising business, and from 1950 until 1958 was president of Creative Productions, Inc., Hollywood, Calif., which created syndicated radio and television programs. During the same period Mr. and Mrs. Gold also owned an advertising agency. Mr. Gold continued in the same type of business until 1962, when he became owner and operator of stations KLUC–AM and FM, Las Vegas, Nev. He now resides in Las Vegas, where he is a member of a number of fraternal and professional organizations. At the present time he is president of the Southern Nevada Broadcasters Association. When Mr. Gold built KLUC–FM, the number of FM sets in the area was relatively small. In order to promote FM, Mr. Gold imported low-priced sets from Japan and arranged with dealers in the Las Vegas area to sell them at a slight profit. He also engaged in other activities to promote FM. While there was no categorical statement that Gold will be general manager, this fact can be reasonably inferred from the record which, in any event, shows that he will actively participate in the operation.

30. Mrs. Gold was also born in Minneapolis and she has actively assisted Mr. Gold in various enterprises for the past 20 years. She is office manager for the AM and FM stations in Las Vegas and participates in that community's civic affairs.

31. Lester H. Berkson was born in Chicago, Ill., and is a member of the bar of both California and Nevada. He resides in Zephyr Cove, Nev., which is approximately 50 miles from Reno and approximately 450 miles north of Las Vegas. At the present time he practices law in Las Vegas but plans to establish an office at Zephyr Cove or Lake Tahoe, which are in the same area. When this is done, Mr. Berkson anticipates that he will spend about 2 days a week in Las Vegas. At the present time he is a member of a number of professional and fraternal organizations in Las Vegas.

32. Mr. Gold, in preparing for television programing, relied first upon his experience in advertising and in his broadcast operations in Las Vegas. Before making up his proposed schedule he talked to people in Boulder City and also in Henderson and Las Vegas. These individuals included not only city officials and leading citizens but average individuals who were selected at random.

Financial Qualifications

33. Boulder City's total cost of construction is $189,539.77. Its estimated cost of operation for the first 3 months of operation will be $45,000. In addition, equipment payments and payments to banks for the first 90 days of operation will total $13,069.54. Thus, the total cost of construction and initial operation will be $247,609.31.

34. Boulder City has $150,000 available to it from stock subscriptions and $50,000 as a loan from the First National Bank of Las Vegas, or a total of $200,000. In addition, it has deferred credit from equipment manufacturers in the amount of $124,904.83. The total funds and credit available to Boulder City is, therefore, $324,904.83.

35. Of the $150,000 in stock subscriptions, $100,000 is to be derived from the stock purchase of Meyer (Mike) Gold and $50,000 from the stock purchase of Lester H. Berkson. Mr. Gold relies on personal assets of $25,000 and a bank loan from the Bank of Las Vegas of $75,000 to meet his commitment.

36. To establish his ability to meet his personal commitment of $25,000, Mr. Gold submitted a balance sheet as of November 30, 1964, showing cash on hand of $16,471.69; listed stocks and bonds of $22,500; and cash surrender value of life insurance of $4,100, among other assets. The balance sheet reflects total assets of $410,351.69. Current liabilities are listed at $610 and long term liabilities at $52,250, with a resulting net worth of $357,491.69.

37. It was established that the correct cash surrender value of life insurance was $7,035 and not $4,100 as shown on the November 30, 1964, balance sheet. Also, the listed stocks and bonds were pledged as security for a note of $6,000 to the Bank of America. Mr. Gold testified he would sell these securities, if necessary, and pay off this loan, realizing the difference in cash ($16,500). He would use this sum to meet any requirement arising out of his stock subscription obligation.

38. Lester H. Berkson lists cash on hand of $136,365.41. His total assets are given as $313,918.41; liabilities are $108,509.45; and net

worth is $205,408.96. He is, therefore, able to meet his $50,000 stock subscription agreement.

Past Broadcast Performance of Mr. Gold

39. Mr. Gold since 1962 has been the licensee of stations KLUC–AM and FM in Las Vegas. Neither he nor the other principals have other broadcast interests. According to the applicant, the logs for the composite weeks of 1963 and 1964 do not adequately express the performance of these stations, and since this assertion has not been challenged it is accepted as fact. The statistical analyses based on these logs, as a matter of fact, do not reflect anything unusual in either a positive or negative sense.[4] In the morning there are two programs entitled "Coffee Time" and "Rise and Shine," in which the announcer conveys information about weather, highway conditions, school notices, and the like in addition to playing records and delivering commercials. Sometimes guests are interviewed on the program. On the "Sproul Remote" program the staff announcer interviews people in show business who are in the area, including Ted Lewis, Mitch Miller, George Burns, Eddie Fisher, Nancy Wilson, Eleanor Powell, Shelly Berman, Jimmy Durante, and scores of others. This program was produced between February and August 1964. Since Mr. Gold took over the operation of KLUC the station has carried the CBS network program of the New York Philharmonic Orchestra. The program is taped and rebroadcast on FM during Sunday evenings for the audience which may not have been able to listen on Sunday afternoon. "Standard School Broadcast" is an educational program described as "a music appreciation program for schoolchildren that depicts the lives of the great American patriots." KLUC produced broadcasts of the Louis Prima Orchestra from the Hotel Sahara in Las Vegas in cooperation with the Treasury Department, in recognition of which the station received citations from the Las Vegas Chamber of Commerce and the U.S. Treasury Department. Editorials are broadcast by Mr. Gold personally on issues affecting the people of southern Nevada. At election times all candidates are accorded equal time with the same charges. The speeches of distinguished figures, such as Presidents Kennedy and Johnson and Senator Goldwater, have been recorded and broadcast by the station.

40. Station KLUC assisted a member of the Extension Division of the University of Nevada in broadcasting a program for homemakers, and it has also carried programs appealing to the Spanish-speaking population of the area.

41. Since 1964, KLUC–FM has operated 24 hours a day, Monday through Saturday, and 21 hours on Sunday. Miss Carolyn Branch, who is described as the only Negro announcer employed by a Las Vegas station, conducts a nighttime program entitled "Jazz With Soul." Despite the low percentage of agricultural programs shown in the composite weeks (see footnote 5), KLUC carries a farm news program three mornings a week which is produced by the University of Ne-

[4] In the 1963 composite week there were no agricultural programs and the analysis for 1964 shows only 0.2 percent agricultural. Evidence in the record, however, indicates that this is not a predominantly agricultural area.

vada's Agriculture Department in Reno and is sent to the station on tape. The station has carried many public service announcements and has helped to publicize cultural events such as the performance of Rossini's "The Barber of Seville" by the Las Vegas Symphony Society. It has carried the Salt Lake City Mormon Tabernacle Choir over the CBS network every week since Mr. Gold assumed control.

42. Vanda has urged certain matters which presumably would indicate an inferior program service on Mr. Gold's stations. Most of these are minor derelictions, such as an incorrect computation of the percentage of live programing and failure to carry a religious program which was promised in the renewal application. There were a number of situations in the 1963 composite week where back-to-back spot announcements were broadcast and there were also situations in which more than three spots were carried in a 14½-minute segment. Mr. Gold reaffirmed his policy against such practices and his explanation of their occurrence showed that exceptional circumstances were the cause. The facts concerning these matters do not justify a finding of marked inferiority in programs.

Proposed Programing

43. As in the case of Mr. Vanda's proposed schedule, the findings of fact will be confined to those particular programs upon which the applicant places special reliance as evidence of superiority. Boulder City proposes news and sports programs, including a half-hour program on Saturday afternoon devoted to sports and consisting of films and talks. There will be a weekly half-hour talk program entitled "Product Scout," which is designed to stimulate interest in the new merchandise, products, and services offered by business houses in the area. "Homemakers" will be a program in home economics for housewives and it will be done live by Mrs. Catherine Everson of the Nevada University Extension Division. Mr. Mike Gold, himself, will give a 15-minute Sunday editorial, and qualified persons of opposing viewpoints will be given equal time to express their views.

44. Mr. Gold proposes to carry symphonic programs on film featuring the Chicago and Boston Symphony Orchestras. Other musical programs will also be telecast. In the field of education, the program "TVU" will be conducted each Tuesday evening by a member of the staff of Southern Nevada University and will consist of demonstrations and talks on science, literature, and the like. "Back to School" is proposed as a Saturday afternoon discussion program aimed at helping culturally deprived children in the community and it evolved from discussions with officers of the public school system.

45. As the name implies, "Boulder City Round-Table" will be a panel program conducted by local citizens and moderated by Mr. Gold. "Just Dropped In" will consist of live interviews with famous personalities appearing at the hotels and nightclubs of the area. In his entertainment programs, Mr. Gold, like Mr. Vanda, proposes to tap the resources of five entertainment in the Las Vegas area. Each Sunday afternoon and evening the show "Spotless Movie" will be featured. It is designed to be free of commercial spots during the showing of the film.

CONCLUSIONS

1. This proceeding has become a contest between two applicants, each of whom proposes to establish a television station on channel 4 in the Las Vegas area. The channel is actually assigned to Boulder City, Nev., and it is in this community that Boulder City Television, Inc., in which Mr. Mike Gold is the predominant stockholder, would build a station. Charles Vanda, on the other hand, seeks a construction permit for Henderson, Nev., which is approximately 9 miles distant from Boulder City. Both of these communities are within the general area of Las Vegas although not actually within its urbanized area.

2. As shown by the findings of fact, both Vanda and Boulder City are financially qualified, so that the issues concerning such qualifications are resolved in their favor. Likewise, the issue bearing upon the possible hazard to air navigation by the Boulder City antenna has been resolved in favor of the applicant. This leaves the section 307(b) issue and, if the case cannot be decided solely on that issue, a comparison must be made between the applicants.

3. In considering need for service it must be borne in mind that the area in which Henderson and Boulder City are located is for the most part very sparsely settled. The cluster of communities around Las Vegas (which includes Boulder City and Henderson) is the only part of Clark County with any population density. This results in a showing with respect to coverage that differences in terms of population are relatively slight.

4. It may properly be asked, however, whether service to a few hundred people in a vast but sparsely settled area, such as desert or heavily forested mountain country, may not have more significance than mere numbers. The examiner is mindful of this problem in deciding the 307(b) question.

5. At the present time there are three television stations assigned to Las Vegas.[5] The grade B contours of each of these stations would more than be encompassed by the proposed grade B contours of either proposal in this case. The white area which would receive grade B service from the Vanda proposal consists of 2,750 square miles, as contrasted with the comparable area to receive grade B service from Boulder City of 7,695 square miles. The difference in populations, however, is less marked. In the Vanda grade B white area there are 4,499 persons and in the Boulder City grade B white area there are 6,301 persons. The number of persons and the areas which would receive a second grade B service from either of these proposals are so similar as to be almost identical. The white area which would receive a grade B signal from Boulder City alone is almost eight times larger than that which would lie solely within the Vanda grade B contour and the ratio of populations within these areas is approximately the same. Nonetheless, it must be observed that the absolute figures are not particularly significant.[6] In reaching this conclusion, account has been taken of the expected retraction of contours de-

[5] See footnote 3 of the findings.
[6] See par. 12 of the findings.

scribed in footnote 2 of the findings of fact but, even aside from the expected losses due to terrain, the differences in population figures are too insubstantial to warrant a summary finding in favor of Boulder City. Thus, isolating the factor of coverage—and especially coverage of white area—one must concede that Boulder City has the more efficient proposal but the margin of superiority is not so pronounced as to be the solely determinative element.

6. Need for service also encompasses the question of need for a local outlet. Neither Henderson nor Boulder City has a local television outlet. There was testimony to the effect that, because of terrain difficulties, it was necessary to erect a booster station in Boulder City so that its inhabitants could receive a satisfactory signal from Las Vegas. Henderson is the larger of the two communities but here again the difference in population is not determinative. Henderson is also closer to Las Vegas and it would appear from the record that its rate of growth is somewhat more rapid than that of Boulder City. There is evidence in the record, including testimony from a city councilman of Boulder City, that the latter community possess certain unique characteristics as contrasted with either Henderson or Las Vegas. Gambling and the sale of liquor are prohibited by the city charter (although both are legal in the other two communities), and the city fathers of Boulder City are quite evidently anxious to endow it with an aura of culture. While there was no assertion that culture was lacking in Henderson or Las Vegas, the obvious implication was that live originations in Boulder City would be of a somewhat higher order. These distinctions, however, are extremely tenuous and are not sufficient for making an absolute determination under section 307(b). It is clearly evident from the record that both communities are sufficiently close to Las Vegas to have an association with it and this was nowhere more evident than in the respective program proposals, where both Charles Vanda and Mike Gold have relied upon the availability of live professionals from the so-called Vegas strip.[7] It is further true that either of these two proposals would serve the community of the other with a city grade signal. All in all, these facts do not compel a conclusion that one or the other of these communities should prevail on section 307(b) considerations alone. They do, however, show a somewhat greater need for local service in Boulder City, especially in the matter of providing an advertising outlet for merchants who are unable to pay the rates charged by the Las Vegas stations. (See par. 7 of the findings.) The decision must turn, therefore, on the general areas of comparison, but the slight preferences with respect to need exhibited in the Boulder City proposal are not to be ignored.

7. On July 28, 1965, the Commission released a policy statement on comparative broadcast hearings (5 R.R. 2d, 1901) in which the traditional criteria were reviewed and reevaluated. It is unnecessary to attempt a digest of this statement but, for the purposes of this case, it is clearly apparent that certain areas of comparison must be

[7] This was not defined in the testimony but the examiner assumes that the Vegas strip comprises nightclubs, motels, and similar spots of entertainment, and further takes official notice of the fact that Las Vegas is a unique entertainment center.

singled out for emphasis. The first of these is diversification of the control of the mass media of communications. The facts of the present case are relatively simple. Mr. Gold, who for all practical purposes represents Boulder City, is the licensee of KLUC–AM and FM in Las Vegas. Mr. Vanda has no ownership interests in any other mass media. The proposal of Mr. Gold, of course, is for Boulder City but it is obviously within what may be called the Las Vegas area. (This statement, likewise, applies to the community of Henderson.) Neither Boulder City nor Henderson have any television outlets within their confines but there are two AM outlets in Henderson. Assigned to Las Vegas are six AM stations and five FM stations.[8] Las Vegas also has two daily newspapers, whereas Boulder City has a weekly newspaper and Henderson has one published twice a week. In this set of circumstances, it cannot be said that the grant of Mr. Gold's application would result in a concentration of control, but a grant of the Vanda application would obviously result in greater diversification of ownership.

8. Following the guidelines established by the above-cited statement on the criteria, it is next important to consider integration of ownership with station management along with the areas of comparison bearing on familiarity with the community. Both Mr. Vanda and Mr. Gold propose to assume full command of the television operations which each proposes.[9] Thus, there is no difference between them with respect to integration.[10]

9. Mr. Vanda is a resident of the Los Angeles area and, notwithstanding his visits to the Las Vegas area, including Henderson and Boulder City, he can in no sense be considered as a local resident. He does, however, intend to move into the area if his application is granted. On the other hand, Mr. Gold is a resident of Las Vegas, which is near Boulder City. In a literal sense, neither applicant has local residence but, in a realistic sense, it must be presumed that Mr. Gold, who has lived in the area for more than 3 years, would have greater familiarity with the needs of Boulder City than Mr. Vanda would have of the needs of Henderson. The distinction here, however, is so tenuous that it should not be the pivotal point in the decision.

10. While Mr. Vanda has had no experience as an owner of a broadcast station, he has a record of experience in program production, including television programs. Mr. Gold has operated two aural broadcast stations for somewhat over 3 years but has had no experience in television production, and the length of his record in this field is considerably less than that of Vanda. As the policy statement declares, this factor of experience is not so significant as local residence but it has value when put to use through integration of owner-

[8] Official notice taken of the Commission's records.

[9] See par. 29 of the findings with respect to Gold.

[10] The proposed participation by Mrs. Vanda and Mrs. Gold does not affect this conclusion, since neither can be correctly considered as a principal. The one-third ownership held by Mr. Berkson in Boulder City might be construed to diminish the degree of integration in that applicant, inasmuch as Mr. Berkson will not participate in station operations to any significant degree. A judgment based on this fact, however, would so clearly be a matter of arithmetical computation that it would be unjudicial to say the least. Accordingly, the examiner is considering the true contenders in this contest as Mr. Vanda and Mr. Gold, and their involvement in management is equal.

ship with management. In these associated areas of experience and integration, therefore, Mr. Vanda has an advantage, albeit a slight one.

11. Both of these men made reasonably careful surveys of the community for which they are applying and both were at pains to devise programing which, in their judgment, would serve community needs. The fact cannot be escaped, however, that both Henderson and Boulder City are relatively small communities which lie within the orbit of Las Vegas and cannot be completely disassociated from that metropolis. Both applicants admittedly rely upon the Vegas strip as a source for live entertainment talent and, while the record is not definitive on this point, it is a reasonable conclusion that both anticipate revenue from the larger community of Las Vegas or at least revenue which is in some way connected with service to Las Vegas. Thus, it was not surprising that the community surveys of both applicants extended to Las Vegas.

12. Each applicant proposes a program service which reveals thoughtful preparation, but there is no reason for saying that one is markedly superior to the other. Even in the area of past broadcast record there is no ground for favoring Mr. Gold, who is the only applicant with such a record. The showing as to the operation of KLUC–AM and FM contains some matters of merit which were naturally stressed by Boulder City and some matters of demerit which were stressed by Vanda. Looking at the record in perspective, however, it cannot be found that the past programing was either unusually good or unusually poor.[11] There were instances of back-to-back commercial announcements but the explanation given by Mr. Gold was reasonable and he reaffirmed his policy against such practice except in unusual circumstances. His attempts to provide adult entertainment with such programs as the New York Philharmonic and Mormon Tabernacle Choir were wholly commendable but, in and of themselves, do not make the kind of showing as to superiority which the Commission's policy statement appears to require.

13. From what has been said, it is undeniable that the choice here is a very narrow one and the hearing examiner is constrained to express his regret that the award must go to one rather than a combination of both. Such, however, is the decision forced by circumstances.

14. The only comparative areas in which an appreciable difference has been found are those relating to diversification of ownership, experience coupled with integration into management, and efficient use of the channel. In the first two of these, Mr. Vanda has been found superior; in the last, Mr. Gold (or Boulder City) has prevailed. The questions of coverage and need for service have been discussed at length in connection with section 307(b), and it has been noted that the preference expressed for Boulder City in this regard is not a strong one, although it should be given consideration in the overall comparison. While the preference for Mr. Vanda with respect to his experience would not normally be controlling, it is augmented by the fact that he will manage the station. The greatest weight, however, is

[11] See the policy statement, 5 R.R. 2d, 1908.

provided by the fact that a grant of Vanda's application will unquestionably tend to diversify the ownership of broadcast stations in the general Las Vegas area. This important consideration, which was so clearly stressed by the policy statement cited above, is sufficient to offset Boulder City's slight superiority in providing white area coverage. It follows, therefore, that the Vanda proposal would better serve the public interest, convenience, and necessity.

It is ordered, This 7th day of January 1966, that, unless an appeal from this initial decision is taken by any of the parties or unless 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 Charles Vanda for a construction permit (BPCT–3315) for a new television broadcast station to operate on channel 4 in Henderson, Nev., *Is granted*, and the application of Boulder City Television, Inc., for a construction permit (BPCT–3327) for a new television broadcast station to operate on the same channel in Boulder City, Nev., *Is denied*.

FCC 66–704

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of WASHOE EMPIRE, RENO, NEV. For Construction Permit for New Television Broadcast Station	File No. BPCT–3686

MEMORANDUM OPINION AND ORDER

(Adopted July 27, 1966)

BY THE COMMISSION: COMMISSIONER JOHNSON NOT PARTICIPATING.

1. The Commission has before it for consideration the above-captioned application of Washoe Empire, requesting a construction permit for a new television broadcast station to operate on channel 2, Reno, Nev.; a petition to deny, filed February 9, 1966, by Nevada Radio-Television, Inc., licensee of television broadcast station KOLO–TV, channel 8, Reno, Nev., and various pleadings filed in connection therewith.[1]

2. Petitioner alleges standing in this proceeding on the grounds that the proposed new station would compete with petitioner's station in Reno and would result in the diversion of viewership and advertising revenues, causing petitioner economic injury. Petitioner's standing is not disputed and 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.

3. The only question raised by the petitioner relates to the applicant's financial proposal. Based on information contained in the application, cash of approximately $609,000 will be required for the construction and operation of the proposed station for 1 year.[2] To meet these cash requirements, the applicant relies upon the availability of existing capital of $12,500, new capital to be derived from stock subscriptions amounting to $40,000, loans totaling $40,000 from the applicant's nine stockholders, and a loan of $475,000 from Valley Bank of Nevada. The applicant would, therefore, have approximately $567,500 available to it, leaving it about $41,000 short.

4. The applicant has nine stockholders who have subscribed a total of $50,000 in stock and have undertaken to lend the applicant an additional $50,000. A total of 20 percent ($20,000) has already been paid in and, after meeting certain costs incurred to date, the applicant has

[1] The Commission also has before it for consideration: (*a*) Opposition, filed Feb. 23, 1966, by Washoe Empire; (*b*) supplement to petition to deny, filed Mar. 2, 1966, by petitioner; and (*c*) reply, filed Mar. 7, 1966, by petitioner, to (*a*), above.

[2] Consisting of downpayment for equipment ($118,847), curtails for equipment ($89,135), interest ($1,931), buildings ($20,000), other items ($15,000), curtails for bank loan ($95,000), and interest on bank loan ($32,354). Applicants for new broadcast stations are required to demonstrate financial ability to construct and operate their proposed stations for 1 year. *Ultravision Broadcasting Company, et al.*, FCC 65–581, 5 R.R. 2d 343.

$12,500 in existing capital. Each of the stockholders has demonstrated, to our satisfaction, his ability to meet his commitments to the applicant. The loan commitment from Valley Bank of Nevada is subject only to the condition that the nine stockholders execute the authorization for the loan, a condition which each stockholder has undertaken to meet by letters of intent filed with the application. The only remaining question is, therefore, the source of the additional $41,000 which the applicant must obtain in order to demonstrate its ability to construct and operate for 1 year.

5. The applicant does not rely upon revenues to meet its costs of operation in the first year. We recognize, however, that the applicant will realize some revenues in its first year and, under the circumstances of this case, we have no doubt that the applicant can obtain at least $41,000 in revenues in its initial year.[3] Television broadcast stations KOLO–TV and KCRL in Reno are the only two television broadcast stations which provide predicted grade B signals to Reno. Station KOLO–TV provides CBS and ABC programing, and station KCRL provides NBC and ABC programing to Reno. The applicant proposes an ABC affiliation. As the third VHF station in the market, it appears reasonable to expect this affiliation to be available. Moreover, the Commission's confidential records disclose that the gross revenues obtained by the two existing stations in the market are such as to leave no doubt that a third station will be able to realize at least $41,000 in revenues in the first year. We conclude, therefore, that the applicant is financially qualified.

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

Accordingly, *It is ordered*, That the petition to deny filed herein by Nevada Radio-Television, Inc., *Is denied*, and the above-captioned application of Washoe Empire *Is granted* in accordance with specifications to be issued.

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

---

[3] See *Howard E. Griffith*, FCC 66–366, 3 FCC 2d 535, 7 R.R. 2d 360.

FCC 66-698

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of VALLEY CABLE TELEVISION CORP., MOUNTAIN HOME, IDAHO, AND MOUNTAIN HOME AIR FORCE BASE For Fixed Point to Point Microwave Stations in the Business Radio Service	Files Nos. 16823-IB-125X and 16824-IB-125X

MEMORANDUM OPINION AND ORDER

(Adopted July 27, 1966)

BY THE COMMISSION: COMMISSIONER BARTLEY CONCURRING IN THE RESULT; COMMISSIONER COX CONCURRING AND ISSUING A STATEMENT; COMMISSIONER JOHNSON NOT PARTICIPATING.

1. The Commission has before it for consideration: (1) The above-captioned applications; (2) petition to deny and petition for interim relief, filed on January 22, 1965, by Boise Valley Broadcasters (Boise), licensee of station KBOI-TV, Boise; (3) opposition to petition to deny, filed on February 24, 1965, by Valley Cable Television Corp. (Valley); (4) response to opposition to petition to deny, filed on March 12, 1965, by Boise; (5) supplement to reply to opposition to petition to deny, filed by Boise on March 31, 1965; (6) motion for termination of deferment, filed April 8, 1966, by Valley; (7) supplement to petition to deny, filed April 21, 1966, by Boise; (8) motion to reject unauthorized pleading, filed April 26, 1966, by Valley; (9) opposition to motion to reject unauthorized pleading, filed May 3, 1966, by Boise; and (10) reply to opposition to motion to reject unauthorized pleading, filed on May 10, 1966, by Valley.

2. These applications seek to provide microwave service to CATV systems in Mountain Home and Mountain Home Air Force Base, Idaho. Valley proposes to provide the signals of four Salt Lake City, Utah, television stations: KCPX-TV, channel 4; KSL-TV, channel 5; KUTV, channel 2, and KUED, channel 7. Notice of the filing of these applications was sent on December 10, 1964, to the two Boise, Idaho, television stations, KBOI-TV, channel 2, and KTVB, channel 7, since the CATV systems lie within the grade B contours of both Boise stations. On January 22, 1965, Boise Valley Broadcasters, Inc., filed a petition to deny and a petition for interim relief.

3. Boise alleged in its petitions that the economic impact of a grant of the Valley applications would jeopardize the operation and programing of KBOI-TV and other area stations; that the grants would result in importation of "big city" signals to the service areas of "small city" stations and thereby intrude on normal coverage areas; and th[illegible]

the grants would distort the Commission's television allocation plan. Boise contended that applications should be conditioned on prohibiting the use of signals of any television station transmitting from a distance of more than 100 miles from Mountain Home (Salt Lake City is approximately 250 miles distant from that city); that Valley should be precluded from originating programs; and, alternatively, that action on the applications should be deferred until such time as disposition is made of the petition for interim relief, which requested that the Commission assume complete jurisdiction over CATV systems and impose a freeze on all applications pending disposition of the CATV rulemaking proceedings. Finally, Boise requested hearing on the validity of the Mountain Home permit, public interest considerations involved in the grant of the applications, and whether importation of signals from another State would violate the spirit and intent of sections 151 and 307(b) of the Communications Act of 1934, as amended.

4. In its opposition, Valley stated that the Boise petition to deny failed to set forth specific allegations of fact showing economic injury to KBOI–TV's operation. It argued that since Mountain Home comprises only 2 percent of the station's total market, that no showing had been made by Boise that would justify departure from the then interim policy set forth in the proposed rulemaking in docket No. 14895. Finally, Valley explained that the city permit was issued to its predecessor and that the franchise provided that the authority granted would vest in the permittee's successors. In its response to the Valley opposition, Boise admitted that the Valley proposals would "not bring catastrophic results" to KBOI–TV, but argued that grants would set the future standard for CATV in that area, in allowing carriage of far distant signals. Boise included excerpts from a Mountain Home City Council meeting which, it stated, indicated that doubt exists as to the validity of the city permit. This was followed by a supplement to Boise's petition to deny, which included an opinion letter from the Mountain Home city attorney to the effect that Valley did not hold a valid franchise.

5. Subsequently, Valley submitted a new, nonexclusive city permit issued to it. In a motion for termination of deferment, Valley argued that Boise's two main arguments, validity of the permit and deferment until Commission consideration of CATV impact on local television stations, had been settled by its latest application amendment, conclusion of the Commission's CATV rulemaking proceedings, and the issuance of its second report and order. In response, Boise submitted a supplement to its petition to deny, which argued that section 74.1107 of the rules adopted in the Commission's second report and order is unreasonable, inconsistent, and arbitrary, because it discriminates against stations which are below the top 100 television markets. Boise argued, also, that Valley would be unable, because of the carriage and nonduplication rules adopted in the second report and order, to comply with the terms of its city permit. Lastly, it argued that Valley had failed to give the requisite notification to educational interests in the Boise area, pursuant to sections 74.1105 and 91.561 of the Commission's new rules, and that it had failed to show

permission to operate a CATV system at the Mountain Home Air Force Base. In view of the foregoing, the petitioner reviewed its request that the Commission either designate the applications for hearing or, in the alternative, require that 15-day before and after nonduplication protection be afforded it.

6. The Boise petitions will be denied. The Commission in enacting the carriage and program exclusivity rules with respect to all CATV systems acknowledged that there is a competitive impact on local television stations arising from CATV operations, and expressly designed such rules to ease the effect of that impact by insuring that the competition involved would be conducted under fair and reasonable conditions. In the first report and order (par. 76) we stated that, "So long as CATV is not an insignificant factor in the competitive conditions facing the television broadcasting industry, we think every station affected is entitled to appropriate carriage and nonduplication benefits—irrespective of the specific damage which any individual CATV system may do to the financial health of the individual station. Commission action to achieve an accommodation of this nature between the two services is appropriate and in the public interest."

7. The rules adopted in the second report and order set forth the basic ground rules under which we will operate in this area. We recognized, however, that the rules would not solve all problems and stated that, should they be inadequate in individual cases, special action could be obtained upon an appropriate showing. But in the absence of such a showing we will adhere normally to the safeguards afforded by the rules. No such showing has been made in this case, nor has anything specific been filed by Boise at any time during the course of this proceeding which would warrant our affording greater relief than that already provided for in the rules. Accordingly, Boise's request for additional nonduplication protection will be denied.

8. Boise's other objections concerning the Mountain Home city permit and authorization to operate at the Air Force base will likewise be denied, since the Commission is satisfied that Valley has made a sufficient showing of authority in both instances. Any question of Valley's ability to adhere to the terms of the city permit is a matter for local law and enforcement.

9. With respect to the petitioner's argument that section 74.1107 of the Commission's rules discriminates arbitrarily against television broadcast stations in the smaller markets, because in those markets the burden of proof is placed upon the station rather than the CATV operator, the Commission fully explained the reasons for establishing different procedures on the basis of the size of the market in paragraphs 145 and 146 of the second report and order. The petitioner has made no arguments or alleged any facts which raise any question concerning the validity or reasonableness of our procedures. More important, it is clear in this case that these procedures have in no way deprived the petitioner of any of its rights. Therefore, Boise's request for an evidentiary hearing pursuant to section 74.1107 procedures will be denied.

106-506—66——5

10. Finally, we find Boise's allegation of noncompliance with notification requirements of sections 74.1105 and 91.561 to be erroneous, since they apply only where a CATV system will operate in a community with an unoccupied reserved educational television channel. Although Boise has such a reserved channel, it is not the community in which Valley will operate. Notification is, therefore, not required to educational interests in Boise.

Accordingly, *It is ordered*, That the petition to deny and other pleadings filed by Boise Valley Broadcasters *Are denied*, and the above applications, as amended, of Valley Cable Television Corp. *Are granted*.

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

CONCURRING STATEMENT OF COMMISSIONER KENNETH A. COX

I concur. For the reasons stated in my dissent attached to the second report and order in dockets Nos. 14895, 15233, and 15971, I believe: (1) That small markets should be treated the same as the top 100 markets in so far as the importation of distant signals is concerned; and (2) that local stations should be given at least 15-day nonduplication protection. However, my views did not prevail. I agree that petitioner has not made an adequate showing under the rules to require a hearing in this case.

FCC 66R-291

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of E. B. CHRISTOPHER, HOWE, TEX. Order To Show Cause Why the License for Radio Station KEH-6538 in the Citizens Radio Service Should Not Be Revoked	Docket No. 16468

DECISION

(Adopted July 27, 1966)

BY THE REVIEW BOARD: BERKEMEYER, SLONE, AND PINCOCK.

1. The initial decision (FCC 66D-25, released May 6, 1966) of Hearing Examiner David I. Kraushaar in the above-captioned proceeding recommended revocation of the license issued to E. B. Christopher, Howe, Tex., for radio station KEH-6538 in the Citizens Radio Service. The Board has before it this initial decision; letters from Christopher (dated May 9, May 18, May 31, and June 20, 1966); the statement of the Chief, Safety and Special Radio Services Bureau, filed on June 15, 1966; the Review Board order (FCC 66R-247, released June 24, 1966) staying the effective date of the initial decision herein pending further review; and all other matters of record.

2. The hearing was held at Denison, Tex., on March 18, 1966. Christopher appeared at the hearing without counsel. Examiner Kraushaar explained to Christopher, who is physically handicapped, the purpose and other pertinent details of the hearing, as evidenced by the official reporter's transcript of the hearing.[1] Additionally, Examiner Kraushaar offered to delay the hearing for an hour or two to allow Christopher time to obtain an attorney, although any longer postponement was ruled out because of the notice respondent had had. Christopher declined to take advantage of the examiner's offer of a recess (tr., pp. 3-4). Later in the hearing, the examiner again asked Christopher whether he wanted to obtain an attorney (tr. 61), and again offered to declare a recess for this purpose. Christopher again declined, stating that he did not feel that he could obtain a lawyer.

3. In addition to those reported above, the transcript of the hearing reflects other considerate actions by Bureau counsel and the hearing examiner (see tr. 27-28; tr. 36, line 4; tr. 38, lines 15-20; tr. 63). To reduce the time required for the hearing, Bureau counsel held a conference with Christopher (tr. 3-4, tr. 10) which resulted in stipula-

[1] Official report of proceedings, docket No. 16468, vol. 1, pp. 2-3; pp. 25-26; p. 37, line 8; p. 38, lines 4-8; p. 51, line 4.

tions that shortened the hearing session.[2] The session also was shortened by virtue of the fact that Bureau counsel refrained from calling certain of the witnesses they had present (tr. 7, tr. 70–71). His right to file proposed findings of fact and conclusions was explained to Christopher at tr. 63.

4. The transcript of the hearing, at pages 12 through 26, and the findings of fact in the examiner's initial decision, establish that Christopher admitted substantially all of the violations alleged by the order to show cause, in some instances offering explanations in mitigation of the violations. Christopher denied, and the examiner found as unproven, an allegation that he had used his station for the transmission of communications over a distance of more than 150 miles. Concluding that Christopher had repeatedly violated the Commission's rules, that nothing in the record sufficed to redeem these violations, and that the public interest would not be served by permitting Christopher to retain his license, the examiner ordered Christopher's license revoked.

5. In the letters cited in paragraph 1 above, Christopher, passing over the rules violations which he admitted at the hearing, discusses an alleged complaint not used at the hearing and requests the names of witnesses with respect thereto, reargues testimony, requests a copy of the hearing transcript—which Christopher alleges he was promised and did not receive,[3] and alleges several inequities in the hearing procedure. Although Christopher's letters do not conform to the Commission's rules concerning the filing of exceptions to an initial decision, the Review Board has carefully considered them. In light of the allegations therein, we have reviewed the record to assure that every reasonable effort was made to protect Christopher's rights during the course of the proceeding. It is clear from paragraphs 2 and 3 above, from the initial decision, and from the transcript of the hearing, that the hearing examiner and Bureau counsel, appreciating Christopher's physical handicaps and lack of counsel, exerted considerable effort to assist him and to protect his rights.

6. Christopher's letters do not retract the admissions in the record, and the bases for the examiner's ultimate conclusion (initial decision, par. 19) that Christopher repeatedly violated the Commission's rules remain unchallenged. The Safety and Special Radio Services Bureau has replied to the substance of the claims appearing in Christopher's letters in a statement filed on June 15, 1966, and the statement comports with the facts as revealed by our own review of the record. A copy of this statement was sent to Christopher by airmail on June 15, 1966.

7. In summary, the Board, after a thorough review of the matters before it, is of the view that Christopher received a fair hearing and that the record supports the hearing examiner's conclusion that the license should be revoked. Accordingly, the examiner's findings of fact and conclusions are adopted. The Board has considered Chris-

[2] Christopher had represented that, because of his physical condition, he could endure no more than 4 hours of hearing. See initial decision, par. 4.

[3] In reply to an informal note from Christopher, the Commission, by letter mailed May 5, 1966, informed Christopher how to obtain a copy of the hearing transcript. This information was repeated in a Commission letter, mailed on May 17, 1966, which also contained a copy of the Commission's rules and information concerning the filing of exceptions.

topher's letters on the merits and with special concern, despite their deficiencies, and finds that they contain inaccurate and intemperate assertions, but nothing which would mitigate the effect of the repeated violations of the Commission's rules.

8. On the basis of the above, and pursuant to sections 312(a)(4) and 312(c) of the Communications Act of 1934, as amended, the Board concludes that the public interest, convenience, and necessity require the revocation of the subject license.[4]

Accordingly, it is ordered, This 27th day of July 1966, that the license of E. B. Christopher for radio station KEH–6538 in the Citizens Radio Service *Is revoked*, effective September 1, 1966, and that a copy of this order of revocation shall be served by certified mail, return receipt requested, upon the said licensee at his last known address at Howe, Tex.; and

It is further ordered, That operation of radio station KEH–6538 shall be terminated upon the effective date of the license revocation specified above and that, immediately upon such effective date of such license revocation, the licensee shall forward his radio station license to the Commission for cancellation.

DONALD J. BERKEMEYER, *Member.*

[4] The Commission's rules, sec. 1.916, 47 C.F.R. 1.916, provide that where a license has been revoked, the Commission will not consider an application from the same licensee (or his successor in interest) for the same communications facilities until after the lapse of 1 year from the date of revocation. The Commission may, for good cause shown, waive the requirements of this section.

FCC 66D-25

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of E. B. CHRISTOPHER, HOWE, TEX. Order To Show Cause Why the License for Radio Station KEH-6538 in the Citizens Radio Service Should Not Be Revoked	Docket No. 16468

APPEARANCES

E. B. Christopher, respondent, pro se; *John H. McAllister* and *Richard P. Breen*, on behalf of the Safety and Special Radio Services Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER DAVID I. KRAUSHAAR

(Adopted May 6, 1966)

PRELIMINARY STATEMENT

1. By order to show cause released February 18, 1966, the Commission, by the Chief of its Safety and Special Radio Services Bureau, acting under delegated authority, directed Mr. E. B. Christopher, the above-named respondent, to show cause why his license for class D radio station KEH-6538 in the Citizens Radio Service should not be revoked. The order specified the following allegations against Mr. Christopher:

> (*a*) That, on July 19 and November 5, 1964, January 17, October 6 and 10, and November 8, 1965, and January 28, 1966, Citizens radio station KEH-6538 was operated beyond permissible frequency tolerance, in violation of rule 95.45;[1]
>
> (*b*) That, on May 9 and 25 and June 24, 1965, and January 14, 1966, communications from Citizens radio station KEH-6538 were not identified by the call sign assigned to that radio station at the beginning and conclusion of each exchange of communications, in violation of rule 95.95(c);[2]
>
> (*c*) That licensee operated Citizens radio station KEH-6538 as a "hobby" or "diversion" on January 11, 1965, in violation of rule 95.81(a), and on

[1] Rule 95.45 provides, pertinently, that "The carrier frequency of a station in this service shall be maintained within the following percentage of the authorized frequency." [In the instance of respondent's station the applicable tolerance is 0.005 percent of the authorized frequency.]

[2] Rule 95.95(c) provides, pertinently: "* * * all transmissions from any transmitting unit of a Citizens radio station shall be identified by the call sign at the beginning and end of each transmission or series of transmissions with a unit of the same or other stations. Each required identification shall include the call sign of all stations involved. If the call sign of the station being called is not known, the name or trade name may be used, but when contact has been made the station shall thereafter be identified by the call sign * * *."

April 27 and June 9, 1965, and January 14 and 28, 1966, in violation of rule 95.83(a)(1);[3]

(*d*) That licensee failed to limit communications to 5 consecutive minutes on January 11, 1965, and January 28, 1966, and observe a 5-minute silent period between communications on May 9 and 25, 1965, in violation of rules 95.81(b) and 95.91(b);[4]

(*e*) That licensee operated Citizens radio station KEH-6538 with power in excess of that permitted by the Commission's rules on December 14, 1965, in violation of rule 95.43;[5] and

(*f*) That Citizens radio station KEH-6538 was "willfully" used for transmission over a distance of more than 150 miles on January 14, 1966, in violation of rule 95.83(b).[6]

2. The show cause order also recited that, "in view of the numerous above-mentioned rule violations, the Commission would be warranted in refusing to grant a license to this licensee were an original application now before it"; and that Mr. Christopher has "repeatedly" violated rules 95.45, 95.83(a)(1), 95.91(b), and 95.95(c). Finally, while the order declares that monetary forfeitures aggregating $300 apparently could be assessed for certain of the rule violations, all such violations, "together with the related facts," also subject the license to revocation under section 312 of the Communications Act of 1934, as amended.[7] Further proceedings in this docket were expressly limited to a determination of the question whether Mr. Christopher's license should be revoked.

3. On February 19, 1966, respondent Christopher replied to the show cause order and stated that he would appear and present evidence at a hearing. By order released March 1, 1966 (FCC 66M-302), the hearing was scheduled to take place on March 18, 1966, in Dallas, Tex. By further order released March 10 (FCC 66M-351), however, the place of hearing was changed to Denison, Tex. The hearing was held, as scheduled, in the Grayson County Annex Branch Office Building, Denison, Tex., on March 18, and the record was closed. Appearances were entered by the Safety and Special Radio Services Bureau of the Commission and by the respondent in person. Proposed findings of fact and conclusions of law were filed by the Bureau on May 3, 1966.

---

[3] Rule 95.83(a)(1) (formerly rule 95.81(a)) provides, pertinently: "A Citizens radio station shall not be used: (1) For engaging in radio communications as a hobby or diversion: i.e., operating the radio station as an activity in and of itself." A footnote to this rule sets forth "typical," "but not all inclusive," illustrations of prohibited uses in this category.

[4] Rule 95.91(b) (formerly rule 95.81(b)) provides, pertinently: "Communications between or among class D stations shall not exceed 5 consecutive minutes. At the conclusion of this 5-minute period, or upon termination of the exchange if less than 5 minutes, the station transmitting and the stations participating in the exchange shall remain silent for a period of at least 5 minutes and monitor the frequency or frequencies involved before any further transmissions are made * * *."

[5] Rule 95.43 limits the power input of a class D Citizens radio station, which is the class of station operated by the respondent herein, to a value of 5 w average and to a value of 4 w average insofar as the power output is concerned.

[6] Rule 95.83(b) provides: "A class D station may not be used to communicate with, or attempt to communicate with, any unit of the same or another station over a distance of more than 150 miles."

[7] Sec. 312(a)(2) and (4) of the Communications Act, as amended, authorizes the Commission to revoke any station license "(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application"; and "(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this act or any rule or regulation of the Commission authorized by this act or by a treaty ratified by the United States."

FINDINGS OF FACT

4. The respondent, Mr. E. B. Christopher, is a resident of Howe, Tex., a community located some 19 miles from the situs of the hearing at Denison, Tex. He is an invalid, paralyzed from the waist down, and he appeared in the hearing room in a wheelchair. He represented his physical condition to be such that he could only endure 4 hours of hearing at the most. The hearing in this proceeding, however, commenced at 9:55 a.m. and was concluded at 12:22 p.m., the respondent having been excused by stipulation a few minutes before the record was actually closed in order to minimize any discomfort to him.

5. Mr. Christopher cannot read and write very well. He was educated formally only through the third grade. However, he personally composed a letter dated February 19, 1966, which he sent to the Commission, requesting a hearing, wherein he described his physical incapacity and stated that he could not travel a significant distance to attend a hearing. This letter manifests substantial native intelligence on Christopher's part, which was corroborated by his demeanor as a witness and his answer to questions during the hearing. He dictated the February 19 letter to Mrs. Christopher, who also holds a Citizens Band radio license and who has a high school education. Mrs. Christopher often explains things to Mr. Christopher, and the latter showed that he has an understanding of applicable Commission rules.

6. The effective date of respondent Christopher's license for his class D Citizens Band radio station (KEH–6538) is November 22, 1963. Unless revoked this license is valid until November 22, 1968. Mr. Christopher holds no other radio license.

7. The record discloses that between July 1964 and January 28, 1966, Mr. Christopher's transmitter was operated on at least seven occasions beyond the frequency tolerance prescribed by the Commission's rules.[8] See allegation (a) in the show cause order, preliminary statement, supra. Mr. Christopher's defense was that he had done everything possible to correct such deviations; that he had shipped rigs which were still under warranty back to the manufacturers; and that he had taken other rigs to "operators," apparently for correction.

8. The record shows further that on May 9, May 25, and June 24, 1965, and again on January 14, 1966, communications from Mr. Christopher's radio station were not identified by the call sign assigned to the station at the beginning and conclusion of each exchange of communications as required by the rules. See allegation (b) of the show cause order, supra. Respondent's defense was that it was difficult to comply with this, due to "other activities on the channel and certain conditions" of his health. Often "other activities" came on the air, apparently while he was engaged in conducting his own transmissions, and he could not get the other unit's call sign. Mr. Christopher suffered from muscle spasms at times which compelled him to remain in bed.

9. Although in other circumstances it might be debated whether the "hobby" or "diversion" description of communications that are pro-

[8] By agreement with Bureau counsel the respondent, Mr. Christopher, freely conceded the basic facts set forth in the preliminary statement hereof as allegations (a) through (e), inclusive. (See preliminary statement, par. 1.)

hibited in the Commission's rules governing the Citizens Radio Service is sufficiently clear and definite to put licensees on notice as to all types of situations to which they may be called on the carpet (see *In the Matter of Amendment of Part 19*, 19 R.R. 1549), there is not a scintilla of doubt in the situation presented in the instant record. Thus, Mr. Christopher has freely conceded that he uses his transmitter for purposes of personal amusement; that he considers the use of his transmitter, which is set up at his bedside and is never turned off unless he is to be away for quite a few hours, to be a "diversionary type of activity"; that he operated the transmitter as a hobby or diversion on January 11, April 27, and June 9, 1965, and again on January 14 and 28, 1966, these being representative instances of such use which were included in the notice of violations which was served upon him; that he does engage in talk about transmitters over his station; and that he does talk for the sake of talking itself (tr. 16–18). See allegation (c) of the show cause order, supra. His only explanation, if it can properly be called that, was that while "some" of his transmissions were in the "hobby" category, others related to a "small business" Christopher was operating; i.e., selling business cards, rubber stamps, and nameplates (tr. 16).[9]

10. The evidence shows, furthermore, that respondent Christopher did fail to limit his communications to 5 consecutive minutes on January 11, 1965, and January 28, 1966, and to observe silence periods between communications on May 9 and 25, 1965, as the Commission's rules require; and that he understood these provisions of the rules (tr. 21, 22). To this he offered no explanation. See allegation (d) of the show cause order, supra.

11. Mr. Christopher admitted that on December 14, 1965, his radio station was operated with power in excess of that permitted by the Commission's rules. See allegation (e) of the show cause order, supra. His defense here was that he did not know about it, but that he did take his transmitter to a repair shop and had been told that a "raw current" which was not being filtered out had been building up the power; that he never intended to exceed the 5-w power limitation; and that although his transmitter did exceed this limitation at times, he had done what he could to make corrections.

12. With respect to the charge that Mr. Christopher "willfully" used his station for the transmission of communications over a distance of more than 150 miles on January 14, 1966, the evidence against the respondent is unimpressive. See allegation (f) of the show cause order, supra. Thus, according to respondent's testimony, at the time of the particular communication he simply did not realize he was transmitting so far; the "other" party had stated he was "local" but had not stated where he was from; and the "other" party had asked for a weather report. At some point during this communication—the record is not at all clear at exactly what point—the party with whom Christopher was communicating did state that "It is 40 below in Can-

[9] Rule 95.83(a)(15) proscribes the use of a Citizens radio station "For advertising or soliciting the sale of any goods or services." Christopher admitted knowing about this rule but he stated that he construed it to mean that he could use his station to inform an inquirer about the stock he had in his business (tr. 19). He has not been accused of violating this particular rule provision in the present proceeding, however.

ada." While Christopher stated that he understood that under the rules he was supposed to cut off a party with whom he was communicating upon discovery that he was more than 150 miles away, and that he had cut off many such communications in the past, he insisted that he simply had not understood in this instance that the man he spoke to was located in Canada. Inasmuch as the evidence is ambiguous on the question, no convincing evidence independent of respondent's explanation to corroborate the charge that he did communicate beyond 150 miles on the particular occasion at issue, and that he did so "willfully," having been adduced by the party having the burden of proof, it is found that this charge was unproven by persuasive, credible evidence of record.

13. Notices of violations covering the charges in the order to show cause were served upon Mr. Christopher. Although these notices were received in evidence without objection, Mr. Christopher having explicitly agreed thereto (tr. 62), the record does not show that it was explained to him, and that he agreed (and understood what he was being asked to agree to) that he was thereby conceding all of the substantive facts, including the interceptions of his transmissions and dates and other details recited therein, on which the Bureau relies in its proposed findings. Because Mr. Christopher was shown not only to be a layman, unskilled in dealing with legal matters, but also a man of very limited formal education, the foregoing findings in regard to substantive matters are based solely upon the testimony in the record. However, it is clear nonetheless that the notices were in fact served upon Mr. Christopher and that he had been forewarned of the various violations, which he has in fact freely conceded (i.e., other than the particular violation set forth in allegation (f), supra).

14. It was established, by evidence of record entirely independent of respondent's own testimony (and his admissions), that Mr. Christopher's transmissions have in fact inconvenienced other Citizens Radio Service licensees. Thus, one of these licensees, who is an organizer and official of a club of such licensees, listened to communications by Christopher. Having suffered the effects of interference from respondent's station he had spoken to Mr. Christopher in person and had sought out the latter's cooperation. This confrontation had been arranged after several members of the licensee's Citizens Band club had asked him to talk to the respondent. As a consequence of his conversation with Christopher, the licensee had prepared and disseminated a bulletin to the club members, with copies to Christopher and to the Commission's monitoring station, which stated that Christopher had declared his continued intention to operate as he had in the past. The licensee's principal complaint was Christopher's continued use of a channel in such manner as to deprive others of their use of it and as to interfere with the efforts of the Sherman, Tex., Police Department to organize a group of Citizens Band operators to assist in emergencies. This witness also overheard the respondent engaging in the discussion of many unrelated items; e.g., how "rigs" were working, the kinds of antennas that were being used, and similar "chitchat." Because of this type of thing, the channel was rendered

virtually unusable at times by other licensees in the Sherman-Denison, Tex., area. Though the witness' testimony was not independently corroborated by the testimony of additional witnesses, and he had made no record at the time of the transmissions about which he testified, his statements that he had heard communications by Christopher that consumed more than 10 minutes, that these lengthy communications appeared to be just "chitchat," and that he had heard in excess of 25 such communications of duration of at least 5 minutes each, are supported in the record by the circumstances, particularly the respondent's own admissions.[10]

15. There was proof (conceded by the Bureau) that on certain occasions Mr. Christopher has operated his radio station in the public interest. Thus, he has provided assistance on several occasions by transmitting emergency calls to hospitals, the police, and auto wreckers, in connection with automobile accidents. It appears that he did this sort of thing twice on January 3, 1965, and on April 1 and 7 of that year, again during May, and on June 27 and July 11, 1965.

16. Although Mr. Christopher assured the hearing examiner at one point that he would do "everything within my power" to abide by the law from now on (tr. 59), an aura of doubt remains regarding his true attitude. It is true that he had indicated he was sorry for not having conformed to the Commission's rules in the past and, when asked what he was going to do about it, replied that "one thing I can do, and that is apologize and quit" (tr. 58). However, when he was asked further whether he meant to commit himself to adhere strictly to the Commission's rules and whether, if he were beset by doubts as to the interpretation to be given these rules, he realized he was not to take the law in his own hands, respondent was equivocal and somewhat querulous.[11] Moreover, it was brought out that his letter to the Commission of February 9, 1966 (in which he requested a hearing), was misleading in at least one respect.[12] That letter, on which there appears a photograph of Mr. Christopher seated on a chair with what seems to be a VFW (i.e., Veterans of Foreign Wars) banner hanging on the wall in the background, states that "I am a paralised Vetran" (sic). It was shown, however, that Mr. Christopher's unfortunate physical condition had nothing to do with military service; indeed, that he had been injured in a shooting incident not far from his home.[13] In view of this, and likewise in view of Mr. Christopher's equivocation on an important point that bears directly upon his

[10] The unimpeached testimony of the Citizens Band licensee provided significant evidence of respondent's derelictions independent of his admissions. It demonstrates, too, that the respondent's use of his transmitter for diversionary communications and in excess of the time limitations prescribed by the rules was knowing and willful.

[11] Viz, "Not completely because whenever I got hold of something * * * I didn't know there was an office in Dallas at all until here just a short while ago" (tr. 59). Respondent indicated he might have his own interpretation of the Commission's rules (tr. 58).

[12] Official notice is taken of the Feb. 9, 1966, letter, both the Bureau and the respondent having consented thereto during the hearing (tr. 59, 60). The letter is incorporated in the official docket of this proceeding.

[13] The letter also states that "I do not work and have no income." Mr. Christopher does receive a monthly stipend, however small it may be, from the Veterans Administration. And he does perform some remunerative work by selling business cards (tr. 56–58).

dependability as a licensee, there is no solid basis in the present record for accepting at face value his promise to do differently in the future.

CONCLUSIONS

17. It is not the function of the Commission to punish a licensee for rule violations, but it is appropriate and necessary for the Commission, in a revocation of license proceeding, among other things, to examine such a licensee's conduct and attitude with a view to determining his future dependability as a licensee. See Commissioner Loevinger for the Commission *In Re Melody Music, Inc.* (*WGMA*), docket No. 14043, FCC 66–226 (released March 9, 1966). In the record before him the hearing examiner is able to find nothing redeeming about Mr. Christopher's conduct or attitude, unless it be respondent's somewhat disingenuous appeal to sympathy because of his crippling physical handicap and his past service to the country in the Armed Forces. But even those who are thus handicapped, or who once served the Nation, owe a responsibility to their neighbors and fellow citizens to abide by the law and the Commission's regulations, so that the airwaves, a valuable public resource, will be available to all on a reasonable basis. The record shows herein that Mr. Christopher repeatedly violated specific regulations which are designed to keep the airwaves from becoming a jungle of discord. The emergency transmissions by the respondent, on certain occasions, involving automobile or traffic accidents, to hospitals, wreckers, and police, do not suffice to offset the serious and repeated encroachments upon the rights and needs of others that were shown in the present record. Christopher's assurance that he will do his best from now on to comply with the rules is not persuasive in view of his numerous repetitions of the violations, his apparent willingness, in a letter to the Commission, to be less than ingenuous, his equivocating attitude during the hearing, and his very physical incapacity which apparently makes it difficult, if not impossible, for him to comply continuously with the identification requirements of rule 95.95(c). (Allegation (b), preliminary statement, par. 1, supra.)

18. It appears that Mr. Christopher depends upon radio primarily as a hobby or diversion. This need may be fulfilled by licensed operation in the Amateur Radio Service. See *In the Matter of Richard H. Sanders*, 38 FCC 3, 8, and the authority therein cited. He would have to take, and pass, an examination to qualify as an amateur or "ham" operator, but official notice is taken of the fact that many disabled persons (paraplegics, blind people, as well as children) are amateur licensees. In that service the required examination can be administered in Mr. Christopher's home by a qualified amateur licensee. The hearing examiner is satisfied from the record in this proceeding that the violations committed by respondent Christopher do not necessarily disqualify him as a licensee in the Amateur Band. In fact, the most serious of these violations is his repeated transmissions of "chitchat" (rule 95.83(a)(1)) on his Citizens Radio transmitter, which resulted in the significant encroachment on the use of this party line service by

other Citizens Radio Service licensees. The Amateur Radio Service is designed to permit such "chitchat" or idle talk.

19. It is concluded ultimately that respondent Christopher is responsible for having repeatedly violated rules 95.45, 95.95(c), 95.83(a)(1), and 95.91(b); that nothing in the record suffices to redeem these discrepancies or to indicate that Mr. Christopher would be a dependable licensee of the Citizens Radio Service in the future; and therefore that the public interest, convenience, and necessity will not be served by permitting him to retain his license in that service. It suffices that such violations bring the respondent squarely within the ambit of section 312(a)(4) of the Communications Act of 1934, as amended, without the necessity of exploring further to determine whether all the proven violations, considered in the factual context, would warrant the Commission in refusing to grant a license to Mr. Christopher on an original application. See Communications Act, as amended, section 312(a)(2).[14]

Accordingly, *It is ordered*, This 6th day of May 1966, in accordance with section 312(a)(4) of the Communications Act of 1934, as amended, that unless an appeal from this initial decision is taken by a party, or the Commission reviews the initial decision on its own motion in accordance with the provisions of section 1.276 of its rules, the license issued to Mr. E. B. Christopher, Howe, Tex., for radio station KEH-6538 in the Citizens Radio Service is hereby *Revoked*.

[14] Under the show cause order the hearing examiner is under a mandate to determine only whether a revocation order against Mr. Christopher should issue. Indeed, the order explicitly denies him the alternative of recommending a monetary forfeiture, although it recites (and the record affirms) the view that a forfeiture could be adjudged. Yet it may be questioned whether the sanction of revocation in this case will conform with the desirable objective of meting out equal justice before the law. On this matter the hearing examiner is aware, however, of a recent memorandum opinion and order by the Chief, Safety and Special Radio Services Bureau, under delegated authority (released Apr. 19, 1966), directing a $400 forfeiture against the licensee of a class D Citizens Radio Service station (KCF-1516), for violations which appear to be similar to Mr. Christopher's. *In the Matter of William Ray Wilson*, Glen Burnie, Md. In the case of Mr. Wilson, a separate order of revocation has also issued. See order of revocation in docket No. 16123, released Apr. 18, 1966 (82792). See also *Richard H. Sanders*, 38 FCC 3 (1964).

FCC 66R-297

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of JAMES L. HUTCHENS, CENTRAL POINT, OREG.	Docket No. 16525 File No. BP-16640
FAITH TABERNACLE, INC. (KRVC), ASHLAND, Oreg.	Docket No. 16526 File No. BP-16745
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted August 2, 1966)

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSTAINING.

1. James L. Hutchens (Hutchens) and Faith Tabernacle, Inc. (KRVC), seek approval of an agreement whereby KRVC would dismiss its application in return for reimbursement of expenses incurred by KRVC in the preparation and prosecution of its application.[1]

2. This proceeding involves the application of Hutchens for a new standard broadcast station at Central Point, Oreg. (1400 kc, 250 w, U, class IV), and the mutually exclusive application of KRVC to change the frequency, power, hours of operation, and class of its existing standard broadcast facility at Ashland, Oreg., from 1350 kc, 1 kw, day, class III, to 1400 kc, 250 w, 1 kw-LS, U, class IV. These applications were designated for hearing by order (FCC 66-238, released March 16, 1966) on various issues including an issue to determine, under section 307(b) of the Communciations Act, which of the two proposals would better provide a fair, efficient, and equitable distribution of radio service.

3. Under the terms of the agreement, Hutchens would reimburse KRVC for its out-of-pocket expenses, in an amount not to exceed $1,000. Attached to the pleadings are the affidavits of Hutchens, KRVC's president, its legal counsel, and its consulting engineer. The affidavits outline the history of the negotiations preceding the joint agreement, and substantiate expenses of over $1,000. Counsel for Hutchens also submitted a document entitled "Dismissal of the Application of KRVC Under Docket No. 16526 Will Not Unduly Impede the Achievement of a Fair, Efficient and Equitable Distribution of

[1] The pleadings before the Review Board for consideration are: (1) Joint request for simultaneous approval of reimbursement agreement and petition for dismissal of the application of Faith Tabernacle, Inc. (KRVC), filed May 18, 1966, by James L. Hutchens and Faith Tabernacle, Inc.; and (2) Broadcast Bureau's comments, filed June 10, 1966.

Radio Service Under Section 307(b) and Will Serve the Public Interest." Hutchens contends that this proceeding includes a section 307(b) issue to determine whether the need for a first local outlet for broadcast service in Central Point, Oreg., is paramount to the need of the Ashland, Oreg., area for an additional nighttime service; that station KWIN, Ashland, Oreg., renders an "unlimited time broadcast service to this community (Ashland)," and that "the dismissal of the application of KRVC without inviting new proposals for Ashland would simplify the issues to be tried in the instant hearing proceeding, avoid a long or protracted proceeding, and enable Hutchens to establish the first broadcast outlet for Central Point which would serve in the public interest."

4. Section 1.525(b)(1) states that if the Commission finds that an agreement would unduly impede achievement of the distribution of services specified by section 307(b), then other persons shall be afforded an opportunity to apply for the facilities specified in the application to be withdrawn, before action is taken on the pending request for approval of agreement. As pointed out by the Broadcast Bureau in its comments, it is not apparent from the pleadings whether there are any underserved areas at night within either proposed service area. Hutchens and KRVC furnished no information in response to the Bureau's comments. KRVC maintains that KWIN, Ashland, Oreg., serves the area proposed to be served by KRVC at night. However, no engineering documentation has been submitted to support this assertion.[2] The Review Board is in accord with the Broadcast Bureau that the parties had an obligation to show what other services are available to KRVC's proposed service area. See *York-Clover Broadcasting Company*, FCC 62R-105, released October 31, 1962: "[i]t is the responsibility of the parties to establish by relevant affidavits, including engineering affidavits, submitted with the request for approval of agreement, that the action requested should be granted." Also see *Northfield Broadcasting Company*, FCC 63R-4, released January 7, 1963. The Board is unable to determine on the basis of the material submitted whether approval of the joint agreement would be consonant with the fair, efficient, and equitable distribution of service pursuant to section 307(b) of the Communications Act. Therefore, the Board can make no finding other than that withdrawal of KRVC's application would unduly impede achievement of a fair, efficient, and equitable distribution of radio service.

Accordingly, it is ordered, This 2d day of August 1966, that consideration of the joint request for simultaneous approval of reimbursement agreement and petition for dismissal of the application of Faith Tabernacle, Inc., filed by James L. Hutchens and Faith Tabernacle, Inc., on June 10, 1966, *Is held in abeyance;* that further opportunity

[2] An examination of KRVC's application in conjunction with an examination of KWIN's license file indicates that there may be a small white area within KRVC's proposed nighttime service area.

be afforded for other persons to apply for the facilities specified in the application of Faith Tabernacle, Inc.; and that Faith Tabernacle, Inc., will therefore comply with the provisions of section 1.525(b) (2) of the Commission's rules.

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

FCC 66-733

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
APPROVAL OF AN INTERIM BASIC PETROLEUM AND GAS INDUSTRY COMMUNICATIONS EMERGENCY PLAN FOR EMERGENCY OPERATION PURSUANT TO EXECUTIVE ORDER 11092, AND AMENDMENT OF PART 91 OF THE COMMISSION'S RULES

ORDER

(Adopted August 17, 1966)

BY THE COMMISSION:

At a session of the Federal Communications Commission held at its offices in Washington, D.C., on the 17th day of August 1966;

The Commission having under consideration a formal recommendation of the Executive Committee of the National Industry Advisory Committee (NIAC), which was submitted October 28, 1965, for an Interim Basic Petroleum and Gas Industry Communications Emergency Plan (PAGICEP) for operation during emergencies and;

It appearing, That Executive Order 11092 places upon the Commission various functions including the development of plans and procedures covering authorization, operation, and use of Safety and Special Radio Services facilities and personnel in the national interest in an emergency; and

It further appearing, That the adoption of the proposed Interim Basic PAGICEP will permit work to commence on development of detailed regional and local emergency plans which upon approval will become part of the PAGICEP; and

It further appearing, That this Interim Basic Plan will be further refined and revised as experience dictates, and will be reissued at a future date as a Final Basic Plan; and

It further appearing, That part 91 of the Commission's rules should be amended to implement this Interim Basic Plan; and

It further appearing, That for the purpose of national defense, notice and public procedure would be contrary to the public interest; and, therefore, section 4 of the Administrative Procedure Act is inapplicable;

It is ordered, Pursuant to sections 4(i), 606 (c) and (d) of the Communications Act of 1934, as amended, and Executive Order 11092, that the Interim Basic Petroleum and Gas Industry Communications Plan *Is approved*, and

It is further ordered, That, effective August 26, 1966, part 91 of the Commission's rules is amended.

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

106-507—66——1

FCC 66-734

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

PUBLIC NOTICE

INTERIM BASIC PLAN FOR PETROLEUM AND GAS INDUSTRY EMERGENCY COMMUNICATIONS APPROVED

(Adopted August 17, 1966)

BY THE COMMISSION:

The Commission today approved the Petroleum and Gas Industry Communications Emergency Plan (PAGICEP) as the industry's Interim Basic Plan for operation during emergency conditions, both national and local. It was prepared under provisions of Executive Order 11092, which assigned emergency preparedness functions to the Federal Communications Commission.

This Interim Basic Plan, which was concurred in by all interested Government departments and agencies, was prepared by a working group of the Industrial Communications Services Subcommittee of the Commission's National Industry Advisory Committee (NIAC).

Further refining and revising as experience dictates will be accomplished and at a future date a Final Basic Plan will be issued.

Work is now underway to develop the detailed regional and local emergency communications plans. These will become the operational portion of PAGICEP. In this regard it is incumbent on all petroleum and gas companies who wish to voluntarily participate in this plan to furnish their emergency communications requirements to the Executive Secretary, NIAC, Federal Communications Commission, Washington, D.C. 20554, not later than October 1, 1966. These companies should also submit in the same manner a listing of their communications facilities which could be made available for use in an emergency as part of this plan.

Distribution of the Interim Basic PAGICEP will be made to all petroleum and gas companies by the Industrial Communications Services Subcommittee of NIAC.

An ad hoc working group of the NIAC Industrial Radio Services Subcommittee is presently developing detailed requirements for emergency H.F. channels for submission to the NIAC Amateur Radio Service Subcommittee and the Commission for consideration pursuant to the provisions of the Interim Plan for the Amateur Radio Service announced by the Commission in public notice FCC 66-476 (mimeo. 83288), dated May 26, 1966, and public notice G dated July 29, 1966 (mimeo. 87593).

FCC 66–739

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of WAIVER OR AMENDMENT OF SECTION 91.504 (a) AND (b) (12) OF THE COMMISSION'S RULES GOVERNING THE SPECIAL INDUSTRIAL RADIO SERVICE	RM–445

MEMORANDUM OPINION AND ORDER

(Adopted August 17, 1966)

BY THE COMMISSION: COMMISSIONER JOHNSON NOT PARTICIPATING.

1. The Commission has before it for consideration a petition jointly filed by Houston Oil Field Material Co., Inc.; its assignee, Black, Sivalls & Bryson, Inc.; and Dunigan Tool and Supply Co. The petitioners request amendment of sections 91.504 (a) and (b) (12) of our rules to make the frequency 43.04 Mc/s available for general use in the States of Texas, New Mexico, Colorado, and Oklahoma, or reconsideration of the Commission's decision of April 21, 1965, which denied petitioners' request for waiver of the same rules to permit them to continue using this frequency for their permanent-type base and mobile operations. These rules provide, among other things, that the frequency 43.04 Mc/s may be assigned only to stations used in "itinerant" operations; that is, to stations that are transferred from time to time to various temporary communication areas.

2. The principal allegations in support of the request for waiver or amendment of the rules, as set forth in the petition, are that the petitioners are presently authorized to operate permanent-type facilities in the frequency 43.04 Mc/s and have received no complaints of interference to any other radio system on 43.04 Mc/s; that the channel loading of the frequency 43.04 Mc/s is substantially lighter than on other frequencies in the 40–50-Mc/s band available in the Special Industrial Radio Service in their areas of operation; and that the petitioners provide essential specialized services to the petroleum drilling industry, and require long-range and reliable radio communications.

3. In its report and order in docket 11991, adopted in 1958, the frequency 43.04 Mc/s was designated as itinerant and the petitioners and others using that frequency for permanent-type operations were permitted to continue using it until April 1, 1963. One frequency in the 25–50-Mc/s, two in the 151–162-Mc/s, and two in the 450–460-Mc/s bands were designated exclusively for itinerant or roving type operations. Itinerant frequencies were made available in the Special Industrial Radio Service to meet the communication needs of companies

engaged in construction, oil field servicing, and a number of other activities, which move from place to place frequently. Licensees may be authorized to operate anywhere in the United States on an itinerant frequency. The purpose of setting aside these five frequencies exclusively for itinerant use was to enable such entities to operate their radio system in all parts of the country without causing interference to stations operated in a particular location on a more permanent basis, and to enable such companies to avoid coordination problems, delays, and expenses inherent in obtaining clearance for the use of a frequency every time they move into a particular location to perform some work for a relatively short period of time. Thus, these itinerant frequencies serve a useful purpose.

4. We realize that the very nature and purpose of the itinerant frequencies create situations where a given itinerant frequency may be less heavily used in a particular area at a given time than frequencies available for permanent-type use. This may be the case with respect to the frequency 43.04 Mc/s in the area where petitioners are operating. The petitioners have submitted a comparison of the number of assignments on the frequency 43.04 Mc/s in the West, Northwest, central Texas, and in the States of New Mexico and Oklahoma, and on three frequencies picked at random in the 40–50-Mc/s band in the same geographical area to illustrate that there are fewer assignments on that frequency than on the frequencies the petitioners must move to. However, there are more than 100 itinerant licensees, with a total of approximately 2,000 transmitters authorized to operate on 43.04 Mc/s throughout the United States, and more than 200 itinerant licensees on the same frequency authorized to operate in various segments of the United States. Because of the nature of their activities, some of these licensees may move into the area where the petitioners operate and change drastically the occupancy of that frequency. As stated above, one of the purposes of the itinerant frequency in the 25–50-Mc/s band is to provide interference protection from roving operations to those who occupy frequencies in that band designated for permanent-type use.

5. We have considered the arguments and the information submitted by the petitioners in the light of the foregoing, and have concluded that they justify neither waiver nor amendment of the rules.

6. Therefore, *It is ordered*, This 17th day of August 1966, that the above-described petition for reconsideration and the petition for amendment of the rules (RM–445) *Are denied.*

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

FCC 66-650

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
REVISION OF FM BROADCAST RULES, PARTICULARLY AS TO ALLOCATION AND TECHNICAL STANDARDS	Docket No. 14185
Petition of	
FM UNLIMITED, INC., FOR CHANGES IN FM STATION ASSIGNMENT RULES	RM-94
AMENDMENT OF SECTION 73.202, TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS (BLUE ISLAND, DES PLAINES, ELMWOOD PARK, LANSING, AND SKOKIE, ILL.; VALPARAISO, IND.)	RM-509
In re Applications of	
RADIO SKOKIE VALLEY, INC. (WRSV) For License To Cover Construction Permit Authorizing a New Class A FM Broadcast Station at Skokie, Ill.	File No. BLH-1916
THE NEWS-SUN BROADCASTING CO., WAUKEGAN, ILL.	Docket No. 13292 File No. BPH-2543
WALTER A. HOTZ AND CHARLES W. KLINE, D.B.A. RADIO AMERICA, CHICAGO, ILL.	Docket No. 13709 File No. BPH-2858
EDWARD WALTER PISZCZEK AND JEROME K. WESTERFIELD, DES PLAINES, ILL.	Docket No. 13940 File No. BPH-3201
For Construction Permits (FM)	
In the Matter of	
AMENDMENT OF SECTION 73.202, TABLE OF ASSIGNMENTS FM BROADCAST STATIONS (CHICAGO AND SKOKIE, ILL.)	Docket No. 15771

MEMORANDUM OPINION AND ORDER

(Adopted July 15, 1966)

BY THE COMMISSION: COMMISSIONERS COX, WADSWORTH, AND JOHNSON ABSENT.

1. The Commission has under consideration a petition for reconsideration of its report, memorandum opinion, and order issued in these proceedings on June 16, 1966, FCC 66-538, and a motion to stay the effective date of that order, filed on June 21, 1966, by Carol Music, Inc. (Carol), presently the licensee of station WCLM (FM), channel 270, Chicago, Ill., whose license expires August 5, 1966,

pursuant to the Commission's revocation order.[1] These pleadings directed at our rulemaking action are based entirely on the requests relating to the revocation order.

2. In our June 16, 1966, decision in this proceeding, channel 270, on which Carol presently operates WCLM in Chicago, was deleted from Chicago and assigned to Skokie, Ill., for the reasons stated therein, which need not be repeated here, to be effective July 25, 1966. At the same time the Commission modified the license of station WRSV, Skokie, to specify operation on channel 270 in lieu of channel 252A under certain specified conditions, including one which precludes any operation until station WCLM ceases to operate on channel 270. Carol states that favorable action on its request for an amendment of its revocation order, which would in effect permit the licensee to sell the station, would automatically invalidate that portion of the order which deletes channel 270 from Chicago and assigns it to Skokie for use by WRSV.

3. We have this date denied the requests of Carol for an amendment of its revocation order, docket No. 14743, and to stay that order. These actions remove the entire basis for that instant request of Carol, pertaining to the rulemaking proceeding involving channel 270. Accordingly, *It is ordered*, That the petition for reconsideration and the motion to stay filed in this proceeding on June 21, 1966, by Carol Music, Inc., *Are denied.*

4. *It is further ordered*, That this proceeding (docket No. 15771) *Is terminated.*

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

---

[1] Responsive pleadings before the Commission are: (1) Opposition of Radio Skokie Valley, Inc., and Main Township FM, Inc., filed on June 28, 1966, to motion to stay effective date of report, memorandum, and order of June 15, 1966; (2) reply of Carol Music, Inc., filed on July 1, 1966, to opposition of Radio Skokie Valley, Inc., and Main Township FM, Inc., to motion for stay; (3) opposition, filed on July 1, 1966, of Radio Skokie Valley, Inc., and Main Township FM, Inc., to petition for reconsideration of June 15, 1966, memorandum opinion and order and to petition to amend revocation order; (4) reply of Carol Music, Inc., filed on July 11, 1966, to opposition to petition for reconsideration and to set aside report, memorandum opinion, and order of June 15, 1966.

FCC 66-741

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of APPLICATIONS BY AMERICAN BROADCASTING COS., INC. FOR ASSIGNMENT OF LICENSEE OF STATIONS: WABC, WABC-FM, WABC-TV, NEW YORK, N.Y.; WLS-FM, WBKB, CHICAGO, ILL.; KGO, KGO-FM, KGO-TV, SAN FRANCISCO, CALIF.; KABC, KABC-FM, KABC-TV, LOS ANGELES, CALIF. FOR TRANSFER OF CONTROL OF STATIONS: WLS, CHICAGO, ILL.; KQV and KQV-FM, PITTSBURGH, PA.; WXYZ, WXYZ-FM, WXYZ-TV, DETROIT, MICH. For Assignments and Transfers of Ancillary Radio Facilities	Docket No. 16828

ORDER AND NOTICE OF ORAL HEARING BEFORE THE COMMISSION EN BANC

(Adopted August 17, 1966)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING AND ISSUING A STATEMENT; COMMISSIONER COX CONCURRING AND ISSUING A STATEMENT IN WHICH COMMISSIONER JOHNSON JOINS.

1. This proceeding involves applications filed March 31, 1966, by American Broadcasting Cos., Inc. (ABC), for Commission approval of assignments and transfers of ABC's broadcasting licenses to a new corporation of the same name which will be a wholly owned subsidiary of International Telephone & Telegraph Corp. (ITT). The applications contain and are accompanied by masses of data and numerous exhibits setting forth in great detail all of the factual information normally sought by the Commission in transfer proceedings, together with a large amount of additional information concerning the corporations involved.

2. On July 20, 1966, the Commission sent letters to the presidents of ABC and ITT requesting a further statement on specified points relating to the future operations of the new licensee company and ITT's public interest responsibilities in connection therein. On July 25, 1966, replies to these letters were received by the Commission from both ABC and ITT. The Commission's letters and the replies are part of the file herein. There are no oppositions filed against the proposed merger and assignments of licenses other than by the licensee of radio station KOB at Albuquerque, N. Mex., relating to its own competing

application for the frequency occupied by station WABC in New York City, which is one of the stations proposed to be transferred to the new ABC.

3. The great bulk of data supporting the application is factual and statistical in nature. The Commission's review of such data has not indicated any questions of fact concerning the proposed transactions, nor has any such question been raised or called to our attention by any interested party. In this regard we note that the KOB opposition does not raise any broad question or factual issue concerning the merger plan as a whole, but rather a specific issue of right to a comparative hearing on a single frequency, which right we believe can fully be protected irrespective of any comprehensive action taken on the merger proposals.

4. In light of the above, the Commission accepts the factual representations in the filings in this proceeding as authentic and accurate statements of fact and as evidence constituting the record herein. However, so as to preserve the right for interested parties to raise any such questions of fact as may appropriately be shown, we are herein establishing a procedure whereby any party desiring to offer other or further evidence in this proceeding may file a written statement of such evidence within 20 days of the date of release of this order. Any statement of facts so filed will be accepted and received as evidence herein, subject to all proper objections and arguments as to relevance and materiality, unless an objection is filed challenging the authenticity or accuracy of such statement within 5 days after the filing and service upon the parties of any such statement of facts. In the event of such an objection, the Commission will issue an appropriate order as to the controverted matters. We follow such a procedure on our present conclusion that no evidentiary hearing for the adjudication of contested facts is required, and that we can appropriately compile a full and accurate factual record without such hearing on which to base our legal and policy determinations in the matter.

5. The Commission has concluded, however, that the pending proposals do raise legal and policy issues of substance and significance which require the Commission's further consideration in an oral hearing before it en banc. Such a hearing will provide a further opportunity for the exploration of such issues on a formal record which should materially assist the Commission in its consideration of and action upon such issues. Accordingly, the Commission orders that an oral argument upon such applications be held before the full Commission on September 19, 1966, at 10 a.m., in the Commission's hearing room in Washington, D.C. The Commission requests the parties to address themselves to the general issues whether the proposed transfers will: (*a*) Increase unduly economic concentration in any market or field; (*b*) affect competition in broadcasting and whether such effect would be consonant with or contrary to the public interest; and (*c*) generally serve the public interest. The applicants may also desire to supplement, or otherwise cover, matters raised by the Commission's inquiries of June 20, 1966, and the replies thereto (see par. 2, above). In addition, the applicants should, insofar as possible, be prepared to address themselves to all issues of law and policy (as

well as any factual issues pursuant to par. 4, above), which may be raised for discussion by the Commission or any party to the proceeding.

6. The Commission's Broadcast Bureau and Common Carrier Bureau will participate in the oral hearing. The Commission anticipates that both bureaus will, in matters under their respective jurisdictions, raise all pertinent questions of law and policy so that we may have a complete record before us. Other interested parties, including radio station KOB (see par. 3, above), may ask to be heard with respect to any question affecting the Commission's disposition of the pending applications. In addition, oral presentations may cover and include any factual question that may have been raised in accordance with the procedures set forth in paragraph 4, above.

7. Interested parties desiring to appear and be heard before the Commission shall file a statement on or before September 5, 1966, designating the attorneys and other spokesmen or officials who would appear and indicating the length of time which they anticipate would be required for their presentation. Such parties should also generally indicate the subject matter of their presentation; that is, the particular issues to which they would address themselves. The Commission will, upon the receipt of the indicated written statements, issue such further order prescribing the order of appearance of parties to be heard, the length of their presentations, and such other procedures for the oral argument as may be appropriate in the circumstances.

8. Following the oral hearing designated herein the Commission will consider and take such further action upon the pending applications, both procedurally and substantively, as may be required by the record then before us.

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

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissent and vote for a formal evidentiary hearing pursuant to section 309(e) of the Communications Act, and sections 5, 7, and 8 of the Administrative Procedure Act, for the reasons, among others, given in my statement opposing issuance of the July 20, 1966, letters of inquiry to ITT and ABC, which statement is incorporated herein by reference.

The order and notice of oral hearing is unique in that it is neither an oral argument pursuant to the Administrative Procedure Act nor an evidentiary hearing pursuant to section 309(e) of the Communications Act, yet it gives the appearance of both. The Commission majority, in accepting the factual representations in the filings by ITT and ABC as authentic and accurate statements of fact and as evidence constituting the record herein, seems to ignore the additional facts which would be developed in the evidentiary hearing I propose. See, for example, issues 10, 11, 12, and 13.

The order and notice of oral hearing is, in my opinion, inadequate and ineffective, since it will elicit opinion rather than evidence tested in the crucible of a formal hearing where the applicant must meet the burden of proof on specified issues, which is necessary to a resolution

of the serious social, economic, commercial concentration, and other public interest questions here obtaining.

In view of the foregoing, I vote for a formal evidentiary hearing on the following issues where the burden of proof is on the applicant:

(1) To determine whether and the extent to which the economic and commercial relationships, and the business structure, operations, and practices of the applicant herein will involve undue concentration of economic power in a manner contrary to the public interest in broadcasting.

(2) To determine whether and the extent to which the merger of ABC and ITT may be inconsistent with the policies set forth in the antitrust laws.

(3) To determine, in the light of the facts disclosed, and the conclusions reached under (1) and (2) above, whether consent to the application is consistent with the Commission's policies to promote licensee responsibility, competitive opportunity, and diversity in broadcasting.

(4) To determine whether and the extent to which the applicant maintains and will continue to maintain, directly or through its subsidiaries or affiliates, commercial relationships with local, State, Federal, and other governments, and the consequential impact on intracorporate policies with respect to its network and station operations.

(5) To determine whether and the extent to which consent to the merger herein would place applicant in a position where it might be impelled or compelled to subordinate its broadcast activities to its overall business interests.

(6) To determine the commercial activities, including marketing and sale of various products and services carried on or manufactured or proposed to be carried on or manufactured by the applicant, particularly in the field of communications, communications equipment and apparatus, ownership, management and operation of communications systems, including the field of space and common carrier communications.

(7) To determine whether and the extent to which the commercial activities of the applicant and its marketing of goods and services will affect competition among advertisers and prospective advertisers for broadcast time and opportunity.

(8) To determine whether and the extent to which consent to the merger herein may bring about concentration of control of facilities for space transmission (either domestic or foreign) and domestic broadcast transmission in the same hands.

(9) The extent to which applicant now owns, controls, or has financial interests in, or proposes to own, control, or acquire financial interests in broadcast facilities in foreign countries.

(10) To determine the intracorporate relations, policies, and practices established or carried on by ITT with its subsidiaries and affiliates as they may affect the independence of judgment by the management of such affiliates.

(11) To determine the extent to which the management of operating subsidiaries and affiliates of ITT have been permitted independent operation.

(12) To determine whether and the extent to which managements of ITT's subsidiaries and affiliates have been changed, and the relation between such changes and the business policies and practices of ITT as a parent.

(13) To determine the extent of independent judgment to be accorded the operating management of the broadcasting enterprise and the extent to which its independence will be affected by economic, commercial and other business considerations of the merged corporation.

(14) To determine whether and the extent to which consent to the merger herein would enhance the ability of the applicant to provide a diversified program schedule in the public interest, as alleged by the applicant.

(15) To determine whether and the extent to which consent to the merger would add to the economic stability and commercial viability of the ABC broadcasting enterprise—as alleged by the applicant—in a manner which will serve the public interest.

(16) To determine whether and the extent to which the consent to the merger herein would encourage or impel other networks and licensees to enter into similar arrangements.

(17) To determine the competitive effect, if any, of consent to the merger herein on the development and entry of additional networks in television.

(18) To determine, in the light of the evidence adduced, pursuant to the foregoing issues, whether the public interest, convenience, and necessity would be served by a grant of Commission consent to the proposed merger.

CONCURRING OPINION OF COMMISSIONER KENNETH A. COX IN WHICH COMMISSIONER NICHOLAS JOHNSON JOINS

I concur in setting this matter down for an oral hearing. It poses issues of too great importance to be handled in routine fashion. However, I believe the applicants should address themselves very carefully to the issues which Commissioner Bartley has indicated he believes should be explored in a full evidentiary hearing. While the procedure adopted here is intended to expedite disposition of this matter, it should nevertheless permit exploration of these important questions in broad outline at least.

FCC 66-711

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of WMOZ, INC., MOBILE, ALA. For Renewal of License of Station WMOZ, Mobile, Ala.	Docket No. 14208 File No. BR-2797
REVOCATION OF LICENSE OF EDWIN H. ESTES FOR STANDARD BROADCAST STATION WPFA, PENSACOLA, FLA.	Docket No. 14228

ORDER

(Adopted July 28, 1966)

BY THE COMMISSION: COMMISSIONERS COX AND JOHNSON NOT PARTICIPATING.

At a session of the Federal Communications Commission held at its offices in Washington, D.C., on the 28th day of July 1966;

1. The Commission has under consideration the petition for stay filed by WMOZ, Inc., in the above-captioned proceeding. Therein it is requested that the Commission stay the effectiveness of its order of May 11, 1966, requiring the termination of operations on station WMOZ by July 31, 1966, and provide for the continued operation of station WMOZ by WMOZ, Inc., until such time and upon such terms and conditions as the Commission deems appropriate.

2. In view of the fact that there are seven other standard broadcast stations which provide service to Mobile, six of which are licensed to Mobile, the Commission believes that continued operation of station WMOZ by WMOZ, Inc., is not required in the public interest. We note that a new application for the frequency has been tendered for filing, together with an application for interim operating authority. These applications will be considered by the Commission in due course. Pending such consideration, however, we do not believe that the reasons advanced by WMOZ, Inc., in support of its petition warrant the extraordinary relief requested therein. Accordingly, its petition will be denied.

3. In view of the foregoing, *It is ordered*, That the petition for stay filed by WMOZ, Inc., *Is hereby denied.*

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

FCC 66-718

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of 1400 CORP. (KBMI), HENDERSON, NEV. Has: 1400 kc, 250 w, U, Class IV For Renewal of License of Station KBMI	Docket No. 16813 File No. BR-2937
JOSEPH JULIAN MARANDOLA, HENDERSON, NEV. Requests: 1400 kc, 250 w, 1 kw-LS, U, Class IV For Construction Permit	Docket No. 16814 File No. BP-16411
CHARLES L. GARNER, GEORGE GARNER, AND WILLIAM J. MULLEN, NORTH LAS VEGAS, NEV. Requests: 1400 kc, 250 w, 1 kw-LS, U, Class IV For Construction Permit	
1400 CORP. (ASSIGNOR), THOMAS L. BRENNEN (ASSIGNEE) For Assignment of License of Station KBMI, Henderson, Nev.	Docket No. 16815 File No. BAL-5158

MEMORANDUM OPINION AND ORDER

(Adopted August 10, 1966)

BY THE COMMISSION: COMMISSIONERS LOEVINGER AND WADSWORTH ABSENT.

1. The Commission has before it for consideration: (*a*) The above-captioned and described applications; (*b*) a petition to dismiss the Marandola application, filed by KBMI; (*c*) a pleading in opposition by Marandola; (*d*) a letter dated February 18, 1966, by Charles L. Garner et al. requesting a waiver of the Commission's "cut-off" rules; and (*e*) opposition to the waiver request by Marandola.

2. As originally filed, the Marandola application proposed to operate the identical antenna system and transmitter site used by KBMI. In its petition to dismiss, KBMI stated that it was the lessee of the site and under no circumstances would it permit Marandola to use the premises. Under those circumstances, KBMI argued that Marandola had no reasonable assurances of the availability of the proposed site and, for that reason, his application should be dismissed. On February 24, 1965, Marandola amended his application to specify a site other than the one leased to KBMI. Accordingly, the petition to dismiss is now moot.

3. By public notice of January 7, 1965, the Marandola application was accepted for filing. The same public notice also stated that all

prospective applicants wishing to file conflicting proposals would have to tender their applications no later than February 15, 1965, in order to receive concurrent consideration with the Marandola application. The Garner et al. proposal was not tendered for filing until February 18, 1966, and is mutually exclusive with Marandola's application. In requesting a waiver of the "cut-off" rules, Garner et al. have made no attempt to explain the 1-year's delay in filing, nor have they alleged any overriding public interest considerations which persuade us to grant the waiver. Accordingly, the application will be returned.

4. The KBMI renewal application and the Marandola proposal are mutually exclusive in that they both seek authorization for use of the same frequency in Henderson. A hearing must be held to determine whether the KBMI license should be renewed for the purpose of assigning it to Thomas L. Brennen or whether Marandola should be authorized to use the frequency. In two recent cases, *Arthur A. Cirilli (WIGL)*, 2 FCC 2d 692, 6 R.R. 2d 903, and *Northwest Broadcasters, Inc. (KBVU)*, 3 FCC 2d 571, 7 R.R. 2d 396, the Commission was presented with similar tripartite situations. In both instances (although for somewhat different reasons), we determined that the public interest would better be served by comparing the qualifications of the two parties intending to operate the station; namely, the prospective assignee and the construction permit applicant, rather than the licensee and the construction permit applicant. In the *Cirilli* case the license had already been assigned to a trustee in bankruptcy under obligation to dispose of the station's assets. There the Commission found that the public interest would not be served by inquiring into the qualifications of a party who was no longer connected with the station. Although the *Northwest* situation did not involve bankruptcy, the station had been silent for almost a year because of financial difficulties, and the licensee had no intention of resuming regular operations. There we found that an assignment application properly filed under one section of the Communications Act was not automatically nullified by a subsequent construction permit application filed under another section of the act. The same rationale will be followed here. In this case, the assignment application preceded the construction permit application.[1] Thus, we are not presented with a situation in which a renewal applicant, faced with a mutually exclusive proposal, attempts to avoid a comparative hearing by substituting a prospective assignee to compete in his place. Of course, we need not reemphasize our basic policy that licensees will be held accountable for their stewardship and will not be allowed to evade the consequences of their misconduct or abuse of a license by selling the station at the end of the license period.

5. The financial information contained in the assignment application is over 2 years old and therefore may be obsolete. For this reason we cannot make the requisite finding that Brennen has enough cash or other liquid assets at this time to purchase KBMI. Moreover, since the station has only recently resumed broadcast operations, we have no information as to what its revenues and expenses are. Accordingly,

[1] The assignment application was filed on July 6, 1964, and the Marandola proposal tendered for filing on Oct. 16, 1964.

an issue will be included to determine whether Brennen now has sufficient funds to purchase the station and meet the financial burden specified in *Ultravision Broadcasting Co., et al.*, 1 FCC 2d 544, 5 R.R. 2d 343.

6. According to the 1960 U.S. census, the population of Henderson is 12,525. The 5-mv/m contour of the Marandola proposal would penetrate the city of Las Vegas, Nev., population 64,405. However, since Marandola is requesting the facilities of KBMI, we find that the *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, adopted December 22, 1965, 2 FCC 2d 190, 6 R.R. 2d 1901, is not applicable and no issue with respect thereto will be included.

7. Except as indicated by the issues specified below, the applicants are qualified. A hearing will be held to compare their qualifications. If Joseph Julian Marandola prevails in the hearing, he will be awarded a construction permit and the renewal application will be denied. If Thomas L. Brennen prevails, the renewal and the assignment will be granted.

Accordingly, *It is ordered*, That, pursuant to section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications [2] *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 Thomas L. Brennen:

(*a*) His current financial position and whether sufficient funds are available to purchase KBMI and to cover initial operating costs.

(*b*) In the event the applicant will depend upon operating revenues during the first year to meet fixed costs and operating expenses, the basis of the applicant's estimated revenues for the first year of operation.

(*c*) Whether, in view of the evidence adduced pursuant to (*a*) and (*b*), above, the applicant is financially qualified in that he has or will have sufficient funds to purchase KBMI and operate it for at least 1 year.

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.

It is further ordered, That the request for waiver by Charles L. Garner, George Garner, and William J. Mullen *Is hereby denied;* and that their application *Is returned.*

It is further ordered, That the petition to dismiss by 1400 Corp. *Is hereby dismissed* as moot.

It is further ordered, That, in the event of a grant of the application of Joseph Julian Marandola, the construction permit shall contain the following condition:

[2] We are also consolidating the renewal application for the sole purpose of permitting action on such application by the examiner in accordance with par. 7, above.

Permittee shall accept such interference as may be imposed by existing 250 w class IV stations in the event they are subsequently authorized to increase power to 1,000 w.

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.

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.*

FCC 66R-310

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of CONNECTICUT RADIO FOUNDATION, INC. (ASSIGNOR) AND CONNECTICUT TELEVISION, INC. (ASSIGNEE) For Assignment of the Construction Permit of Television Station WTVU (TV), Channel 59, New Haven, Conn.	Docket No. 16576 File No. BAPCT-370

ORDER

(Adopted August 10, 1966)

BY THE REVIEW BOARD:

The Review Board has before it for consideration: (*a*) An appeal from the presiding officer's adverse ruling, filed by Impart Systems, Inc. (Impart), on June 15, 1966, and (*b*) the pleadings filed in response thereto.[1]

It appearing, That Impart seeks reversal of the hearing examiner's memorandum opinion and order [2] denying Impart's petition (filed May 4, 1966) to intervene in this proceeding; and

It further appearing, That, insofar as Impart seeks intervention as a matter of right pursuant to rule 1.223(a), by virtue of status as an applicant for the facilities now authorized to Connecticut Radio Foundation, Inc., it has no such status in view of the Commission's memorandum opinion and order [3] returning Impart's application as unacceptable for filing; and

It further appearing, That, insofar as Impart seeks intervention as a matter of discretion pursuant to rule 1.223(b), it has failed to allege with particularity how its participation as a party would assist the Commission in the determination of the hearing issues herein; [4] and

It further appearing, That Impart seeks intervention primarily to press its private interests; and that, accordingly, its general reliance upon *Office of Communications of the United Church of Christ* v. *F.C.C.*, —— U.S. App. D.C. ——, 359 F. 2d 994, 7 R.R. 2d 2001 (1966), is misplaced; and

It further appearing, That a denial of intervention would not preclude Impart from making its evidence available to and providing

[1] Comments filed by the Commission's Broadcast Bureau on June 21, 1966, support the appeal; an opposition filed by Connecticut Television, Inc., on June 27, 1966, urges denial thereof.

[2] FCC 66M-806, released June 7, 1966.

[3] FCC 66-596, —— F.C.C. 2d ——, released July 8, 1966.

[4] Compare *Niagara Frontier Amusement Corp.*, 10 R.R. 39 (1954).

assistance to the Broadcast Bureau, or from otherwise participating as a nonparty pursuant to rule 1.225;[5]

It is ordered, This 10th day of August 1966, that the appeal from the presiding officer's adverse ruling, filed by Impart Systems, Inc., on June 15, 1966, *Is denied.*

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

[5] See *Evansville Television, Inc.*, FCC 58–109, 16 R.R. 745.

FCC 66–726

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
KWHK BROADCASTING CO., INC. (KWHK), HUTCHINSON, KANS.	Docket No. 16588 File No. BP–15356
COLUMBIA BROADCASTING SYSTEM, INC. (WCAU), PHILADELPHIA, PA.	Docket No. 16589 File No. BP–15446
KAKE–TV AND RADIO, INC. (KAKE), WICHITA, KANS.	Docket No. 16590 File No. BP–15968
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted August 17, 1966)

BY THE COMMISSION: COMMISSIONER LEE DISSENTING; COMMISSIONER JOHNSON NOT PARTICIPATING.

1. The Commission has before it a petition of Columbia Broadcasting System, Inc. (CBS), seeking reconsideration of the memorandum opinion and order (FCC 66–332, released April 19, 1966) designating the above-entitled applications for hearing, and related pleadings.[1] CBS requests a grant of its application herein without hearing, and dismissal of the applications of KWHK Broadcasting Co., Inc., and KAKE–TV and Radio, Inc., without further consideration.

2. It is unnecessary to set out CBS' contentions at length, inasmuch as they are essentially repetitive of those advanced by it in pleadings filed with and considered by the Commission prior to the designation of the above-described applications for hearing. Although CBS argues that it "has not heretofore been afforded an opportunity to express its views as to the significance of the interference its proposal would cause either KAKE or KWHK's proposed operation if granted," it is clear that CBS had full opportunity to do so in its predesignation pleadings. Moreover, CBS has offered no new facts which would justify reconsideration of the Commission's order setting the instant applications for hearing. The contentions now advanced by CBS may be presented at the hearing herein in response to the several issues, for consideration and evaluation in light of all of the evidence.

3. *Accordingly, it is ordered*, This 17th day of August 1966, that the petition of Columbia Broadcasting System, Inc., filed May 19, 1966, for reconsideration, for grant of WCAU's application without hearing, and for dismissal of KWHK's and KAKE's applications *Is denied.*

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

[1] Pleadings before us are: (*a*) A petition for reconsideration filed May 19, 1966, by Columbia Broadcasting System, Inc.; (*b*) opposition filed June 2, 1966, by the Chief, Broadcast Bureau; (*c*) opposition filed June 2, 1966, by KWHK Broadcasting Co., Inc.; and (*d*) opposition filed June 2, 1966, by KAKE–TV and Radio, Inc.

FCC 66-591

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

July 1, 1966.

THE MCLENDON PACIFIC CORP.,
2008 Jackson Street,
Dallas, Tex. 75201

E. EDWARD JACOBSON,
5670 Wilshire Boulevard,
Los Angeles, Calif. 90036

GENTLEMEN: This is in regard to the application for the assignment of the license of KGLA, Los Angeles, Calif., from E. Edward Jacobson to the McLendon Pacific Corp.

The assignee proposes to change the programing format of KGLA to a "want-ad page of the air," and to devote the station solely to the broadcast of what are termed "classified ads," which will be the only matter broadcast, other than public service announcements.

The Commission is unable to find an adequate basis in the materials submitted for authorization of the use of a broadcast frequency for a novel service of this kind. However, the Commission is disposed to afford a suitable opportunity for the assignee to demonstrate that a classified-ad format has capacity to render a useful service and for the public to appraise its desirability and register its reactions.

We have concluded that a conditional grant of the instant application would be in accordance with section 303(g) of the Communications Act of 1934, as amended, which, in relevant part, empowers and directs the Commission "as public convenience, interest, or necessity requires" to:

> (g) 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.

The Commission proposes to grant the application with the following conditions:

1. The grant will be for a trial period of 1 year, the dates to be specified in the license.
2. The facilities will be used during the trial period exclusively for the broadcast of classified ads and public service announcements as proposed by the assignee.
3. At the termination of the trial operation, the assignee will be required to submit a full and detailed report on the operation, including: (*a*) Reactions of the listening public and leaders in the community; (*b*) a statistical breakdown of the types of classified ads broadcast; and (*c*) such financial information as the Commission may deem pertinent.

4. Such periodical reports as may be requested by the Commission concerning all aspects of the trial operation will be furnished.

5. In view of the experimental nature of the proposed operation and this authorization, applicant shall waive the privilege of confidentiality as to any reports filed during this license period pursuant to the conditions of this grant.

This action does not represent a determination that the assignee has fully complied with the Commission's standards for ascertainment of needs and interests. Nor does it represent a determination that for the long run a service including no other program elements would be in the public interest. Because of the novelty of the proposal and the Commission's desire to permit an experimental operation on as broad a scale as possible, we do not deem it necessary to reach a decision with respect to these matters. Further, the Commission understands that this mode of operation is one in which the presentation of commercial matter is the basic program service to be provided, and is therefore completely different from the normal pattern of entertainment, informational, or other programing, interrupted by commercial matter. The proposed authorization is, therefore, not to be construed as representing a change in the Commission's policy of reviewing other licensees' commercial practices on a case-by-case basis.

Finally, the assignee will be permitted, at the end of the trial operation, to file an application for a regular 3-year license. That application will be considered on its merits at that time.

The assignee is hereby directed to file an application for renewal of license to cover this operation on August 15, 1967. A composite week will be provided near the end of the period for this purpose.

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

FCC 66R-299

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of WHAS, INC. (WHAS-TV), LOUISVILLE, KY. For Construction Permit	Docket No. 15544 File No. BPCT-3187

APPEARANCES

Neville Miller, John P. Bankson, Jr., and *Eugene F. Mullin, Jr.*, on behalf of WHAS, Inc. (WHAS-TV); *Russell Rowell* and *John L. Tierney*, on behalf of WLEX-TV, Inc.; and *Robert B. Jacobi* and *Joseph Chachkin*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted July 27, 1966)

BY THE REVIEW BOARD: BERKEMEYER, NELSON, AND SLONE.

1. The applicant, WHAS, Inc. (WHAS), is the licensee of television broadcast station WHAS-TV which, pursuant to a partial grant herein, operates directionally on VHF channel 11, Louisville, Ky. In the instant proceeding, it seeks removal of the directional condition and authority to operate nondirectionally from its present transmitter site, located 3.6 miles north of New Albany, Ind. The respondent, WLEX-TV, Inc. (WLEX), is the licensee of television broadcast station WLEX-TV, which operates on UHF channel 18 at Lexington, Ky. It opposes any change by the applicant from its present directional operation to nondirectional operation. The background information which follows will be conducive to a fuller understanding of the purpose, nature, and scope of the issues involved in this proceeding.

2. On July 2, 1957, in a prior proceeding (docket No. 12067), the Commission designated for hearing a WHAS application seeking authority to move its transmitter site 19 miles northeast of Louisville and to increase antenna height (to 1,992.8 feet above average terrain) with the following issue, among others:

> **To determine the impact upon UHF television broadcasting in Lexington, Ky., in view of the fact that with the proposed tower height and location, WHAS-TV would provide a grade A signal intensity to Lexington and its surrounding area for the first time.**

The burden of proof on said issue was on the applicant.[1] The record in that proceeding was closed in April 1959; an examiner's initial decision denying the application was issued in August 1960 (31 FCC

[1] The application was opposed by the two Lexington UHF stations (WLEX and WKYT-TV), among others.

286); and the Commission's decision affirming said denial was released in August 1961 (31 FCC 273; 21 R.R. 929). The Commission found, among other things, that if its application were granted, WHAS would furnish to Lexington, Fayette County, and the majority of the areas and populations within the grade B contours of the Lexington UHF stations, a vastly improved television signal, thus permitting many persons then receiving no more than a marginal WHAS signal to view a grade A or grade B VHF signal; that the two UHF stations in Lexington had been operating at a loss since the inception of their services; that a grant to WHAS would cause said UHF stations immediate and permanent economic losses which "would almost inevitably be quickly translated into loss by the public of locally oriented programing, and of an outlet for self-expression and local advertising"; and that the WHAS proposal would have the effect of altering the allocation plan through forcing the Lexington stations to cease operations. The Commission referred to the following language in *Carroll Broadcasting Co.* v. *FCC*, 258 F. 2d 440, 103 U.S. App. D.C. 346, 17 R.R. 2066 (1958):

> * * * economic injury to an existing station, while not in and of itself a matter of moment, becomes important when * * * it spells diminution or destruction of service. At that point the element of injury ceases to be a matter of purely private concern.

3. The above-captioned application was filed by WHAS on May 3, 1963, and was amended on January 22, 1964. The application resulted from the fact that Louisville's urban renewal authorities had announced their intention to take WHAS' existing downtown Louisville site for a new Federal office building. WHAS would not, as a result of a grant of this application, provide a predicted signal of grade B or better to any area or population not now receiving a VHF grade B signal from at least one station; nor would the grade B contour include any part of Fayette County, which contains Lexington. The application was opposed by WLEX,[2] which filed a petition to deny, proposing three issues which may be summarized as follows: To determine the impact of the applicant's proposed operation upon UHF television broadcasting in Lexington, Ky.; to determine whether a grant would result in a fair, efficient, and equitable distribution of television service within the meaning of section 307(b) of the Communications Act; and to determine what steps the applicant has taken to ascertain program needs in the additional area to be served, particularly within the area served by the Lexington stations, and to determine what steps have been taken by the applicant to meet such needs. In support of its request, WLEX relied on the Commission's prior decision, discussed above, in *WHAS, Inc.*

4. In a memorandum opinion and order (*WHAS, Inc.*, FCC 64–604, 2 R.R. 2d 1073) released July 8, 1964, the Commission concluded, among other things, that "* * * the present application clearly will not have as substantial an effect on the basically UHF area of Lexington as would the previous proposal * * *"; that by a reduction of radiated power in the direction of Lexington, WHAS could maintain

[2] WKYT–TV, the other UHF station in Lexington, at first opposed the application, but later withdrew its opposition.

approximately its present contour in that direction; that by making a partial conditional grant permitting such operation, it could proceed with a hearing on the subject application to determine whether an unconditional grant would have an adverse effect on WLEX's operations to an extent inconsistent with the public interest; and that this procedure obviated the need for a 307(b) issue. At the same time, the Commission found that an issue directed to the efforts of WHAS to determine the needs of the additional area to be served and the steps taken to meet such needs was not warranted.

5. On the basis of the above-summarized views, the Commission made said partial conditional grant and framed the following issues:

> 1. To determine the impact upon station WLEX–TV which would result from operation of station WHAS–TV without directionalization.
> 2. To determine, in view of the evidence adduced pursuant to the foregoing issue, whether removal of the directionalization condition would serve the public interest, convenience, and necessity.

In the course of its opinion, after distinguishing the facts in the prior proceedings from those which pertain in this proceeding, and after concluding that the impact on WLEX would be substantially lessened, under WHAS' present proposal, the Commission stated, among other things:

> If at the conclusion of this hearing the Commission determines that the full operation proposed by the applicant would not *significantly* affect petitioner's operation, it will order the [directionalization] condition removed. (Italic added.)

The Commission ordered that "the burden of proceeding with the introduction of evidence and the burden of proof with respect to issue 1 are hereby placed on WLEX–TV." (As noted above, in the first WHAS proceeding, this burden had been placed on WHAS.)

6. In an initial decision released June 2, 1965 (FCC 65D–24), Hearing Examiner Thomas H. Donahue concluded, with respect to issue 1, that the impact was unproven; that if any were to occur, WLEX would be amply able to cope with it; and that, with respect to issue 2, on the basis of the record, removal of the condition requiring directionalized operation would serve the public interest. This proceeding is now before the Review Board for decision on exceptions to the initial decision filed by WLEX and the Broadcast Bureau both seeking a contrary result. WHAS' statement in support of the initial decision includes exceptions seeking to bolster the ultimate conclusion in its favor. Oral argument was held before a panel of the Review Board on December 14, 1965. The Board is of the view that the examiner's recommendation should be affirmed, and this decision so provides. It may be noted at the outset that the preparation of the decision has not been without its burdensome aspects. For example, the parties' exceptions, in many instances and in varying degrees, are unduly repetitious of proposed findings submitted to the examiner, lack specificity, or are otherwise inconsistent with the conciseness and related provisions of section 1.277(a) of the Commission's rules.[3] Nevertheless, the

[3] Thus, WLEX's 155 exceptions cover 52 pages, repeat lengthy excerpts of testimony, and are otherwise of a type hindering or precluding precision as to the rulings thereon. Although WHAS has filed "only" 77 exceptions (on 40 pp.) supporting the initial decision, subdivisions of many of the exceptions advance the real total to nearly 200. And 2 of the Broadcast Bureau's 18 exceptions (16 and 17) cover nearly 12 of its 20 pages of exceptions.

Board has passed upon the substance of the exceptions, since the procedural deficiencies therein are at least in part traceable to the examiner's stated attitude with respect to portions of WLEX's submissions in the proceeding. Thus, after commenting (statement, 4) upon "the general obesity of the record," the examiner declared himself (findings, 7) unable "to utilize the large mass of material that, on [one] facet of Respondent's thesis, in one way or another has found its way into the record," and pronounced that "It would be bootless to recapitulate Respondent's material on the point or even to digest it." Notwithstanding the foregoing, "Findings [were] approached" (statement, 5) by the examiner, although many of them are set forth only in a generalized manner, so as to require modification and supplementation in major respects. Such modifications and supplementations are reflected in this decision or in the attached appendix, which contains the Board's rulings on the parties' exceptions. Those findings and conclusions in the initial decision which are not inconsistent with this decision or the rulings in the appendix are hereby adopted.

7. Louisville, the largest city in Kentucky, had a 1960 population of 390,639 persons. Pursuant to the above-described partial grant, WHAS is authorized to operate on channel 11 with a directional antenna employing effective radiated power of 79.4 kw (19 dbk) and antenna height above average terrain of 1,290 feet at a site located 3.6 miles north of New Albany, Ind., and about 7.5 miles northwest of downtown Louisville. It seeks to operate nondirectionally with effective radiated power of 133.5 kw (21.26 dbk). The other commercial television stations operating in Louisville are WAVE–TV on VHF channel 3; WLKY–TV on UHF channel 32; and WTAM–TV on UHF channel 41.[4] Prior to the Commission's partial grant to WHAS, WAVE–TV's grade B contour included 338,068 more persons than that of WHAS; the partial grant reduced the difference to 178,086, and nondirectional operation by WHAS would further reduce the difference to 107,586.

8. Lexington, the second largest city in Kentucky, located about 69 miles in an easterly direction from Louisville, had a 1960 population of 62,810 persons. The Lexington standard metropolitan statistical area (Fayette County) had a population of 131,906, with the Lexington urbanized area having 111,940. Two commercial television stations, both on UHF channels, operate in Lexington—WLEX–TV (channel 18) and WKYT–TV (channel 27). WLEX operates with effective radiated power of 272 kw (24.3 dbk) and antenna height above average terrain of 640 feet. Its grade B contour extends approximately 41 miles in all directions from Lexington, and includes a population of 429,852 in 5,360 square miles. Within this grade B contour are 14 counties in their entirety, at least half of 8 other counties, and portions of 11 other counties. In addition to that of WKYT–TV, the grade B contours of the following five VHF stations overlap the grade B contour of WLEX: WHAS–TV and WAVE–TV, Louisville; and WKRC–TV, WCPO–TV, and WLWT, Cincinnati, Ohio.[5]

[4] The owners of WHAS also operate a 50-kw standard broadcast station in Louisville and publish its two daily newspapers.

[5] These five stations were on the air when WLEX commenced operation.

The penetration (grade B contours) from these five VHF stations affects 155,860 persons in an area of 2,799 square miles, representing 36 and 52 percent, respectively, of the total population and area within the WLEX grade B contour. Thus, the UHF-only portion of the WLEX grade B contour includes 273,992 persons (64 percent) in 2,561 square miles (48 percent). Except for a narrow strip, all of the area within WLEX's grade B contour lies within the grade B contour of WKYT–TV, the only UHF station serving any portion of such area when the hearing herein was held.[6]

9. WHAS' directional operation suppresses radiation eastward toward Lexington, bringing its grade B contour about 18 miles from the center of Lexington. Nondirectional operation would place the grade B contour about 9 miles from Lexington's city limits, and about 1 mile short of the nearest boundary of Fayette County, in which Lexington is located; this contour would not reach any part of the Lexington standard metropolitan statistical area, which includes all of Fayette County. WHAS' grade B contour now includes 1,286,025 persons in an area of 11,720 square miles.[7] If WHAS is permitted to operate nondirectionally, an additional 70,560 persons in an area of 1,505 square miles would gain the new grade B signal of WHAS, which would then cover a total of 1,356,585 persons in 13,225 square miles.

10. Operating directionally, WHAS' grade B contour overlaps that of WLEX in an area of 863 square miles, with a population of 51,438 persons (16 and 12 percent, respectively, of the WLEX grade B area and population). Nondirectional operation would increase the overlap area to 1,530 square miles, with a population of 83,492—an increase of 667 square miles (13 percent) and 32,054 persons (7 percent) within the WLEX grade B contour. These increases would represent a gain of 6 percent of the area now covered by WHAS and 2.5 percent of the population.

11. The new overlap area resulting from WHAS' proposed nondirectional operation contains 19,000 persons, who would receive a first full-time CBS network service from WHAS. Outside of said overlap area, 7,100 persons in 166 square miles would gain a second grade B signal from WHAS, while 6,600 persons in 167 square miles would gain a third grade B signal and a first CBS network service.

12. As we have noted above, WAVE–TV, the other VHF television station in Louisville, provides a grade B signal within the WLEX grade B contour. This grade B signal, in the direction of Lexington, reaches about 5 miles nearer to that city than would WHAS' proposed grade B contour, penetrates Fayette County, and encompasses the entire area overlapped by the grade B contours of WLEX and WHAS. The northern part of this overlap area is within the grade B contours

[6] Official notice is taken of the fact that on Jan. 25, 1965, the Commission authorized an increase in power for Louisville UHF station WLKY–TV, with the result that it will, for the first time, place a grade B signal inside WLEX's grade B contour. BPCT–3427, public notice B, Jan. 26, 1965, Broadcast Actions, report No. 5396. WLKY–TV will cover 65,806 persons in an area of 1,252 square miles within WLEX's grade B contour. A small part of this area extends beyond the authorized directional contour of WHAS–TV and within the overlap area under consideration in this case.

[7] Prior to its partial grant, WHAS' grade B contour encompassed 1,126,103 persons in 8,560 square miles.

of the three Cincinnati VHF stations noted above. Of these, the signal of WLWT is the nearest to Lexington, extending to a point approximately 12 miles from that city. WLEX's grade B contour includes almost 35,000 persons within the various grade B contours of said Cincinnati stations and 121,332 within the grade B contour of WAVE-TV.

13. In its designation order, the Commission refused to frame a *Suburban* issue against WHAS, finding that WHAS has shown "a continued responsiveness to the needs and interests of its service area," and concluding that WHAS "has adequately demonstrated its responsiveness to changing needs and has made clear its recognition of its continued responsibility to serve the needs and interests of its viewing public." WLEX's programing is discussed in the initial decision in paragraphs 15–20, inclusive. The hearing examiner found that WLEX has afforded time to civic, educational, religious, and agricultural groups. For the 1963 composite week, 76.49 percent of WLEX's programing fell in the "Entertainment" category, while the balance (23.51 percent) consisted of "Religious," "Agricultural," "Educational," "News," "Discussion," and "Talk." During the same period, "Network" programs totaled 73.49 percent; "Recorded"—15.98 percent; "Wire"—3.52 percent; and "Live"—7.01 percent. WLEX has only one program which is directed specifically to the residents of the overlap area. Although in some instances, WLEX has rejected network sustaining public affairs programs in order to present local live programs which it deemed of more immediate interest and service to the Lexington area, the record shows that in prime time, during the 1964 composite week, WLEX presented no local live programs of any kind, no sustaining programs of any kind, and no noncommercial spot announcements.

14. WLEX's threshold presentation was designed to show that the procedures followed by advertisers and their advertising agencies in buying station time are based on the use of statistical data referred to as "tools of the trade." Among these tools are reports issued by the American Research Bureau (ARB) and the A. C. Nielsen Co. (Nielsen), and data contained in "Television Factbook." ARB and Nielsen provide statistical sampling services of television audience information. "Television Factbook" is a reference source used by the advertising, television, and electronic industries. Testimony and exhibits relating to these tools were received in evidence—not as proof of the accuracy of the tools—but as evidence of their nature and extent of their use.

15. It is WLEX's position that WHAS' nondirectional operation, followed by the use of the above tools of the trade, would result in a substantial adverse impact on WLEX. In substance, WLEX's main thrust is to the effect that nondirectional operation by WHAS would permit WHAS to serve people within the WLEX grade B contour not presently served under WHAS' directional operation; that experience has shown that an existing UHF station suffers losses in income following the introduction of a new or improved VHF signal into the market area of a UHF station; that WLEX would lose audience; that the cost per thousand on its station would increase and make advertis-

ing more expensive; that it would lose network programs and valuable adjacencies; that it would suffer reduced rates; that it would lose advertising accounts and revenues; that its operating costs would have to be cut and its programing curtailed; and that all of the above would result in detriment to the public.

16. Heavy emphasis was placed by WLEX on the "cost per thousand" [8] and "unduplicated homes" [9] aspects of its showing. Particularly, it urged that it would be the adverse effect on these factors resulting from WHAS' nondirectional operation which would bring about the consequences set forth in the preceding paragraph. During the fiscal years (ending March 31) 1956–60, inclusive, WLEX's operations resulted in annual losses. In this connection, we should point out that the question to be resolved in this case is whether the proposed nondirectional operation of WHAS would have a significant impact on WLEX's existing operation irrespective of its difficulties and losses during said period. During the years (ending March 31) 1960–64, inclusive, the figures for its revenues, the amount and percentage thereof as to source, and its profits before Federal income taxes are as follows:

Revenues (in thousands) 1960–64 fiscal years

[Decimal figures in percent]

Year	Total	Local	Regional	National	Network	Profit
1960	$408	$196	$83	$78	$51	($15)
		48.1	20.3	19.0	12.6	
1961	[1] $470	$252	$53	$96	$65	$73
		53.6	11.3	20.5	13.9	
1962	$563	$247	$71	$128	$117	$107
		43.8	12.7	22.8	20.7	
1963	$648	$246	$98	$141	$163	$96
		38.0	15.2	21.7	25.1	
1964	$749	$305	$127	$139	$178	[2] $106
		40.7	17.0	18.6	23.7	

[1] Includes miscellaneous revenues of 0.7 percent.
[2] In fiscal 1964, WLEX claimed $142,659.72 for depreciation and $16,800 in salaries to two stockholders, who owned 69.6 percent of the stock. In 1963, $114,089.31 was claimed for depreciation and the foregoing salaries approximated $9,000. WHAS urges that money set aside as depreciation should be considered as cash available to WLEX.

Income for April and May 1963 totaled $120,846.16; for April and May 1964, the total was $147,984.95. Accordingly, it is appropriate and necessary, at this time, that we evaluate the record herein with respect to the anticipated impact of a grant to WHAS on WLEX's future revenues—local, regional, national, and network.

17. As is indicated in the above chart, revenues from local advertisers averaged about 45 percent, the largest percentage of the four sources of revenue. They were achieved competitively with radio, television, newspaper, and other media bidding for the local advertising dollar, and the high percentage figure has been maintained even though there has been a substantial concurrent increase in total revenues. In many instances, local advertisers seek time which is adjacent

[8] Obtained by use of a formula embracing the number of viewers and the advertising charges. The ARB and Nielsen reports are used to compute cost per thousand and in projecting the comparative ranking of respective markets.
[9] Although the record contains various concepts concerning "unduplicated homes," in general, they are homes which are credited exclusively to one market.

to programs broadcast on the station, particularly network programs. WLEX does not have any advertisers who are located in the proposed overlap area, nor does it have any advertiser whose business is primarily directed to that area. WLEX did not discuss the WHAS proposal with any of its local advertisers and did not name a single local advertiser who had indicated that he would withdraw or decrease his local advertising in the event of a grant to WHAS. In fact, WLEX acknowledged that the impact at the local level would be less than at the national and regional levels. While it generalized that the loss of network programs would decrease the number of attractive adjacencies presently available for submission to local advertisers, as we shall see hereinafter, WLEX was unable to show that it would, in fact, lose any network programs.

18. WHAS has never solicited any of the local Lexington advertisers.[10] In all of its years of operation, WHAS has had only one such adviser, a Lexington retailer who bought a one-fourth participation in a University of Kentucky basketball playoff game to which WHAS had exclusive rights. WHAS rates are the same for local, regional, and national advertisers. In prime time, a 20-second spot costs $230. On WLEX, a 20-second spot at the national rate is $65 or $70, while the local rate is $39.50. Thus, it would be impractical for Lexington advertisers to pay WHAS rates for Lexington coverage when they can buy much more efficiently and economically on one of the two Lexington television stations.

19. The above chart indicates that since WLEX's last loss-year (1960), local revenues have increased by $109,000 (55.6 percent), regional by $44,000 (53 percent), national by $61,000 (78.3 percent), and network by $127,000 (249 percent). Thus, in terms of both actual dollars and percentage, the increase in network revenues has been more than with respect to any other category. Since it is clear from the above that WLEX would be likely to lose local advertising (its largest source of revenues) only if there is a decrease in network programs (its second largest source of revenues), the potential impact of a grant to WHAS on WLEX's network affiliations and programing must be considered. WHAS is affiliated with the CBS Network. WLEX is affiliated with the NBC Network, which is its principal source of network programing. It is also affiliated with CBS, but as an "also available" station—one which looks to another network as its primary source of network programing.[11] Both network rates to WLEX are the same and, from the record, it appears that they will so continue. During the composite weeks of 1963 and 1964, 73.49 and 76.61 percent, respectively, of WLEX's programing was derived from network sources. During the years ending in June 1963 and 1964,[12] network revenues amounted to 25.1 and 23.7 percent, respectively. Evidencing Lexington's desirability to the networks and their advertisers are the facts that WLEX has been ordered

[10] WHAS' representatives do call on nonlocal, regional advertisers whose headquarters are located in Lexington. In its sales promotional material it has claimed that Fayette and other counties within the WLEX grade B contour are within WHAS' coverage and part of its market.

[11] WKYT, the other UHF station in Lexington, is an ABC affiliate. WAVE-TV, Louisville, is an NBC affiliate.

[12] WLEX became an affiliate of NBC in 1959 and of CBS in June 1962.

almost 100 percent by NBC and CBS; that although the networks have complained to WLEX about their respective programs which WLEX had not carried, neither network ever threatened that it would not renew its affiliation with WLEX; that at no time did both networks reject the Lexington market for the same time period; and that in the event a third UHF station were authorized in Lexington, it would be sought by CBS as an affiliate.[13]

20. WLEX witnesses (its director and secretary-treasurer, station manager, and national spot representative) predicted, among other things, that as a result of a grant to WHAS, WLEX would suffer reduced network rates and would lose network programs and business; that some of such loss could be replaced from the other of its two affiliations; that the audience in the overlap area would not be entirely lost;[14] that if WLEX retained its NBC and CBS affiliations, its present availabilities would remain unaffected by a grant to WHAS; that recent network rate increases granted WLEX by CBS and NBC indicate that the Lexington market is being recognized as a good market that has coverage and can deliver audience; that WLEX could operate at the present network rates with NBC alone, irrespective of a grant to WHAS; that the loss of the CBS affiliation would not affect WLEX's network rate but might affect its local, regional, and national revenues; and that if it were reduced to one network, WLEX's programing would not be as attractive.

21. WHAS' vice president and director predicted that nondirectional operation by WHAS would have no effect on WLEX's relationships with NBC and CBS; that WAVE–TV's (NBC affiliate in Louisville) greater penetration has not adversely affected WLEX's affiliation with NBC, the amounts of its programing, or its income; that the CBS affiliation will not be affected because WLEX clears for only about one-third of the CBS programs; that because of changes in network selling patterns, sponsorship is now offered to groups of advertisers rather than to just one; and that sponsors seek to amortize advertising costs by spreading them into more markets.

22. WLEX has not discussed WHAS' proposed operation with either network. The only witness at the hearing who was not an employee, station representative, officer, or consultant of WLEX or WHAS was Carl S. Ward, vice president and director of affiliate relations for the CBS Network, who appeared pursuant to a subpena obtained by WHAS. His testimony with respect to network practices in general and CBS in particular carries considerable weight. CBS has no cost per thousand figure which is computed as standard for an affiliate. Its rates are determined by the findings of its research department and its engineering department. The research department does not consider county lines or grade B areas in arriving at a recommendation as to rates, nor would it attach significance to the new WHAS–WLEX overlap area. The basic factor from the research

[13] Carl S. Ward, CBS director of affiliate relations, testified that if WLEX were a CBS principal affiliate, it would be part of its primary interconnected network, the same as is its New York City station. WLEX's station manager testified that as far as NBC is concerned, Lexington is in the same category as a number of other similar and larger markets.

[14] The revenue losses anticipated by WLEX's secretary-treasurer were based on total loss of audience in the overlap area.

standpoint is the average quarter-hour homes delivered per night as reported by ARB. Engineering considers the number of homes in "an area that is normally somewhat greater than the grade B [area] of a station"; its part of the rate formula is based on dominant service areas which are predicted upon such calculated contours. The research findings carry three times the weight of that given the engineering findings. The network rate reflects the extent to which a station is able to maintain or obtain a share of the audience. CBS has increased network rates to stations despite their failure to increase their audiences. It has never cut rates because a two-station market became a three-station market.

23. The ultimate decision as to whether a network commercial program will be delivered to WLEX is one which is made by the network advertiser rather than by the network itself. Normally, the advertiser starts off with a fixed budget. The factor of cost per thousand is considered in terms of network rather than station cost per thousand. Where a community is recognized as a separate and distinct television market (as is Lexington) and one which an advertiser has been ordering, experience has shown that a change in a station's cost per thousand resulting from the entrance of a new facility or the establishment of overlap with an existing facility has not been a factor in the advertiser's decision regarding the ordering of markets. What have been factors in market selection are such matters as the limitations of budget or the fact that the advertiser's product is not being sold in a market.

24. Although most network advertisers have been ordering on the basis of a list of network-affiliated stations, the current trend is toward participating in programs with other network advertisers.[15] Due to the increasing cost of network programing, advertisers are interested in amortizing these program costs over a greater number of stations and increasing the effectiveness of their advertising; accordingly, each year the number of stations ordered by the advertiser has been increasing automatically. With respect to participation programs, unless he has lack of distribution in an area, the advertiser is interested in getting every station he can to clear those programs. Although he did not have the figures, it was Ward's strong impression that, by a significant margin, a greater number of advertisers order the full network than order less than the full network. As to fractional ordering of CBS programs on WLEX, the basic, normal reasons for this would be either lack of budget or lack of product distribution in the area.

25. During the evening prime time period of 7:30 to 11 p.m., WLEX has been ordered commercially 100 percent by CBS; the same is true with respect to NBC, except for a 1-hour program broadcast on alternate weeks, whose sponsor does not provide its service in Lexington. As to commercial daytime programing, although CBS has ordered WLEX 100 percent, the only shows cleared by WLEX were a half-hour weekday program and a Sunday professional football

[15] The participating advertiser does not sponsor an entire program but buys participation in a show already produced and cleared on the network's affiliates. Ward estimated that with respect to the CBS, NBC, and ABC Networks, from 40 to 50 percent of their nighttime schedules consist of participation programs.

game. While a few of the daytime programs (six, totaling less than 3 hours during the entire week) ordered by CBS were not fully sold, they were sold in the following percentages: two-thirds, three-fourths, five-sixths, eleven-twelfths, twelve-thirteenths, and fifteen-sixteenths. During the 1964 fall season, no CBS sustaining program, available to all of its affiliates, was broadcast by WLEX. With the exception of a half-hour period, WLEX broadcasts the NBC daytime commercial programs furnished on weekdays, amounting to 8 hours per day. However, the period from 1:30 to 4:30 p.m. is not always fully ordered by network advertisers.

26. Ward stated that there would be some shifting among viewers within some portions of the service area from WLEX to WHAS; "the grant of the facilities requested [by WHAS] would not in any way cause CBS Television Network to seek to terminate its affiliation with WLEX–TV"; that a grant would not affect attempts by CBS to clear its commercial programs on WLEX or to order such programs; that a grant would not result in fewer orders or in a lesser degree of sponsorship; that he did not consider Lexington as a marginal market for television; and that the outlook in the Lexington market for UHF stations should be very good.

27. Although WLEX's cost per thousand factor was directed toward the impact on all sources of advertising revenue, particular reference was made to national spot advertising, which has been accounting for approximately 20.5 percent (average) of WLEX's revenues. While this factor is important, there are other factors which enter into a national spot advertiser's determination as to whether his product warrants exposure in a market and, if so, which station is to be preferred. Among the matters taken into consideration are: Budget; the size of the market under consideration; whether there is product distribution in the market; whether the product is sufficiently sold in the market to justify an advertising expenditure therein; the income level and type of audience; suitability of the market for a test campaign; the extent to which the market is served by television stations located in other markets; satisfaction with network coverage; and the number of unduplicated homes served by a station in the market. While the cost per thousand factor may enter into the question of choosing a market, the record indicates that its greatest use is after a market has been selected, when cost per thousand is considered in choosing among the stations located in such market.

28. Market rankings for Lexington and Louisville vary. In 1963, ARB ranked Louisville as 41st and Lexington as 135th, and credited WLEX with a total net weekly circulation of 102,600 television homes. In 1965, the respective rankings were 44th and 147th. According to an agency source (Doherty, Clifford, Steers, & Shenfield), Louisville is ranked 43d and Lexington 150th. "Television Magazine" ranked Lexington as the 178th market. CBS, with 202 affiliates, classifies markets according to network rates. Ward guessed that Lexington was about 140th or 145th. An advertiser with a fixed budget may pick the first 50, 75, or 100 markets and then proceed to lower-ranked markets. When an advertiser reaches a market like

Lexington, his funds are running low and he is not apt to spend too much in such a market unless there is a specific reason, such as supporting his sales effort. While the unduplicated homes factor is a consideration, WLEX showed only one advertiser who rejected Lexington on that basis. Since WAVE's VHF signal presently extends over the proposed overlap area, a grant to WHAS would not affect the existing number of unduplicated homes. Further, a grant would not affect Lexington's market ranking.

29. As indicated above, product distribution in a market is a factor considered by advertisers and, as a matter of strategy, some advertisers will buy on every station in every market in which their products are distributed. As between the two factors of sales of a product in an area and the penetration in an area by television stations of other markets, to some advertisers the sales factor is the more important. This is of significance here because, during the year 1964, about one-third of WLEX's national spot revenues was derived from advertising purchased by manufacturers of beer. It is customary for these advertisers to buy every station in each market in which their beer is sold. Thus, the WLEX beer advertisers who distribute in Louisville or Cincinnati also advertise in those markets. Substantially all of the beer revenues for the year ending in March 1964 were derived from four beer companies. Inquiries directed to them by WHAS indicated that a grant to WHAS would have no effect on their advertising on WLEX.

30. During the year ending in March 1964, WLEX's national accounts included about 15 products of Procter & Gamble. In its choice of markets, a weighting factor is used based upon ARB figures. These products have been advertised on WAVE–TV in Louisville as well as on WLEX. WAVE–TV, whose grade B signal extends beyond WHAS' proposed grade B, did not attain any rating for the Lexington area in ARB's report for March 1964. In fact, most of the national spot advertisers on WLEX who spent $2,000 or more also advertise on WAVE–TV. A WHAS inquiry as to Maxwell House advertising revealed that a grant to WHAS would not raise WLEX's cost per thousand beyond reasonable limits. Standard Oil, whose advertising is based on dealers in a market, bought WAVE as well as WLEX. Other WLEX accounts contacted by WHAS indicated that WHAS' new facility would not change the buying habits of those clients. WLEX's examples of refusals to advertise over its facilities dealt, in the main, with the period prior to 1960. Practically all of them have advertised after that date. WLEX did not discuss WHAS' proposed operation with any of its national spot advertisers or their agencies.

31. Revenue received by WLEX from regional advertising averaged 15.3 percent of total revenues received during fiscal years 1960–64, inclusive. Because of the element of proximity, regional advertisers are usually more knowledgeable than national advertisers about a station and its market; thus, WLEX has found that selling problems at the regional level "are not nearly so severe as they are at the national level." Regional market selection takes into consideration programing, support for product distribution, and size of the market. Almost all of the WLEX regional accounts which spent

106-507—66——3

$2,000 or more for advertising either have no product distribution in Louisville or advertise over WAVE–TV as well as WLEX. WLEX did not discuss WHAS' proposed operation with any regional accounts or their agencies. WHAS did make such contacts, named the accounts contacted, and reported their views on the impact question with respect to their advertising. None felt that a grant to WHAS would affect its advertising on WLEX.

32. The ratings indicate that WLEX delivers more homes during prime time than does WKYT, its UHF competitor in Lexington. A 1964 report showed approximately 29,000 homes viewing television in the Lexington metropolitan area, consisting of Fayette, Clark, and Madison Counties. WAVE–TV delivered only 3 percent of the viewing homes in this area during prime time, while WLEX and WKYT–TV delivered a total of 90 percent. WHAS placed great stress on the limited rating attributed to WAVE–TV, emphasizing the fact that WAVE–TV's present penetration of the Lexington market is deeper than would be that of WHAS in the event it is granted authority to operate nondirectionally. WLEX's witnesses conceded that WAVE–TV does not deliver too great an audience in the Lexington metropolitan area; that WAVE–TV's showing is very poor there; and that, as between WHAS' nondirectional operation and WAVE–TV's current operation, it was expected that WAVE–TV would have the greater audience in the Lexington metropolitan area. As we have seen, the WHAS grade B contour would not reach Fayette County, and also would not reach Clark or Madison Counties. WLEX uses Nielsen reports in selling time. These reports showed the following percentages for market sharing in the Lexington metropolitan area:

[Figures in percent]

	7 to 9 a.m.	9 a.m. to noon	Noon to 5 p.m.	5 to 7 p.m.	7:30 to 11 p.m.	11 p.m. to 1 a.m.
WKYT	31	42	44	46	41	51
WLEX	54	40	45	43	49	34
WAVE	0	0	0	3	3	0
Others	13	15	9	7	8	14

(We recognize that the above columns do not total 100 percent; however, the chart is derived from WLEX's exhibit 44, p. 7.)

33. The only dollars and cents figure offered by WLEX as evidence of anticipated financial losses resulting from a grant to WHAS was the estimate of a director of WLEX, H. Guthrie Bell, who is also its secretary-treasurer. Bell estimated that the loss would be from $75,000 to $100,000 per year. He arrived at this figure as follows: Approximately 32,000 people reside in the additional WLEX grade B area which would be overlapped if WHAS operates nondirectionally: this population amounts to 8,000 television homes, of which 80 percent, or 6,400, can be considered UHF homes; all of these homes would be lost to WLEX; [16] the 6,400 homes represented about 8 percent of all the UHF homes within the grade B contour of WLEX; 8 percent of

[16] Bell appeared to modify his "total loss of homes" view when he further testified that the loss in the overlap area could be some percentage of the 6,400 homes; whatever WLEX's present share of the 6,400 homes, WLEX would lose its present share.

the gross billings for the month of May 1964 multiplied by 12 resulted in the above figure of $75,000 to $100,000. However, three other WLEX witnesses believed that rather than incur a total loss of audience in the overlap area, WLEX would share that audience with other services and WHAS. Factors involved in audience sharing include the loyalty of the viewers, which would be to WLEX's advantage; whether the shorter-lived UHF oscillator tubes in the UHF TV sets would be replaced when they become defective; the quality of the respective signals; and programing.

34. A WHAS director, who is also its vice president, also believed that the overlap audience would be shared and that the availability of a complete CBS schedule, together with WHAS' proposed local programing, would attract viewers in that area; that although it would compete for all viewers, WHAS expects to obtain from 10 to 15 percent of the sets in use for network programs and more for local news, weather, and sports programs; that during prime evening hours, about 60 percent of the 6,400 UHF sets, or 3,800, would be in use; that he hoped to take about 400 homes, or 1,600 people, from WAVE-TV and the two Lexington UHF stations; that there would be no impact on network, national, regional, or local advertising; and that some impact would occur when the stations were competing on equal technical terms for audience based on program content.

35. Additional views expressed by WLEX's station manager, secretary-treasurer, and national spot representative were as follows: The problem of selling WLEX would be increased because a grant to WHAS would lessen the number of homes which WLEX might otherwise claim; that a grant would affect WLEX as a matter of degree which might be "an increasing thing" because UHF stations "are not too sturdy or too healthy anyway"; that loss of network programs, advertising, and revenues would adversely affect WLEX's ability to serve its community; that a grant "may not mean that WLEX would be affected immediately, in the long run it would be affected because they would have a loss of homes"; that in order to maintain the same cost per thousand, WLEX would have to reduce its rates to maintain business, resulting in reduced revenues, overhead, and programing; and that WLEX's ability to serve its community would be adversely affected.

36. As we have seen, no discussions were initiated or conducted by WLEX's personnel or officials concerning WHAS' proposed nondirectional operation with any local, regional, national, or network advertiser or agency. No discussions were conducted by WLEX's board of directors regarding specific program adjustments which would be made in the event of a grant to WHAS. As to the probable degree and amount of adjustment that might be required, WLEX's secretary-treasurer believed that "we have to cross that bridge when we come to it." The president of WLEX's national spot representative testified that he had not contacted CBS or NBC to determine the effect of a grant to WHAS; that certain national accounts would or might be

affected by a grant; and, when asked to identify said accounts, stated that "I am not able to answer that question either satisfactorily to myself and it wouldn't be to you." The vice president and sales manager of said national representative conceded that he had not talked to any advertising agency or any advertiser with respect to the proposed WHAS operation because "There is no need to bring it in, because at the current time, it hasn't been granted."

37. Our approach to the "impact" issue in this case involves certain considerations. In *Carroll Broadcasting Co.* v. *FCC*, 103 U.S. App. D.C. 346, 258 F. 2d 440, 17 R.R. 2066 (1958), the court of appeals held that the Commission had the power to determine whether the economic effect of a grant of a broadcast operation on the service of an existing station would be to damage or destroy service to an extent inconsistent with the public interest; that "* * * economic injury to an existing station, while not in and of itself a matter of moment, becomes important when * * * it spells diminution or destruction of service. At that point the element of injury ceases to be a matter of purely private concern." Unlike other broadcast proceedings, in cases involving claims by UHF television stations of adverse economic impact from VHF stations, the Commission has not limited itself solely to the detriments considered in the *Carroll* case. Thus, in its second decision in *Triangle Publications, Inc.*, FCC 64–692, 37 FCC 307, 3 R.R. 2d 37 (1964), the Commission stated:

> 33. * * * However, in determining whether a grant of the application would serve the public interest, our concern is not limited to the possible demise of the UHF stations or even to the possible degradation of service to the public. It is also of the utmost concern to the Commission that UHF service be maintained in a healthy condition because with a healthy UHF operation we can look forward toward program improvement and a greater capability to serve the public.

Accordingly, a review of Commission and other precedents is in order at this time.

38. In April 1952, the Commission adopted its television Table of Assignments, wherein VHF and UHF channels were assigned to listed communities. During the period that followed, it became apparent that UHF was not developing as anticipated. In both large and small markets, UHF stations were encountering difficulties in operating successfully or continuing in operation in VHF markets. The questions presented by the introduction of a VHF signal in a UHF market came before the Commission in its first decision in *Triangle Publications, Inc.*, FCC 60–921, 29 FCC 315, 17 R.R. 624 (1960), affirmed by the court of appeals, sub nom. *Triangle Publications, Inc.* v. *FCC*, 110 U.S. App. D.C. 214, 291 F. 2d 342, 21 R.R. 2039. In that case, Triangle, licensee of a VHF station in New Haven, Conn., sought to move its transmitter site about 14 miles to a site almost 20 miles from New Haven. As a result, for the first time its city grade contour would be moved to the southern border of Springfield, Mass., while its grade A contour would encompass all of Springfield and substantial portions of other communities. Triangle's proposal was opposed by UHF station WWLP in Springfield. The Commission denied Triangle's application on findings that the proposed move would result in the likelihood

of loss by WWLP of the ABC Network; that it would impair the ability of the UHF stations in the Connecticut Valley to compete effectively, and would jeopardize in whole or in part the continuation of their existing service; that potential losses in income had been demonstrated by the uncontroverted testimony of qualified witnesses; that the proposed move would upset the delicate balance in distribution of services that the Commission had so carefully allocated for the Springfield area; and that said move would result in a net loss of some 903,000 persons by Triangle.

39. As is indicated in paragraph 2 herein, in the first *WHAS* case, released in August 1961, WHAS proposed to furnish a vastly improved signal to Lexington, Fayette County, and the majority of the areas and populations within the grade B contours of both Lexington UHF stations, thus permitting many persons then receiving no more than a marginal WHAS signal to receive a grade A or grade B VHF signal. Citing the first *Triangle* case, the Commission denied the application on grounds similar to those set forth in said case.

40. In the above first *Triangle* decision, the Commission pointed out that among the reasons for the difficulties encountered by UHF stations in competition with VHF stations were those "related to receiver conversion, advertising support, program availabilities, and other related factors." With respect to receivers, there are references in the record before us to the so-called "all-channel receiver law." This act, Public Law 87–529, was signed by the President on July 10, 1962, and was implemented by Commission rules. Under its terms, all television receivers shipped in interstate commerce or imported into the United States for sale or resale are required to be capable of adequately receiving all television channels. The purposes of the law are obvious: It was directed squarely to the problem of television receiver incompatibility with the expectation that it would open the opportunities for the fuller use of UHF channels. See *First Report and Order in the Matter of Fostering Expanded Use of the UHF Television Channels*, FCC 62–797, 23 R.R. 1576, released July 20, 1962; *Report and Order Terminating the Eighth Captioned Deintermixture Proceedings*, FCC 62–953, 23 R.R. 1645, released September 14, 1962. The Commission believed that

> * * * For with this legislation, time would begin to run in favor of the UHF development. The UHF operator (both commercial and educational) could look forward to UHF receiver saturation not only in his home city but in the surrounding rural areas as well, and could expect improvement in the quality of the UHF portion of the receivers in the hands of the public * * *. (FCC 62–953, supra.)

41. Thereafter and on July 24, 1964, the Commission released a second decision in *Triangle Publications, Inc.* (FCC 64–692, 37 FCC 307, 3 R.R. 2d 37), where, although concern was again indicated for the well-being of the UHF operations, it was tempered with the Commission's belief that, with the ultimate intended effect of the all-channel receiver legislation, UHF would be in a position to compete more effectively with VHF. The Commission had nevertheless included among the issues at the time of designation one which sought to determine whether a grant of the application would have such an economic

impact upon UHF stations in the Connecticut Valley as to jeopardize the continuation of their, to wit, existing services, and had placed the burden of proof on the VHF applicant Triangle.[17] In resolving this issue, and denying the VHF application to relocate its transmitter, etc., the Commission pointed out that pending any appreciable effect of all-channel receiver legislation on set conversion, the immediate impact of VHF signal encroachment on existing UHF stations should not be permitted absent exceptional public interest considerations; and that optimum conditions for growth of UHF to achieve VHF compatibility should be fostered. With this overall policy concept in mind the Commission looked to the showing made on the record. On the basis thereof the Commission concluded that the definitive showing in the *Triangle* proceeding established that the economic impact on the UHF stations if the VHF application were granted would jeopardize the continuation of their existing services; that Triangle, the VHF station, did not sustain its burden in establishing inter alia that a grant would not cause such an economic impact upon the existing UHF stations in the Connecticut Valley as to impair their ability to compete effectively; and that a denial was therefore warranted. The Commission predicated its conclusion essentially on the showing, not counteracted by Triangle, that a UHF respondent suffered specific reverses in its national advertising when a VHF station had previously entered the competitive area; that the UHF station was forced to adjust to meet the competition; that in the final analysis the UHF was unable to improve its public service programing to the detriment of the public interest; that these same conditions would prevail if the Triangle application to change location were to be granted.

42. The second *Triangle* decision thus appeared to establish that, although a general protection of UHF stations was still warranted, the need for the protection would continue to be reduced by time in view of the all-channel receiver law; that in any event the specific showing in each case would also be considered. In keeping with this policy, the Commission on March 16, 1964 (which date precedes the actual release date of the second *Triangle* decision, supra, but is approximately 2 years subsequent to the issuance of the designation order therein), released a memorandum opinion and order in the Sioux City, Iowa, proceeding (*KTIV Television Co.*, FCC 64–212, 2 R.R. 2d 95), designating for hearing three VHF applications for change in transmitter sites, etc., since such requested changes would encroach upon the service contour of station KQTV, the only UHF station in the area. The Commission stated in the *KTIV* proceeding:

> 8. The Commission's concern with the plight of UHF stations in a VHF-dominated area is too well known to require further discussion here. That concern is, however, even more acute where, as here, the UHF station appears to be in a precarious financial condition. We do not propose to provide a "protected contour area" for KQTV, but rather we are interested in the effect on the public interest of the possible demise of KQTV in the event of a grant of any or all of these applications * * *.

[17] Under its second proposal, Triangle would have increased its coverage so that its grade B contour would have embraced virtually all of Springfield, portions of other sizable communities, and 46.4 square miles of the Springfield urbanized area.

The Commission pointed out further that because of KQTV's precarious economic condition, the question was whether a grant of the VHF applications would occasion the demise of KQTV, and, if so, whether the local television service would be lost or replaced by the new services of applicants. However, the burden of proof with respect to the survival issue was now shifted to the UHF respondent—KQTV was now called upon to show that a grant of the VHF applications would impair its ability to compete effectively and would jeopardize the continuation of its existing UHF service.[18]

43. The change in approach continued to prevail in subsequent proceedings. The Commission, in designating VHF applications for hearing, continued to seek a determination of the impact which the proposed VHF operations would have on the UHF development in the area, with due consideration given the financial status of the UHF operation, and placed the burden of proof with respect to the survival issue on the UHF respondents. As we have noted, in its designation order in the case before us (FCC 64–604, released July 8, 1964), the Commission placed on WLEX "the burden of proceeding with the introduction of evidence and the burden of proof" on the impact issue. The same was true in *Selma Television, Incorporated (WSLA–TV)*, FCC 65–216, 4 R.R. 2d 714, released March 22, 1965, even though one of the UHF respondents had just resumed operation in March 1964, after its predecessor had failed financially after 11 months of operation; and in *Central Coast Television (KCOY–TV)*, 2 FCC 2d 306, 6 R.R. 2d 719, released January 18, 1966, where the Commission questioned the impact which a grant would have on the prospects for the early activation of a new UHF station on which construction has not as yet been completed.

44. Significant observations of interest here were set forth by the Commission in *Atlantic Telecasting Corporation (WECT)*, FCC 66–307, 7 R.R. 297, released on April 18, 1966. In that case, an AM station and an applicant for a UHF station in Fayetteville, N.C., opposed the application of WECT to change its VHF facilities, alleging that WECT's grade B signal in Fayetteville would be increased to grade A, causing serious adverse effects upon the development of a local UHF station. Although the Commission rejected the claims because of an inadequate showing and lack of standing, it proceeded to discuss the "UHF impact question." After referring to grade B and grade A signals being received in Fayetteville from other VHF stations, the Commission set forth the following criteria and precedents:[19]

> 9. WECT proposes to operate in accordance with all of the Commission's rules,[2] would not introduce a new VHF television service into the com-

[2] Cf. *St. Anthony Television Corporation (KHMA)*, FCC 64–330, 2 R.R. 2d 348, reversed and remanded sub nom. *Louisiana Television Broadcasting Corporation, et al.* v. *Federal Communications Commission*, —— U.S. App. D.C. ——, 347 F. 2d 808, 5 R.R. 2d 2025.

[18] In a memorandum opinion and order in the Sioux City proceeding, released May 25, 1964, FCC 64–458, 2 R.R. 2d 712, the Commission denied applicant's request for clarification of the issue concerning impact and repeated its concern over the public interest as opposed to the private interest; that it did not propose to provide a protected contour area for UHF; that the issues were intended more as a guideline for use in evaluating the possible injury to the public interest. Thereafter, in a memorandum opinion and order, released Jan. 22, 1965 (FCC 65–46, 4 R.R. 2d 243), the Commission accepted an agreement among the parties, granted two of the applications (denying one), and terminated the proceeding.

[19] Cf. *Black Hawk Broadcasting Company*, FCC 66–559, released June 24, 1966.

munity,[3] would not represent encroachment of a new VHF service into an area served only by a UHF station,[4] and would not result in any loss areas.[5] There would be a gain area of 8,075 square miles, containing 736,157 persons, within WECT's proposed grade B contour, representing an increase of 105 percent of the population presently within its predicted grade B contour.[6] Moreover, there would be a reduction of 12.7 percent of the area within WECT's present predicted grade B contour which is wasted over the waters of the Atlantic Ocean, representing a more efficient use of the frequency consistent with the mandate of section 307(b) of the Communications Act. There is insufficient factual support for Lee's suggestion that the WECT proposal constitutes an attempted "move-in."

[3] Cf. *Selma Television Incorporated* (*WSLA–TV*), FCC 65–216, 4 R.R. 2d 714.
[4] Cf. *KTIV Television Company* (*KTIV*), FCC 64–212, 2 R.R. 2d 95.
[5] Cf. *Triangle Publications, Inc.*, 29 FCC 315, 17 R.R. 624, affirmed 110 U.S. App. D.C. 214, 291 F. 2d 342, 21 R.R. 2039; *Central Coast Television* (*KCOY–TV*), FCC 66–48, 2 FCC 2d 306.
[6] With respect to WECT's newly authorized predicted grade A contour, there would be a gain of 4,422 square miles, containing 356,198 persons, representing a 198-percent increase in population within the predicted grade A contour. There would be a reduction of 17.3 percent of the area within the predicted grade A contour which would be over water. Within the grade A gain area, 104,484 persons will receive a first grade A signal.

45. Another significant pronouncement made by the Commission in the *Atlantic* case is that

> * * * the unsupported conclusion that any improvement of the service contours of a VHF station in an area to which a UHF channel is allocated is, per se, fatal to the prospects for successful UHF operation is not warranted. Such a view would severely restrict the Commission's ability to authorize improvements in the facilities of VHF stations because there are few areas in the United States to which no UHF channels are located * * *.

Clearly, the above statements constitute a substantial reassessment of the view expressed in the first *Triangle* case to the effect that VHF penetration of a UHF market was presumptively fatal to UHF stations.

46. In review, it is apparent that sight of the basic goal has not been lost—the Commission still seeks a competitive intermixed 82-channel television system, predicated on full use of the 70 UHF channels. However, with the passage of time since the enactment of the all-channel receiver law, the need to protect UHF stations vis-a-vis VHF stations without regard to the ad hoc showing and the status of the individual stations has diminished. Each application must now be examined not only in light of the overall protection concept but on the basis of the evidence produced pursuant to the issues, with consideration to be given the length of time the UHF has been in operation and what its financial status may be, to determine what effect the impact would have on its operation and how this impact would in the final analysis alter the benefits to the public. WLEX urges that the very speculative nature of the issues defies proof by absolute and concrete means. It, therefore, contends that it established its proof by the best possible method of showing the effect of like causes and happenings. However, these like causes and happenings must be related to the present operation, and it was WLEX's burden to demonstrate how the public interest and not merely its private interest would best be served. Thus, the position assumed by WLEX and supported by the Bureau, namely, that, because of the class of operation, WLEX is entitled to protection, must be rejected. Absent a specific and con-

vincing showing by WLEX that the impact on WLEX by a non-directional operation of WHAS would result in damage not only to WLEX's private interest but to the public interest as well, the Board must conclude that WLEX failed to meet its burden.

47. In designating WHAS' application for hearing on the impact issue (*WHAS, Inc.*, supra), the Commission discussed at length the considerations on which the issue was framed and the basis for placing the burden of proceeding and proof on WLEX. These considerations relate to the showing expected of WLEX on the impact issue and warrant further mention. In reaching its determination to grant WHAS directional operation, the Commission found that "the present application clearly will not have as substantial an effect on the basically UHF area of Lexington as would the previous proposal." In its summary comparison of the two proposals, the Commission pointed out in footnote 3:

> In its earlier decision, *WHAS, Inc.*, supra, the Commission found that a grant of the applicant's earlier application would have resulted in WHAS-TV's predicted grade A contour encompassing Lexington, Ky., and two-fifths of Fayette County, while its predicted grade B contour would have extended to approximately 21 miles east of Lexington. Sixty-two percent of the population within WLEX-TV's grade B predicted contour does not receive VHF service of predicted quality of grade B or better. Had the earlier WHAS-TV application been granted, only 13 percent of the population within WLEX-TV's predicted grade B contour would not have received predicted VHF service of grade B or better. On the other hand, under the present proposal, WHAS-TV's predicted grade B contour will remain west of Lexington and will not even reach Fayette County. WHAS-TV presently serves approximately 14.3 percent of the population within WLEX-TV's predicted grade B contour and this figure will increase to approximately 20 percent of the population within the WLEX-TV grade B contour. However, the additional overlapping of the two services will occur entirely within an area which is already receiving at least one VHF service.

48. As indicated previously, in the designation order herein, the Commission did not talk about "some impact" or "an impact" upon WLEX; rather, it talked in terms of "substantial * * * effect" and "significantly affect[ing]." Further, reference was made to the "basically UHF area of Lexington." This factor, the other matters mentioned above, and the placing of the burden of proof on WLEX confirm the view which we have expressed that UHF impact cases in general and the instant case in particular are no longer to be decided on the basis of presumed economic injury and adverse public effects but rather on the basis of an ad hoc determination in each case.

49. As we have seen, WLEX's grade B contour presently encompasses 429,852 persons in 5,360 square miles. Of the foregoing, 273,992 persons (64 percent)—including the 131,906 persons in the Lexington standard metropolitan statistical area (Fayette County)—in 2,561 square miles (48 percent) are now and (with a grant to WHAS) would continue to be beyond the grade B contour of any VHF station. Thus, nearly half of WLEX's area, containing nearly two-thirds of WLEX's population, is a "UHF island" served by the two Lexington stations. The remaining 155,860 persons in an area of 2,797 square miles are presently reached, in varying degrees, by the grade B signals of 5 VHF stations—3 in Cincinnati and 2 in Louisville. Of the lat-

ter (155,860 persons, 2,797 square miles), 51,483 persons in 863 square miles are presently within the grade B contour of WHAS and within that of WAVE–TV as well. With a grant, WHAS (without a loss of any existing areas or populations) would add to its grade B coverage by 70,560 persons and 1,505 square miles. Of the latter, however, only 32,054 persons in 667 square miles are of particular significance here, for it is these persons and areas that would represent additional overlap between WHAS and WLEX. But all of these persons and areas are presently within the grade B contour of WAVE–TV, Louisville, and some of them are within the grade B contours of from one to three VHF stations based in Cincinnati. According to the contour maps in evidence, all portions of the new overlap area are closer to Lexington than to Louisville. The persons reached by WAVE–TV, but not by the Cincinnati stations, presently have ABC coverage from WKYT–TV in Lexington, NBC coverage from WAVE–TV and WLEX (in major part), and CBS coverage from WHAS (full) and WLEX (partial). Utilizing WLEX's UHF conversion rate of 80 percent (and assuming that all homes in the area are television equipped), 20 percent of the 32,054 persons, or just over 6,400 persons (1,600 TV homes), are presently incapable of receiving UHF stations. On the basis of the foregoing statistics, and viewing the whole of the technical evidence in a light favorable to WLEX's position, the most that can be concluded for WLEX is that (*a*) 6,400 persons would have a lesser incentive than before to convert to UHF; and (*b*) of the balance of 25,600 persons, some (1) would be less inclined than before to replace a wornout UHF oscillator tube, (2) would view WHAS during certain hours when a CBS or a nonnetwork program appears on that station and not on WLEX, and (3) would run counter to the principle of audience loyalty, and direct their viewing habits away from WLEX. When the above factors are weighed against the other statistical evidence discussed above, and when it is remembered that the all-channel receiver law will continue to run in WLEX's favor (as wornout VHF-only or monochrome sets are replaced), any initial persuasiveness of said factors is substantially diminished.[20] Additionally, the total data discussed herein corroborates WHAS' "opinion" evidence to a high degree, and has the completely opposite effect on that submitted by WLEX.

50. WLEX attempted to translate its predicted viewer losses into dollars and cents, and arrived at a figure of $75,000 to $100,000 per year. But WLEX's figure is predicated on assumptions that (*a*) all of the 6,400 UHF homes (32,000 persons, divided by an average of 4 persons per home, and multiplied by the 80-percent conversion rate) in the proposed new overlap area are now creditable to WLEX; and (*b*) all would be lost to WLEX with a grant to WHAS. Even were there no other signals presently in the area, the predictions would be patently unreasonable. For the most part, WLEX carries NBC programs during prime time. Were WHAS to be WLEX's first competitor, would all of the 6,400 homes switch exclusively to WHAS

[20] Compare *Northern Microwave Service, Inc.*, FCC 64–911, 3 R.R. 2d 708 (1964), where the Commission held that a potential loss of 800 TV homes did not appear to have a significant effect on a station's net weekly circulation of 24,300 TV homes.

merely because that station is a CBS affiliate? Surely, someone would continue to watch NBC shows on WLEX. But the fact is that the 6,400 homes have not belonged exclusively to WLEX: As the record indicates, it has been sharing all of them with WAVE-TV, substantially all with WKYT-TV, and some of them with up to 3 Cincinnati stations. Thus, where WLEX presently shares the 6,400 homes with from 2 to 5 other stations, a grant to WHAS would increase the competitors to from 3 to 6. It is unreasonable to predict that those in a position to place or influence the placing of advertising would be persuaded by so modest an increase in WLEX's competition. It is reasonable to assume that viewers have selected (in the past) and would select (in the future) their channels according to their taste for the programs offered by the respective stations. To the extent that WLEX in the future presents competitively appealing programs—either locally or network originated—it will obviously continue to attract viewers in respectable numbers, thereby precluding any significant impact upon either its private interests or the public interest. The foregoing is not to say that WLEX would not suffer some loss of audience. WHAS concedes that it would take viewers away from WLEX, and has announced an intention to attempt to do so. WHAS anticipates that it would obtain from 10 to 15 percent of what it terms "3,840 sets in use" (6,400 UHF homes times 60 percent). It talked in terms of gaining 400 homes, and none of its figures was controverted by WLEX. If this estimate is correct, and if WLEX is correct in asserting that audience loss would translate directly into revenue loss, WLEX would lose revenues in no greater amount than $6,250 per year (one-sixteenth of WLEX's prediction of $75,000 to $100,000). However, the Board's determinations herein are in no way based upon acceptance of WHAS' financial estimates. The burden of proof was upon WLEX, and the unreasonableness of its predictions, by itself, precludes any holding that it has sustained that burden.

51. The balance of WLEX's showing with respect to the impact on its revenues and profits as a result of WHAS' proposed operation was also of a generalized nature and, in the main, conclusionary. It lacked direct, specific factual data, the type of pertinent and relevant material required for it to prevail in the ad hoc resolution of the impact issue. Its revenues are derived from local, regional, national, and network advertisers. While its showing as to the "tools of the trade," "unduplicated homes," and the "cost per thousand" factors are pertinent and relevant considerations, the conclusion most favorable to WLEX to be drawn therefrom is that, generally speaking, certain advertisers, particularly on the national level, would refrain from buying a station if the cost per thousand is too high. In the case before us, WLEX has failed to show that any increased cost per thousand would result in the loss of a single advertiser, existing or future; it has also failed to show that WHAS' nondirectional operation would have any significant effect on WLEX's audience ratings or circulation, as reported in the "tools of the trade" relied on by advertisers.

52. As we have seen, the record reflects an avoidance by WLEX of certain direct sources of evidence pertinent to the impact issue; it did not approach a single local, regional, national, or network ad-

vertiser to discuss WHAS' proposed operation and its effect on the advertiser's buying policies. Similarly, it did not contact any advertising agency or network. On the other hand, WHAS did contact WLEX advertisers and agencies as well as the CBS Network. It offered testimony concerning these numerous contacts, identified the products advertised, and named the persons contacted and the period of contact. Neither this testimony nor that of a CBS official was controverted by WLEX, nor was it substantially affected by cross-examination.

53. WLEX's revenues from local advertisers have averaged about 45 percent. As we have seen, in the 1960–64 period, local revenues increased from approximately $196,000 to approximately $305,000, and this appears to indicate a strong upward trend in local acceptance. WHAS' proposed grade B signal would not reach either Lexington or Fayette County, and local advertisers use WLEX to reach the local Lexington audience and pay a local rate therefor; this could not be accomplished by buying WHAS and paying its rate, which is about three times that of WLEX. WLEX has failed to show that its local revenues would be diminished as a result of a grant to WHAS. The same is true with respect to WLEX's national and regional revenues which amounted to almost 36 percent of its total revenues during the fiscal years 1960–64, inclusive. There is no testimony from any national or regional advertiser that he would cease buying WLEX, or even reduce the amount of his expenditures on the station. Lexington is recognized as a separate and distinct market, a high priority and important consideration to national and regional advertisers who buy WLEX to meet their Lexington needs, which cannot be met by using a Louisville station—not even WAVE–TV, whose signal extends farther toward Lexington than would that of WHAS operating nondirectionally. As to network revenues (which have averaged 19 percent of total revenues), WLEX offered no testimony from its two networks, NBC or CBS, to show that its supply of network programs or revenues would be diminished upon a grant to WHAS; nor did it produce any other direct, concrete evidence permitting a conclusion that its network revenues would be adversely affected. The testimony of Ward, a CBS vice president, is to the contrary. The record establishes that WLEX is ordered for virtually all of the commercial programs of both CBS and NBC and that this would continue, with no reduction in network orders or rates, if WHAS commences nondirectional operation. WLEX is operating on a profitable basis, earning over $100,000 annually after allowance for depreciation and salaries to certain stockholders. As recently as November 1963, WLEX's general manager and 10.85 percent stockholder described the station to the Commission as "one of the most successful UHF stations in the Nation."

54. WLEX argues further that service contours as projected according to Commission rules do not determine service coverage or a station's market and that consideration must be given to the advertising value of the station coverage. In a large number of exceptions, WLEX relies upon rating service and similar data in contending that (*a*) Cincinnati, Louisville, and other VHF stations have actual and

potential viewers in certain areas beyond their respective grade B contours; and (*b*) Lexington's two UHF stations (including WLEX) have no present viewers in certain areas within their respective grade B contours. A prime implication of the contentions appears to be that (with a grant) WHAS would gain actual and potential viewers beyond the new overlap area of 667 square miles (32,054 persons). Although the boundaries of a station's viewing audience are not necessarily coextensive with the station's grade B contour, this circumstance is of no material consequence in this proceeding in light of the facts (among others) that (*a*) WLEX has flourished in recent years under the existing situation; (*b*) WLEX is currently fully ordered by CBS, whose director of affiliate relations (Carl S. Ward) testified that a grant herein would not affect attempts by CBS to clear its commercial programs on WLEX or to order such programs; (*c*) WLEX is also virtually fully ordered by NBC, notwithstanding that NBC also affiliates with WAVE–TV, which allegedly has actual and potential viewers in the Lexington area; (*d*) in connection with (*c*), WAVE–TV had no rating in the Lexington area in ARB's report for March 1964, and only 3 percent of the Lexington market according to the Nielsen reports utilized by WLEX; (*e*) a grant to WHAS would still leave its grade B contour 5 miles farther from Lexington than WAVE–TV's; (*f*) audience loyalty is a factor in WLEX's favor; and (*g*) WLEX (as well as UHF stations generally) can expect increased viewer potential with additional passage of time from the enactment of the all-channel receiver law. In view of all of the foregoing, it is clear that the area of appreciable impact (if any) would be essentially limited to the new area of overlap (described above) between WHAS and WLEX; and that findings of impact beyond that area would be speculative and conjectural to a totally unwarranted degree. WLEX conceded as much in limiting its "dollars and cents" calculations to such new area of overlap.

55. WLEX contends further that even without the proposed additional area and population, WHAS has held itself out to the advertisers as covering the Lexington market and that with the additional projection it will be in a position to identify itself more readily with Lexington. It is true that in its sales promotion material WHAS has represented that it has as part of its service area the Lexington market. On the other hand, WHAS has not held itself out as a Lexington outlet and cannot now do so. It has not solicited local business in Lexington and has no intention of doing so. In the main, making due allowance for customary coverage "puffing," the promotional coverage material is intended to define its TV market and coverage as a means of competition with its VHF competitor and not for the purpose of selling Lexington market advertisers. Thus, although the outer periphery of WHAS' contour would be brought closer to Lexington, its grade B signal would not actually cover Lexington. It has not been in competition with WLEX for advertising intended for the Lexington market in the past and would not, by the extension of the grade B contour, place itself in such a competitive position. WHAS would continue to be a Louisville station, to be principally sought out by advertisers intending to advertise on a Louisville outlet.

56. In the preceding paragraphs it has been shown that (*a*) WLEX's predictions of substantial audience losses and consequent revenue losses of up to $100,000 find no convincing measure of support either in reason or in the statistical and other technical data of record; and (*b*) the testimony as to the individual categories of revenues and the continued availability of network programs permits only a conclusion that there would be no diminishing of revenues at all to WLEX with a grant to WHAS. But in arguments that go well beyond the question of impact on WLEX's existing financial situation, WLEX appears to take the position that it is entitled to protection so that it may be permitted to adjust the difference between its operation and that of what it considers to be the powerful and wealthy VHF applicant, in order to create a more equitable financial balance. This has never been the Commission's established position. The Commission's interest has extended only to the establishment of a compatible climate between the UHF and VHF operations, and it has protected the UHF operation only to the extent that it could operate in the competitive market. This is clearly pointed out by the Commission in the *KTIV*, *Selma*, and *Central Coast* proceedings, supra, where protection was indicated in each instance because of the precarious financial position of the UHF station. WLEX is not in such a hazardous financial position. On the contrary, WLEX has been a flourishing operation since April 1960, not only reversing the previous loss trend, but also reporting 4-year profits of $384,000 even after deducting (*a*) salaries of nonintegrated stockholders and (*b*) substantial sums for depreciation allowances.

57. Similarly, WLEX contends that its future growth would be affected, with a result that it would not be in a position to extend its programing in the public interest. The further argument appears to be that WLEX would be frozen to its present rates and therefore to its present profits, and WLEX urges that the status quo be preserved until such time as the expected benefits of the all-channel receiver law have been fully realized. The total argument is not a persuasive one. The desired effects of the all-channel law will advance closer and closer to saturation as VHF-only sets are replaced, whether WHAS is relieved of the present restriction on its radiation now or at some future time. In this connection, although the conversion total in the overlap area has reached 80 percent, and although it is undoubtedly higher on WLEX's "UHF-island," it is not unreasonable to assume that future conversions will make possible at least modest increases in existing rates. But even if it is assumed that a grant to WHAS would freeze WLEX to its present profits, it has not been demonstrated that the present return on investment is unfair, or that it is the Commission's function to insure an ever-increasing rate of return for broadcast stations. Moreover, the WHAS proposal in all respects comports with the Commission's rules; and it may be noted here that the imposition of radiation restrictions on television stations, although obviously justifiable in certain public interest situations, is nonetheless at odds with the basic theory of preengineered allocations. With respect to WLEX's argument that it would be financially unable in the future to increase its programing expenditures, WLEX has failed

to demonstrate that in the past such expenditures have kept pace with its increased profits. Thus, in 1956, a year in which it showed a loss of over $92,000 (initial decision, par. 21), its programing expenditures totaled nearly $87,000 (initial decision, par. 41); yet, in 1964, when its profits exceeded $106,000, its programing expenditures actually decreased to just over $82,000. In the foregoing connection, during the 1964 composite week, WLEX did not carry a single sustaining program in the 6–11 p.m. period, and did not present a single noncommercial spot announcement, notwithstanding that 190 spot announcements were presented. Clearly, WLEX's record with respect to sustaining programs and announcements would not worsen with a grant to WHAS. WLEX presently reaches a substantial percentage of the homes within its grade B contour, and it is therefore in a good position to compete for audience. It is not unreasonable to assume that a station's audience (and therefore its revenues) will increase with improvements in programing. With the strong likelihood that WLEX's favorable financial picture will not be impaired, and that it will continue to have substantial sums available for programing improvements, it must be concluded that it will have ample capacity to operate successfully. WLEX has not persuaded the Board that the Commission should provide more than that.

58. In light of all of the above, we conclude that WLEX has failed to sustain its burden of proof under the impact issue; that it has failed to prove that WHAS' proposed nondirectional operation would significantly or otherwise adversely affect WLEX's operation in Lexington; that it has failed to prove diminution or destruction of its service; that it has failed to prove that its service cannot be maintained in a healthy condition permitting program improvement and capacity to serve the public; and that it has failed to prove that the impact on WLEX of a grant to WHAS would affect WLEX to an extent inconsistent with the public interest. We further conclude that the record herein establishes that there would be no significant or other adverse impact on WLEX's coverage, service area, audience ratings, or revenues, and that insofar as there would be any competitive effects WLEX has ample capacity to operate successfully and in the public interest. In short, the criteria for grant specified in the *Atlantic* case (supra, par. 44), namely, (*a*) compliance with Commission rules; (*b*) no new VHF signal to the community; (*c*) no new VHF signal in a UHF-only area; and (*d*) no loss areas by the applicant have been successfully met by WHAS.

59. At the time of the Commission's partial grant of the instant application (July 1, 1964), the only public interest bar to a complete grant was the outstanding question of whether such a grant would significantly affect WLEX's future operations, and, if so, whether any adverse effect would be to an extent inconsistent with the public interest. In ordering an evidentiary hearing on the question, the Commission ruled that upon a determination that the full operation would not significantly affect WLEX's future operations, the condition limiting WHAS' visual radiated power in the direction of Lexington would be removed. The Board's determination here is not merely that WLEX has failed to establish the likelihood of significant effect,

but also that the total evidence of record affirmatively establishes that adverse impact on WLEX and the viewing public is not likely to occur. Therefore, under issue 2, removal of the condition on the Commission's previous grant follows as a matter of course. In connection with the foregoing, it should be noted that, as is apparent from the designation order herein, the Commission has already determined that the areas-and-populations data submitted by WHAS in its application (in the absence of significant adverse impact upon WLEX) supports the requisite finding of public interest, convenience, and necessity. This data, as well as information supplementary thereto, is now of record and is summarized at paragraphs 7, 9, and 11, supra.

Accordingly, it is ordered, This 27th day of July 1966, that the directionalization condition appended to the Commission's partial grant herein of July 1, 1964 (FCC 64–604, released July 8, 1964), *Is removed;* and that WHAS–TV *Is authorized* to operate as proposed in BPCT–3187 (as amended), which specifies an effective radiated power of 133.5 kw (21.26 dbk) nondirectionally.

JOSEPH N. NELSON, *Member.*

APPENDIX

Rulings on Exceptions to the Initial Decision

Rulings on Exceptions of WLEX

Exception No.[1]	*Ruling*
1	Granted in part and denied in part as reflected in the decision's characterization of the proceeding. It may be noted that the proposed substitute wording has the same infirmities of generalization as does the wording to which exception is taken.
2	Granted to the extent that par. 4 of the initial decision is considered to be of no decisional significance. It will remain solely as the examiner's personal explanation of the "obesity of the record."
3, 6	Granted in substance. See pars. 9 and 10.
4, 5	Granted. See par. 8.
7, 8, 13, 17, 24	Granted in substance. WLEX's position in this proceeding is summarized in par. 15.[2]
9, 10	Granted in substance as reflected in this decision.
11	Granted to the extent set forth in this decision and denied in all other respects. See pars. 37–48, inclusive.
12	Granted in substance. See par. 8.
14, 15, 27, 30, 34, 38, 78.	Denied as not of decisional significance.
16	Granted. Par. 14 of the initial decision is amended to show that WLEX replaced its driver transmitter in 1964 at a cost of almost $13,000.
18–22	Denied. The examiner's findings adequately reflect the record in the respects complained of.
23	Denied. See par. 7 of the designation order herein (FCC 64–604; 2 R.R. 2d 1073). The record herein contains substantial evidence with respect to applicant's programing.
25	Granted. The first sentence of footnote 1 is deleted. (The exception erroneously refers to the footnote as "21.")
26	Granted in part. The first sentence of footnote 2 of the initial decision is deleted. See ruling on exception 25. Denied as to the balance of the footnote which adequately reflects the record.
28, 44, 45, 50, 139	Granted to the extent set forth in this decision and denied in all other respects as not being of decisional significance.
29	Granted to the extent set forth in this decision and denied in all other respects as not being of decisional significance, and based on conclusions not warranted by the record.
31	Granted as reflected in this decision. The third sentence in par. 26 of the initial decision is deleted.
32	Granted. "Cost per thousand" is substituted for "Dollars per thousand."
33	Granted to the extent set forth in this decision and denied in all other respects as being too generalized to permit the ultimate finding requested.
35	Granted to the extent set forth in this decision and denied in all other respects as constituting findings and conclusions not warranted by the record.
36, 37	Granted. In the fourth sentence of par. 28 of the initial decision, substitute "do not" for "only rarely."
39, 40	Granted to the extent set forth in this decision and denied in all other respects. See par. 30.

[1] Hyphenated numbers are inclusive. Except as otherwise noted, all paragraph references in the rulings on the exceptions of all parties are to this decision.
[2] Exception 8 erroneously refers to par. 8 rather than par. 7 of the initial decision. Exception 24 contains erroneous references to other exceptions.

106-507—66——4

Exception No.	*Ruling*
41	Granted to the extent set forth in this decision and denied in all other respects as being incomplete. See, for example, par. 23.
42	Denied. The examiner's observation has record support.
43	Granted as set forth in this decision. See par. 28.
46–49, 51–54, 57–74, 77, 137, 138, 143–145, 147, 152.	Granted to the extent set forth in this decision and denied in all other respects as being of no decisional significance. See par. 54.
55	Granted.
56	Denied. The figures cited are misleading. See, for example, the spring 1964 ARB rating book reports that WAVE–TV's rating and share of audience in the Lexington metropolitan area was below minimum reporting standards during all segments of the broadcast week.
75	Granted. See par. 27. However, the record indicates other methods for determining market areas.
76	Granted in part and denied in part. See footnote 11 of this decision. The examiner's observation substantially reflects the record.
79	Denied. The requested findings and conclusions are not supported by the record as a whole.
80	Denied as not of decisional significance. WLEX here complains about the disadvantages to it of the status quo and does not relate them to the impact issue. See also par. 54.
81, 82	Granted and the initial decision is amended to reflect the requested findings.
83	Granted in part and denied in part. The record does not support a finding that Lexington "still remains in a delicate status." See also par. 54.
84	Denied. The requested findings are in part cumulative, and in part contrary to the record.
85, 148	Granted to the extent set forth in this decision and denied in all other respects as not being of decisional significance. See ruling on exception 20. Official notice is taken of the 1960 U.S. census data with respect to Louisville.
86	Granted to the extent set forth in this decision and denied in all other respects as being misleading and not being supported by the record. See also ruling on exception 56.
87–92, 142	Granted to the extent set forth in this decision and denied in all other respects. See pars. 18, 54, and 55.
93	Granted to the extent set forth in this decision and denied in all other respects as not being supported by the record.
94	Denied as containing conclusions not supported by the record.
95, 96, 109	Granted to the extent set forth in this decision and denied in all other respects as containing conclusions not supported by the record.
97, 98	Denied as being speculative, assuming a proposal not in issue, and containing conclusions not supported by the record.
99–105, 153–155	Denied for the reasons set forth in this decision. See, for example, pars. 48 et seq.
106	Granted in substance. See pars. 25 and 26.
107, 135, 136	Granted to the extent set forth in this decision and denied in all other respects as misleading and not reflective of the overall testimony of Ward.
108	Granted to the extent set forth in this decision and denied in all other respects. The significant findings and conclusions are set forth in this decision.
110	Granted to the extent set forth in this decision and denied in all other respects as being speculative in part and cumulative in part.

Exception No.	*Ruling*
111	Granted. The words "To get the full flavor of his views," in par. 37 of the initial decision are deleted and the words "Part of" are substituted therefor.
112, 147	Granted to the extent set forth in this decision and denied in all other respects. See rulings on exceptions 93 and 107.
113, 115–118	Denied. The findings are supported by the record.
114	Granted as reflected in par. 16.
119–121	Denied, and the rulings complained of are hereby sustained. Although a number of differences relating to the financial structures and competitive practices of the two stations are revealed by the record (see, e.g., par. 18 of this decision), a full comparison of what WLEX has termed "the competitive statures" of the two stations is unessential (indeed, is irrelevant) to a resolution of the impact issue.
122, 149–151	Granted in substance as set forth in this decision.
123–130, 140	Granted to the extent set forth in this decision and denied in all other respects as being cumulative in part and argumentative in part. See pars. 37–46.
131	Granted in part and denied in part. The sentence in par. 1 of the conclusions beginning with the word "While" is deleted. The remainder of the conclusions in said paragraph are supported by the record.
132	Denied for the reasons set forth in this decision. Moreover, the facts and issues in the *Triangle* cases, supra, are not identical with the facts and issues in the instant case. See, for example, pars. 30 and 49.
133	Granted to the extent set forth in this decision and denied in all other respects. See rulings on exceptions 123 et al., 132, and par. 51 of this decision.
134	Granted to the extent set forth in this decision and denied in all other respects. The conclusions in par. 4 of the initial decision are warranted by the record.
141	Granted to the extent set forth in this decision and denied in all other respects as being in part cumulative and in part not supported by the record.
146	Granted to the extent set forth in this decision and denied in all other respects. See rulings on exceptions 93, 123 et al., and 132.

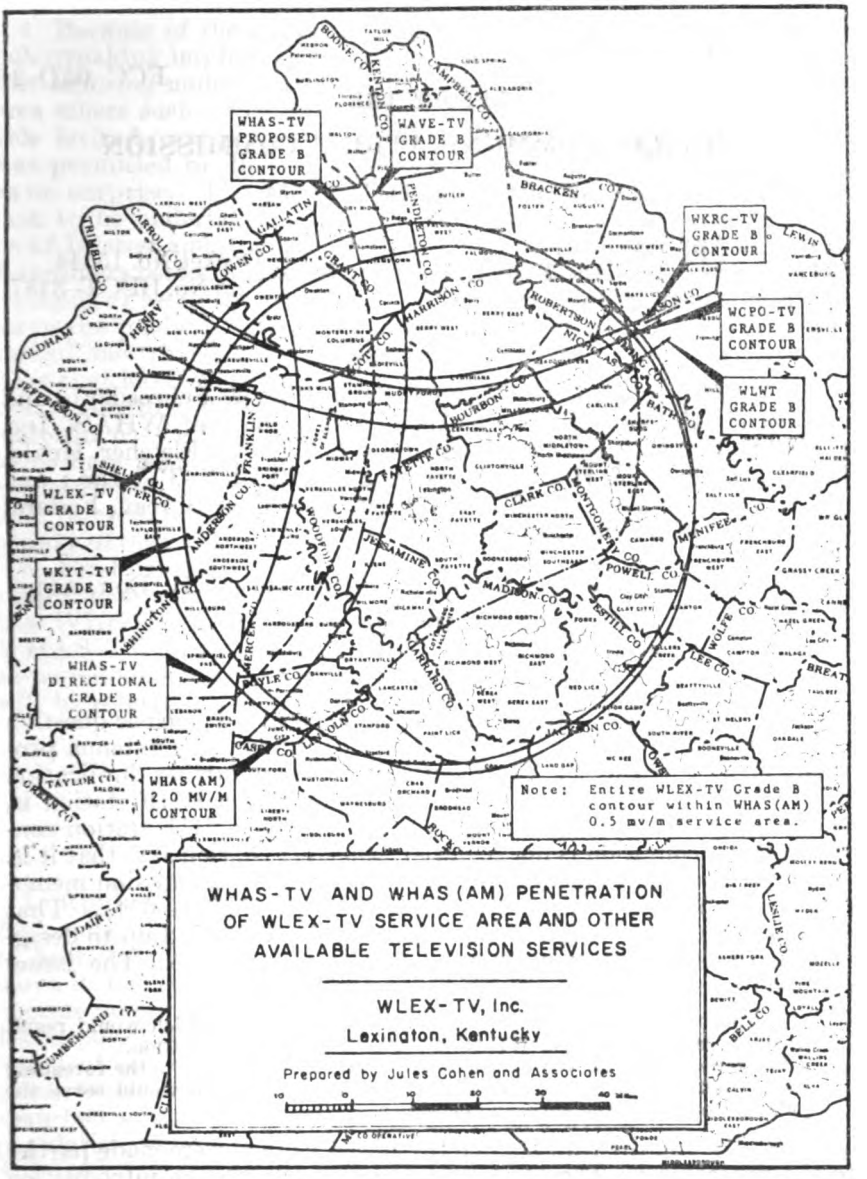
Rulings on Exceptions of Broadcast Bureau

Exception No.	*Ruling*
1	Granted to the extent provided in the ruling on WLEX's exception No. 2.
2	Denied. The examiner's generalized characterization of the task before him, although not all-inclusive, is accurate.
3	Granted as set forth in this decision.
4	Denied. See par. 8.
5	Granted in substance. See par. 8.
6	Granted in substance. See coverage and overlap findings set forth in this decision and ruling on WHAS' exception No. 6.
7	Granted in part and denied in part. See decision and rulings on WLEX's exceptions Nos. 7–11, inclusive.
8	Denied. The examiner's findings adequately reflect the record in the respects complained of.
9	Granted to the extent set forth in this decision and denied in all other respects. See pars. 18, 54, and 55.
10	Denied. Although conclusionary, the sentence objected to is supported by the record.
11, 12	Denied. On the basis of the record as a whole, the Board is essentially in agreement with the substance of the paragraphs complained of.

Exception No.	*Ruling*
13	Granted to the extent set forth in this decision and in the rulings on exceptions of the parties herein, and denied in all other respects as being unsupported by the record and cumulative.
14, 15	Granted in substance as set forth in this decision.
16	Granted to the extent set forth in this decision and denied in all other respects as being in part of no decisional significance and in part cumulative.
17	Granted to the extent set forth in this decision and rulings on the exceptions of the parties herein, and denied as to the ultimate conclusion for the reasons set forth in this decision, particularly pars. 49 et seq.
18	Denied for the reasons set forth in this decision.

Rulings on Exceptions of WHAS, Inc.

Exception No.	*Ruling*
1	Granted in substance as set forth in this decision and in ruling on WLEX's exception No. 2.
2–5, 64	Granted in substance as set forth in this decision.
6	Granted. WLEX's exception 32, p. 7, is substituted for the maps set forth in finding 4 of the initial decision and is attached hereto.
7–15, 17–63, 65–75, 77.	Granted to the extent set forth in this decision and rulings on the exceptions of the parties herein, and denied in all other respects as cumulative and of no decisional significance.
16	Denied as not of decisional significance.
76	Granted. The word "Respondent" is substituted for the word "applicant" in the second sentence of conclusion 5 in the initial decision.



FCC 65D-24

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of WHAS, INC. (WHAS-TV), LOUISVILLE, KY. For Construction Permit	Docket No. 15544 File No. BPCT-3187

APPEARANCES

Neville Miller, John P. Bankson, Jr. (Miller & Schroeder), and *Eugene F. Mullen* (Mullen & Connor), on behalf of WHAS, Inc. (WHAS-TV); *Russell Rowell* and *John L. Tierney* (Fletcher, Heald, Rowell, Kenehan, & Hildreth), on behalf of WLEX-TV, Inc.; and *Robert B. Jacobi*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER THOMAS H. DONAHUE

(Adopted May 28, 1965)

PRELIMINARY STATEMENT

1. This case is not without its unusual aspects. The basic question to be resolved is whether imposition of a directionalized antenna provision on the license of a VHF station to prevent further duplication by that station of portions of the service area of a UHF station is, under the public interest standard, required. The VHF station contends such a condition is not required; the UHF station says that it is.

2. The matter was designated for hearing by a Commission memorandum opinion and order released July 8, 1964 (FCC 64-604). That document recites at length the background facts that led up to designation. Their recapitulation need not detain us here. The issues specified were:

> 1. To determine the impact upon station WLEX-TV which would result from operation of station WHAS-TV without directionalization.
> 2. To determine in view of the evidence adduced pursuant to the foregoing issue whether removal of the directionalization condition would serve the public interest, convenience, and necessity.

WLEX-TV and the Chief of the Broadcast Bureau were made parties to the proceeding. The burden of proceeding with the introduction of evidence and the burden of proof with respect to issue 1 were placed upon WLEX-TV.

3. The record of transcribed proceedings commenced on September 1, 1964. Three prehearing conferences were held. On October 26, 1964, formal hearing commenced. It ran intermittently for 16 days and closed on December 1, 1964. Proposed findings were filed on March 1, and reply findings on March 22, 1965.

4. Because of the unique character of the proceeding, its inchoate policymaking implications, and the patent handicap that WLEX-TV was laboring under in advocating insulation from competition in an area where such a concept is not without alien implications, considerable latitude was permitted WLEX-TV on the scope of evidence it was permitted to elicit in support of its position. The result comes as no surprise. The record contains much matter not material to the task to be undertaken in this initial decision. Conceivably, it may be of interest and even assistance to those in a policymaking position. Examiners perform no role in the monumental job of blending various methods of using the television spectrum into a synthesis best suited to serve the public interest. Thus, pleas adorned or unadorned by historical fact that claim equitable relief because of membership in a class that has been bruised in acting as an ingredient in experimentation trying to find that blend are not for the undersigned. That such material has been gathered up en route to the bread and butter task to be here performed may be regarded in the overall scheme of this proceeding as a sort of "lagniappe" by those involved in the difficult task referred to above. This is all by way of explaining the general obesity of the record.

5. Findings are approached. The task under issue 1 may now be simply characterized: On the basis of facts material to the question, has WLEX-TV made out a case for the proposition that, were WHAS-TV to expand as proposed, WLEX-TV would be so injured as to redound to the injury of the public? Hereafter, WHAS-TV will be referred to as Applicant; WLEX-TV as Respondent.

FINDINGS OF FACT

The Parties

Applicant

1. Applicant, which operates on channel 11 (VHF) in Louisville, Ky., is moving its antenna and transmitter from downtown Louisville to New Albany, Ind., about 3½ miles north of Louisville. With the move it also seeks to expand its service area. Under its proposal to operate nondirectionally, its grade B contour would overlap the grade B contour of Respondent in a 1,530-square-mile area, including a population of 83,492 (19 percent of the population within Respondent's grade B contour). Operating directionally, that overlap area would span 863 square miles and a population of 51,438 (12 percent of the population within Respondent's grade B contour). In the order of designation, the Commission noted that it approved the move but, pending outcome of this proceeding, conditioned operating authority so as to prohibit further contour expansion by Applicant in the direction of Respondent.

2. Applicant is an affiliate of the Columbia Broadcasting System Network.

Respondent

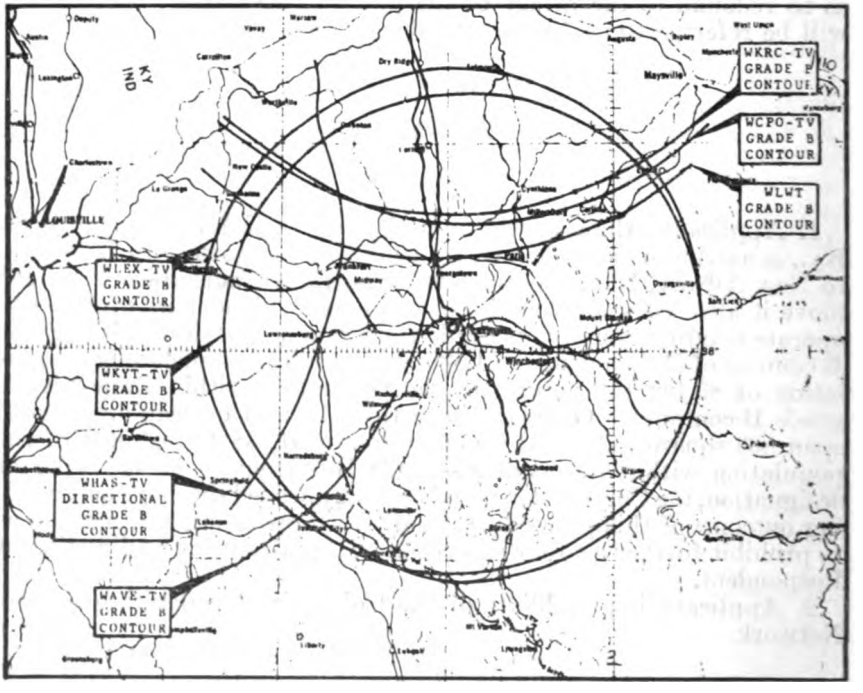
3. Respondent, a UHF station located in Lexington, Ky. (population of 62,810; metropolitan area population, 131,906), is located some 70-odd miles from Louisville. Respondent and another UHF station are the only television stations in Lexington. The grade B contour of Respondent spans 5,360 square miles and a population of 429,852. There are six stations whose service contours extend over the service contours of Respondent. Those stations are WKYT (UHF), Lexington; WHAS, Louisville (Respondent's station); WAVE, Louisville; WKRC, Cincinnati; WCPO, Cincinnati; and WLWT, Cincinnati.

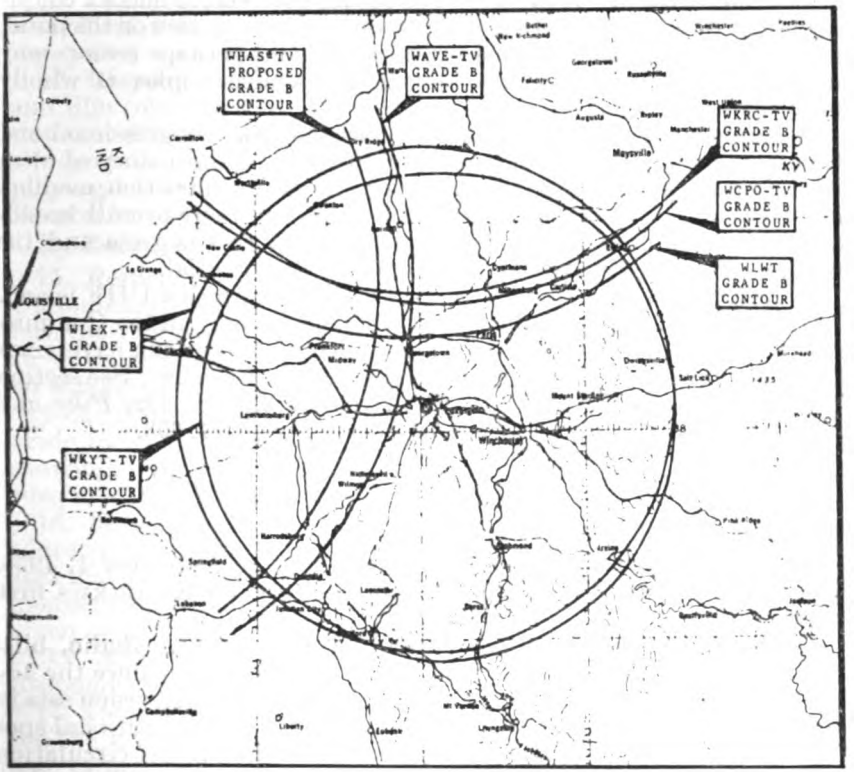
4. On the maps reproduced below is graphically shown the duplication of Respondent's coverage area these stations affect. The extent of Applicant's duplication is shown with and without limitation on radiation in the direction of Respondent.

5. Respondent has both National Broadcasting Co. and Columbia Broadcasting Co. Network affiliation.

Respondent's Thesis of the Case

6. Although Respondent's showing does reflect a certain amount of integration, it may be roughly divided into two categories: (1) That which claims relief from further service area duplication by Applicant on the basis of equitable principles; (2) that which claims such relief





on the ground that injury to it breeds injury to the public. The first of these categories can also be subdivided: (*a*) Equities that flow to Respondent by reason of its membership in a class that is innately infirm and is entitled to preferential treatment by reason of injuries that class has suffered in the past; (*b*) equities that flow to it independently by reason of past hardships and good works.

Equities

Those That Flow to Respondent Because of Its Class

7. The incompetence of the undersigned to utilize the large mass of material that, on this facet of Respondent's thesis, in one way or another has found its way into the record has already been mentioned. In the final analysis, the material is aimed at obtaining a declaration that because UHF stations are UHF stations, their service areas must remain inviolate from service-area incursions by VHF stations. It is a policy declaration that is sought and policy declarations, at least those of the scope of the one sought here, are no business of examiners. It would be bootless to recapitulate Respondent's material on the point

or even to digest it. It might not be amiss, however, to make a couple of observations in order to clarify Respondent's contention on the point, give a little more body to this presentation, and perhaps remove any implication that, if properly lodged, Respondent's plea is wholly devoid of substance.

8. Respondent's material is largely gleaned from congressional and Commission documents. It is devoted to detailing the history of ultra high frequency television broadcasting, the vicissitudes that medium has encountered in attempting to find its niche in our overall broadcasting system, and the concern evinced by both Congress and the Commission not only over its plight but over its potential.

9. Respondent does operate on what might be termed a UHF island. Lexington, Ky., was allocated UHF frequencies only in the Commission's sixth report and order. While channel allocations have since then been shifted, no VHF allocation has ever been made. See section 73.606, *Rules and Regulations*, FCC, volume 3, page 192, *Pike and Fischer Radio Regulation, Current Service*, page 53:653.

Those That Flow to Respondent Independently

By Reason of Technical Improvement:

10. Construction of Respondent commenced on December 1, 1954. It went on the air March 15, 1955, and was central Kentucky's first television station.

11. Dealers in television sets supported Respondent. Radio, billboards, newspapers, and direct mail were all used to announce the advent of the new station. At the outset, the number of television sets in Respondent's service area was negligible. Network and national spot advertisers were slow to buy time on the new medium. Set circulation was continually being measured. By February 1956, a "Telepulse" study agreed with Respondent's conclusion that there were then an appreciable number of UHF sets in the area. When Respondent went on the air it broadcast from 3 p.m. to midnight. In January 1956, it increased hours of service to 1:30 p.m. to midnight. On August 4, 1958, it inaugurated a full broadcast day, 7 to 12:30 a.m.

12. Respondent progressively improved facilities. Production aids such as rear screen projection and teleprompter were installed. A property room was constructed. A new transmitter was acquired. Four offices were added at the studio location. The plant was remodeled, refinished, and landscaped. In 1959, a tornado demolished the antenna and a substantial part of the studio and transmitter buildings. Reconstruction was promptly started. A temporary antenna was installed and housing construction was incomplete when the station returned to the air a month later. Operation at low power during this hiatus coupled with being off the air for a month hurt business. Respondent went ahead nevertheless. The studio was enlarged and reequipped. The office was rebuilt, restyled, and redecorated. Later in 1959, Respondent was granted authority to construct its own intercity microwave relay system. This system carries color. It cost about $105,000 to install.

13. In 1962, Respondent's operation was further enlarged. Three new offices, a darkroom, a new property room, and a new air-conditioning system were added. The plant was redecorated throughout.

14. Respondent has broadcast network color since 1955. Local live and film color were added in 1962. This latter addition to the operation cost $125,000 and an enlargement of staff was required. In 1963, a video tape recorder was purchased, which enables the recording and playing back of both black and white and color recordings. In 1964, Respondent again replaced its transmitter.

By Reason of Program Service:

15. Respondent's program showing is by no means comprehensive. Undoubtedly this is, in substantial part at least, attributable to the fact that, by reason of dual network affiliation, networks have played an unusually heavy role as Respondent's program source. Though no attempt has been made to furnish data reflecting its day-in-and-day-out program efforts since inception, Respondent does point with pride to its past programing and did advance on the record such a showing. While this data is sometimes lacking in specificity, it is adequate to support the following findings.

16. Respondent has from the beginning afforded time to civic, educational, religious, and agricultural groups. Eight colleges in the area have used Respondent. Civic groups have appeared over Respondent on behalf of various charitable activities. Time has been given to the local ministerial association. The University of Kentucky Agricultural Extension College has also enjoyed the use of Respondent's facilities.

17. Interest in athletics is high in central Kentucky. Respondent for the first time afforded live television coverage of a State basketball tournament. Similar coverage was given University of Kentucky basketball games while the team was on the road. Flat and harness horse racing have also been carried, both live and on film. This year the Cincinnati Reds baseball TV schedule will be carried by Respondent for the eighth consecutive year. Sports feature broadcasts by all three networks are also carried.

18. In September 1959, Respondent became the first commercial television station in the State to carry regularly scheduled educational programs. For 4 years it carried anthropology I, Monday, Wednesday, and Friday, 9 to 9:50 a.m. Extension credit was given this course by the State university. Other subjects, including English and oriental culture, were carried during the 1962–63 academic year, Monday through Friday, also at 9–9:50 a.m. Mathematics, English literature, and political science were carried during 1963-64. Greek mythology-classics, sociology, and political science are scheduled for 1964–65. In September 1959, the station's operating day was expanded to accommodate continental classics during the school term.

19. Respondent's program breakdowns by type and source for the composite week 1963 and 1964 are set forth below:

WLEX–TV 1963 composite week program percentages

	Percent
1. Entertainment	76.49
2. Religious	3.15
3. Agricultural	2.02
4. Educational	2.27
5. News	6.83
6. Discussion	0
7. Talk	9.24
8.	0
9.	0
10. Miscellaneous	0
	100.00

WLEX–TV 1963 composite week program log analysis

[Corrected Sept. 2, 1964]

	8 a.m. to 6 p.m.	6 to 11 p.m.	All other	Total
1. Network commercial	54.60	76.40	37.52	58.49
2. Network sustaining	16.17	7.14	26.28	15.00
3. Recorded commercial	5.71	6.44	0	5.07
4. Recorded sustaining	14.14	.72	19.04	10.91
5. Wire commercial	.79	.19	3.82	1.07
6. Wire sustaining	1.40	1.48	8.29	2.45
7. Live commercial	1.54	5.72	3.90	3.13
8. Live sustaining	5.65	1.91	1.15	3.88
9. Total commercial (1+3+5+7)	62.64	88.75	45.24	67.76
10. Total sustaining (2+4+6+8)	37.36	11.25	54.76	32.24
11. Complete total (percent)	100.00	100.00	100.00	100.00
12. Actual broadcast hours per week (hours)	65½	35	17½	118
13. Number spot announcements per week	274	205	77	556
14. Noncommercial spot announcements per week	25	4	25	54

WLEX–TV 1964 composite week program percentages

	Percent
1. Entertainment	75.00
2. Religious	1.54
3. Agricultural	1.69
4. Educational	3.22
5. News	7.16
6. Discussion	.42
7. Talk	10.97
8.	0
9.	0
10. Miscellaneous	0
	100.00

WLEX–TV 1964 composite week program log analysis

	8 a.m. to 6 p.m.	6 to 11 p.m.	All other	Total
1. Network commercial	68.29	87.14	34.41	68.57
2. Network sustaining	6.49		28.83	8.04
3. Recorded commercial	3.76	5.76	2.43	4.14
4. Recorded sustaining	5.48		16.04	5.52
5. Wire commercial	.92	1.57	9.28	2.41
6. Wire sustaining	1.98		4.32	1.77
7. Live commercial	2.93	5.53	3.97	3.85
8. Live sustaining	10.15		.72	5.70
9. Total commercial (1+3+5+7)	75.90	100.00	50.09	78.97
10. Total sustaining (2+4+6+8)	24.10		49.91	21.03
11. Complete total (percent)	100.00	100.00	100.00	100.00
12. Actual broadcast hours per week (hours)	65½	35	18½	119
13. Number spot announcements per week	280	190	97	567
14. Noncommercial spot announcements per week	20	0	32	52

20. An insight into how a broadcast day actually goes at Respondent may be obtained from the following program schedule for Wednesday, March 11, 1964, a day chosen at random from Respondent's 1964 composite week:

1964 composite week program schedule

[Wednesday, March 11, 1964]

a.m.			
7 to 7:25	Today	(NS)	Entertainment.
7:25 to 7:30	First News Report	(WC)	News.
7:30 to 7:45	Today	(NC)	Entertainment.
7:45 to 8	----do	(NS)	Do.
8 to 8:25	----do	(NS)	Do.
8:25 to 8:30	Second News Report	(WC)	News.
8:30 to 8:45	Today	(NC)	Entertainment.
8:45 to 9	----do	(NS)	Do.
9 to 9:50	American Government	(LS)	Educational.
9:50 to 10	Take Five	(LS)	Religious.
10 to 10:25	Say When	(NC)	Entertainment.
10:25 to 10:30	NBC News Morning Report	(NC)	News.
10:30 to 11	Word for Word	(NC)	Entertainment.
11 to 11:30	Concentration	(NC)	Do.
11:30 to 12 noon	Missing Links	(NC)	Do.
p.m.			
12 noon to 12:30	Your First Impression	(NC)	Do.
12:30 to 12:55	Truth or Consequences	(NC)	Do.
12:55 to 1	NBC News Day Report	(NC)	News.
1 to 1:05	Third News Report	(WS)	News-Agriculture.
1:05 to 1:30	Leisure	(LS)	Entertainment.
1:30 to 1:45	As the World Turns	(NC)	Do.
1:45 to 2	----do	(NC)	Do.
2 to 2:25	Let's Make a Deal	(NC)	Do.
2:25 to 2:30	NBC News Early Afternoon Report.	(NC)	News.
2:30 to 3	The Doctors	(NC)	Entertainment.
3 to 3:30	Loretta Young Show	(NC)	Do.
3:30 to 4	You Don't Say	(NC)	Do.
4 to 4:25	The Match Game	(NC)	Do.
4:25 to 4:30	NBC News Afternoon Report	(NC)	News.
4:30 to 5	Make Room for Daddy	(NC)	Entertainment.
5 to 5:47	The Bunkhouse	(RS)	Do.
5:47 to 5:51	Livestock Report	(WS)	Agriculture.
5:51 to 5:58	Sports Extra	(WS)	Talk.
5:58 to 6:07	World in Brief	(WC)	News.
6:07 to 6:13	Scan the Weather	(LC)	Talk.
6:13 to 6:30	Farming	(LC)	Agriculture.
6:30 to 7	Huntley-Brinkley	(NC)	News.
7 to 7:30	Miami Undercover	(RC)	Entertainment.
7:30 to 8	The Virginian	(NC)	Do.
8 to 8:30	----do	(NC)	Do.
8:30 to 9	----do	(NC)	Do.
9 to 9:30	Beverly Hillbillies	(NC)	Do.
9:30 to 10	Dick Van Dyke Show	(NC)	Do.
10 to 11	Danny Kaye Show	(NC)	Do.
11 to 11:07	Weather	(LC)	Talk.
11:07 to 11:19	News	(WC)	News.
11:19 to 11:30	Sports	(WS)	Talk.
11:30 to 12	Tonight Show	(NC)	Entertainment.
a.m.			
12 to 12:30	----do	(NC)	Do.
12:30 to 1	----do	(NS)	Do.

By Reason of Financial Hardship:

21. Respondent reports station losses for the first 5 years of operation as follows: 1956, $92,292.86; 1957, $53,531.89; 1958, $28,155.04; 1959, $38,064.70; 1960, $14,664.29. These figures aggregate $226,708.78.[1] During these years, Respondent's revenues were insufficient to keep it in business. J. D. Guy, Jr., president, director, and owner of 37.07 percent of Respondent's stock, and H. Gutherie Bell, secretary-treasurer, director, and 33.10 percent stockholder, furnished the funds to meet operating expenses. They did this through personal loans, loans through other jointly owned business interests, and by personally endorsing Respondent's promissory notes for bank loans.

22. Respondent reports profit before taxes as follows: 1961, $73,091.95; 1962, $106,625.43; 1963, $98,200.22; 1964, $106,488.59.[2]

Injury to Respondent Breeds Injury to the Public

The Environment in Which Respondent Sells Advertising:

23. The advertiser plays a dominant role in television broadcasting.[3] He pays the freight and there are many carriers. Not only does the vendor of the station's television time compete for the advertiser's dollar with other television stations but he also competes with other media as well—radio, newspapers, magazines, billboards. Thus, the time buyer's prospect is a buyer in a buyer's market and is in a position to pretty much dictate by whom and under what conditions it will make its purchases.[4]

24. Advertising over a station is sold at three levels. Local: Here merchants situated in the locale of the station purchase advertising directly from salesmen for the station. National Spot: Here advertising is sold over local stations to national or regional advertisers by persons and firms specializing in this type of business. These are called national sales representatives or "Reps." The term "spot" comes from the ability of advertisers utilizing this type of exposure to strategically locate or "spot" their advertising message in such fashion as to obtain maximum results for the particular campaign

---

[1] As the examiner understands these figures, they speak in terms of depreciation, some officers' salaries, and some travel and entertainment as constituting loss items. Respondent has never paid dividends nor director's fees. Guy and Bell drew no salaries during the period covered by the figures; and during the period of initial operation, they did not charge Respondent for travel and other expenses incurred by them in transacting Respondent's business. Earl Boyles, 10.8 percent stockholder, did draw a salary but he was and is general manager of Respondent; whereas, Guy and Bell are not active in its day to day operation.

[2] These figures are also subject to the comments made in the previous footnote, with this added information. In April 1963, Bell and Guy each started drawing salaries of $630 a month. That figure was increased to $700 a month in June or July 1963.

[3] To anyone who may doubt the considerable "clout" the advertiser has in television, the following extract from Respondent's proposed findings should be of interest:

"On one occasion, WLEX-TV requested that CBS permit it to telecast the Kentucky Derby. CBS denied the request on the grounds that the network had sufficient coverage of the program in Lexington from other television stations. WLEX finally was successful in obtaining the program by directly contacting the network sponsor who then ordered that CBS put WLEX-TV on the network for the program." (Tr. 208-209.)

[4] There are some 600 television stations in the United States. If we assume a modest 12-hour day for each station, we speak in terms of 432,000 hours or some 26 million minutes of air time. The remarkable capacity of this time to absorb commercial continuity is too well known to warrant comment. When the staggering numbers of availabilities in other media are reckoned with and the comparatively few businesses who are in a position to avail themselves of such promotion, it seems manifest that the term "buyer's market" is all too weak a term to apply to the competitive jungle in which a television time salesman vends his wares.

being pursued. Network: Here the network organization sells the station to national advertisers as a part of its (the network's) coverage.

25. Local salesmen and national spot representatives get a small percentage of the station's card rate as their commission. Networks receive a large percentage of the card rate but, of course, furnish the program with which the advertising is associated. At both the network and national spot levels, advertising is handled for the advertiser by advertising agents (Madison Avenue). These agents, in the main, handle an advertiser's account in toto and place its business strategically among the various advertising media.

26. The components of what a television advertiser wants to know are triple: (1) What is the capacity of the media that is to carry the message; (2) what competition does the station have to meet; (3) with what success does it meet its competition. The last category has two aspects: (*a*) How does the station meet competition from the standpoint of service area coverage; (*b*) how does it meet competition from the standpoint of viewer acceptance of the program or programs with which advertising messages would be associated. The techniques employed to answer these questions can only be characterized as, if not bizarre, at least imperfect. Advertisers and their agents have, over the years, developed various considerations they like to take into account. Whether you feel that they are tools of the trade or merely business folkways, and whether you like them or not, if you are a television time salesman, you have to deal with them.

27. Looming large among these considerations is one called "dollars per thousand." This calls for a determination of how many thousand viewers are going to get a particular television advertising message and how much it will cost per thousand persons thus exposed. On its face, this seems like a large order. But there are businesses that purport to furnish background data from which such calculations can be made. Chief among the purveyors of such material are A. C. Nielsen and the American Research Bureau. These firms advance figures on station and program popularity among viewers. The record reflects that the data which they supply stands somewhat in the same status to a time buyer that a Bible does to a minister. Apparently when cost per thousand figures are computed, stations with modest coverage suffer by comparison with stations with large coverage, for when rates are divided by coverage (circulation) the quotient invariably is lower among stations with large coverage. This phenomenon sires an advertising precept—"high circulation with high dollar rates yields low cost per thousand while low circulation with low dollar rates yields high cost per thousand."

28. Another factor that is given weight by the advertiser is "unduplicated coverage." This consideration as its name implies looks to avoidance of the same material being carried over two stations in the same area. Networks with considerable success avoid such a condition. Advertisers only rarely consider it advantageous. The latter use various formulas in attempting to identify it. National representatives are forced to cope with the concept almost daily. One advertiser is said to have a policy of not placing television advertising

where fewer than 25,000 unduplicated homes can be reached. Some agencies are said to hold that if 40 percent of the viewers in an area are subject to exposure of their message, that area has received adequate exposure. Respondent has had experience where business was lost because it was unable to deliver enough unduplicated homes to satisfy the advertiser.

29. In the dialectic of the marketplace of advertising, service contours, projected according to Commission rules, are given pretty short shrift. Instead, a concept termed a station's market is there employed. Presumably, this term has something to do with identifying those who are potential purchasers of products by reason of advertising appeals that may be viewed and heard over a subject station. Just how, however, the boundaries of a station's market are established, this record does not make clear. Nor does it make clear that a station's market is a very constant concept. A station's market seems to be what a station says it is if that conclusion is buttressed by some kind of support from a research organization to the effect that the station has been heard in the area claimed as part of its market. The Applicant in its promotional material points to its market with pride. The area there encompassed is appreciably larger than the area encircled by its grade B contour. Respondent smarts under Applicant's claim there that Lexington and the county in which Respondent is located is a part of Applicant's market.

30. Carl Ward, vice president and director of affiliates for CBS, testified that CBS determines network rates on the basis of information from both its engineering department and its research department. Primary reliance is placed on the latter department, and it employs in its work such tools as Nielsen, ARB, and other survey data. The basic factor in ratemaking from the research standpoint is average quarter-hour homes delivered by a station at night "on the basis of our procedure and as reported in ARB in their March and November reports." A station's A and B contours play no role, as such, in the ratemaking process.

31. Ward further testified that there was a growing tendency on the part of advertisers to purchase commercial spot announcements associated with particular network programs. This practice wins for the program the name "participating program." Taking all three networks together, Ward testified some 40 to 50 percent of nighttime schedules are devoted to such programs.

32. Ward corroborated the fact that if a station lost audience and did not lower rates, its cost per thousand would increase. He also agreed that that fact might be reflected in survey data such as that published by Nielsen and ARB, and that in turn advertisers might well consider the station's changed condition as there reported in determining whether to order the station as part of a network.

33. A pretty good idea of the kind of arcade the Respondent and its agents operate in when vending its wares may be gleaned from the following excerpt from the testimony of Mahlon H. Edmonson, vice president of Paul H. Raymer, Inc., Respondent's national sales representative.

A. Well, to start off, the first tool that is used within the trade are the surveys, Nielsen and ARB. Normally if a product is going to go into a market which we represent the agency will contact the representative.

Now, this can vary in terms of products. Let us say, for instance, that we have a product that is directed to women. They might want to have daytime availabilities. If it is a product that can be directed to a family group they will look for a composite audience. If it is a product that is directed to adults they are going to look for availabilities that are directed to adults such as news, weather, sports.

To start out with, if an agency contacts one of our salesmen and states that the product is going into the market they request the availabilities. These availabilities are given to the salesman by the station. The salesman will give information to the station as to what is desired.

When these availabilities are given to the salesman he in turn makes a sales presentation to the time buyer. Depending on what availabilities are requested, time—shall we make it, for example, say, a 6:15 spot or a 10:15 spot on, say, Tuesday or Wednesday is—offered by the station as a possible availability to be sold to the agency for that product.

We make the presentation giving the program and using the ARB and Nielsen, depending upon what survey this particular agency will use. We believe that all the agencies use some measurement and this measurement is the Nielsen or the ARB study.

That gives you the number of homes reached by that particular spot that you are trying to sell.

* * * * * * *

I think cost per thousand is a very important factor in any advertising. Some advertisers have a cost per thousand limit of $3. That is the maximum they will go.

Others have a cost per thousand of $2.50, depending upon the market. If an advertiser cannot buy in a particular market at a cost per thousand of $3 he may not go into it because the cost of advertising is too high. He cannot realize his sales potential so he will let that market go by on a spot basis, so cost per thousand is very important.

Now, to get back to the idea of selling to an agency; as I stated, we get the availabilities from the station. We work out the programing, the cost and in many cases cost per thousand.

Now, that cost per thousand can vary also in this particular way: If an advertiser is going to go into the market with five spots we have certain plans based on the idea of volume. If we took the one-time open rate the cost would be higher, but because an advertiser is buying 3 or 4 or 5 spots or 10 spots his cost will come down and be much lower.

Normally in most cases the 10 plan is roughly 50 percent off the one-time rate. If the spot cost $60, if they bought 10 spots they could probably get the spot for $30, if they bought the 10 plan, so depending on the number of spots that could go into a market, we can plan our presentation to that particular buyer and in many cases make the buy for him by giving him what he has requested, by giving him the type of audience he wants to reach, and give him a plan based on what the budget could be and based on cost per thousand.

By Mr. ROWELL [counsel for Respondent]:

Q. Just how do you use the tools in using this information. You say that the tools are available. Can you give us some examples?

A. Well, if you took an ARB and let's assume that this might be a cigarette account which is using 20-second spot announcements, if the station offers me availabilities at 9 o'clock on Monday I can go to the ARB and in the back of the book they have taken a survey and rated the programing and show the number of homes 9 o'clock would reach, the metro rating, the total men, women and also this is broken down into the age bracket, between 18 and 39.

In other words, these are tools that are used by the agencies and this is information that the agencies want, and ARB is one of the services that gives you the information that is broken down.

Now, this Monday spot at 9 o'clock, every spot for the whole week is broken down. In other words, it breaks down from 5 o'clock until signoff and then on Monday through Friday where you have a normal network every

day programing they give you the Monday through Friday average, so if a person is going to buy daytime you take an 11 o'clock spot. That will deliver so many homes, so many women, and based on the cost it will give you a cost per thousand.

Q. By consulting that data would you find that the audience would fluctuate from, say, day to day, or evening to evening, or maybe even hour to hour?

A. I would say this: That the audience does not fluctuate in the daytime because it is taken on a Monday through Friday average. You can take the nighttime programing, depending on the network, and the program will vary.

In other words, the Beverly Hillbillies might do 170,000 in one market and a program like CBS Reports might do 28,000.

Q. You mean on the same station?

A. On the same station.

34. The foregoing material in this section of the decision by no means exhausts the volutions, evolutions, and convolutions of data employed by buyer and seller in the sale and purchase of television advertising—what has been called in this record "the tools of the trade." The record is replete with additional information on the subject. To spread it out in this decision would be pointless. It is enough to say that the vast bulk seems to be short on fact and long on theory. One gets the impression that in this area, seller and buyer both agree that to the latter "all is grist that comes to his mill." The power of advertising is a nebulous subject and most of the tools it employs in its affairs seem to be equally obscure.

Some Gloomy Prognostications:

35. Respondent's showing is short on direct, concrete evidence of injury to either Respondent or to the public were Applicant to succeed here. Two witnesses did, however, address themselves squarely to the subject.

36. Gutherie Bell, secretary-treasurer of Respondent, gave a pessimistic forecast of how Respondent would fare were Applicant to expand as proposed. According to Bell, the expansion could have nothing but an adverse effect on Respondent. It would certainly not induce advertisers to buy more time on the station. It would increase Respondent's cost per thousand and, in order to maintain present business, Respondent would have to reduce rates. Bell estimated that Respondent would lose from $75,000 to $100,000 a year revenue from national, regional, and network accounts. Were Applicant to expand as proposed and the loss anticipated were to result, Respondent would have to cut down overhead, including some of its present programing. If, however, Respondent were to be protected from service area incursions by VHF stations and the effect of all-channel receiver legislation were to be felt, Respondent would be able to develop its potential in areas where viewers could, but do not now, view the station.

37. Paul Raymer, president and founder of Paul H. Raymer Co., Inc., a well-known and long-established firm of national sales representatives (see par. 24, above), with main offices in New York, also addressed himself to the subject of the impact on Respondent of Applicant's proposed expansion. To get the full flavor of his views, his testimony is here set forth:

* * * from all my experience and knowledge of this business, it would affect the station, sir, as a matter of degree. There is not any question about that whatever. It is a matter of—it is as simple as any other form

of dilution. What would happen here would be an injury to the audience which is really the product of our station, and it would injure it to a degree.

The degree might be an increasing thing, because UHF's are not too sturdy or too healthy anyway, in the business. There is a strong prejudice against them, no matter how good they are. Some people in fact refuse to buy any UHF, even if the surveys show it has audience, and that shows the prejudice extreme in some places.

That is gradually being overcome, but still, UHF's generally have a very difficult time for existence, as certainly the history of them will show, and also the record, your FCC records will show that a great many of them, even last year, did not make money, or very much money. They had a bad time.

* * * * * * *

This situation in Louisville, to me, is very very clear, and very simple. It is a matter of us losing some audience, and I say of injury to our product. How much that would be, in some cases, it would not bother us very much.

In other cases, it would be critical. There are certain accounts that buy certain things and certain things only. Those accounts would probably say "You are beneath our limit, and we are all through," or something to that effect.

And another thing is we have CBS affiliation. As this deterioration sets in, it is like a kind of dry rot, too, for the property. It increases, as a rule, unless something else is done, so that with CBS affiliation and CBS affiliation in Louisville, there is even a possibility, in the days to come, that we might lose quite a few CBS programs, which would in turn injure our product, and make us less attractive to the advertiser because of the lack or loss of audience.

I mean, I know this thing from my own experience, and I have seen it. I see it every day. To measure exactly what the injury would be is a fairly difficult thing to do. But it would be there. It is in the overlap area. It might be as much as 28,000 to 30,000 people, with the number of homes, the number of our population, or of all the data that we have, that would be a fairly large percentage of users.

You have submitted these figures. There are others. The things like the figures that are published in Television Magazine, in which they are published every month, of every month's issue. Television magazine gives us 76,000 UHF sets; ARB, I believe, gives us about 126,000.

You see there are differences here. But we use, and everybody uses, the best figures that are available, and these are the figures, and there are a few other figures, but the loss of listeners with 26,000 or with 76,000 sets— * * * This would injure us, and on some accounts, it would injure us considerably, and it might snowball into a greater loss, and the loss, I say, of network standing, network prestige, our ability to get the right amount of money for our network accounts, and for us to get the right number of national spot accounts, and in turn, this, of course, would hurt the public interest.

So without that revenue, without that income, WLEX-TV would have greater difficulty in being useful in its community, which it was designed to be.

38. It should be noted that the predictions of Bell and Raymer are set forth only to round out Respondent's case and point up the degree of concern that Respondent and its associates share over Applicant's proposal. The testimony of these two witnesses on the specifics of what would happen were Applicant to succeed in this matter cannot be accepted as fact. The testimony of both in that regard is wholly unsupported by concrete evidence. The computation that led up to Bell's forecast is dubious to say the least, for it is honeycombed with questionable assumptions and extrapolation of data that itself is of highly questionable accuracy (Tr. 1423–1428). Raymer's predictions, such as they are, appear to stand solely on his considerable reputation, unquestioned here, as a pioneer radio and television salesman and

executive. Admirable as that reputation may be, it does not qualify him as an expert in predicting the future ramifications of a rather intricate competition problem.

Applicant's Case

Counter Considerations to Those Advanced by Applicant

39. Applicant's proposed nondirectional operation will neither serve Lexington nor its metropolitan area. The increased area Applicant would serve is not an exclusive preserve of Respondent's. Other stations already serve there (see par. 4, above).

40. Respondent is a highly profitable television operation. On a total investment of about $1 million it has earned net profits of over $100,000 during each of its last 3 fiscal years. During its last fiscal year, if depreciation and non-station-employed-ownership salaries are added to net profits, the station realized over $265,000. In 1963, Respondent represented to the Commission that it was "one of the most successful UHF stations in the Nation." At about the time of hearing in this case, one of the stockholders advised the Commission that the book value of a 10.85-percent interest in Respondent was worth $177,500. This suggests that the book value of Respondent was then placed at $1.6 million. Respondent was once proposed for sale to Crosley for about $1.8 million worth of stock in a Crosley subsidiary. Respondent's owners have recently purchased a UHF–AM station in Montgomery.

41. Audience loyalty is conceded to be an important factor in station sales. Yet Respondent has evidenced no plans for improvement of its local programs. In 1956, 40 percent of Respondent's expenditures went into programing. In 1964, the comparable figure was 15 percent. In 1956, program expenses totaled $86,707. In 1964, that total was $82,019. Respondent is nearly fully ordered by both networks. It carries a considerable saturation of spot announcements.

42. There is no evidence in this record that any advertiser—national, regional, or local—has plans to drop business over Respondent if Applicant succeeds here. There is no evidence that Respondent's relationship with its networks would in any way be altered fiscally or otherwise, for that reason. Carl Ward of CBS (see par. 30 above), called to the stand by Applicant, testified specifically that the contemplated step would not cause CBS to terminate its affiliation with Respondent. He further testified that such a step would not result in fewer orders being placed for Respondent on the network or that there would be any lessening of the degree of sponsorship in such orders.

Public Interest Aspects of Applicant Operating Nondirectionally

43. Nondirectional operation by Applicant would result in 200,000 persons who do not now receive such service getting a grade B signal from Respondent. To 19,000, it would result in reception for the first time of a full CBS network service. For 7,100 persons, it would constitute a second television service. It would also narrow a service

imbalance between Applicant and one of its competitors. WAVE–TV in Louisville now serves 338,068 more people than does Applicant. Were Applicant to operate nondirectionally as proposed, that figure would be reduced to 107,586.

CONCLUSIONS

1. The record amply demonstrates that Respondent, during its formative years, fought the good fight and in doing so surmounted very substantial obstacles. Unlike many that ventured into UHF, at first reverses it did not turn tail and run. Respondent and those like it undoubtedly played a very real part in salvaging UHF from threatened, at least, extinction. For 5 long years it operated from a loss position. The dimensions of the problem with which it was confronted in the matter of receivers for its signal are too well known for comment. Nature was not always kind. A tornado played havoc with its operation. Respondent's ownership, however, fought back, continuing to underwrite its losses and substantially improve its housing and equipment. In doing this, ownership put its own money on the line. Respondent brought central Kentucky its first television station and opened the door for thousands to a new world of entertainment and information. While perhaps not deserving of an "Emmy" for the way its programing has matched the Commission's programing policies, it appears to have paid reasonable attention to those standards. With two networks to draw from, its record in the field of local programing has, perhaps, been a little on the sparse side, but it has by no means ignored that area of service, and qualitatively some of its programing there appears to be good (e.g., its educational series; its athletic coverage). There is no doubt but that Respondent has operated in the best tradition of American enterprise in general, and radio enterprise in particular. That Respondent has won rich reward (and this record leaves no doubt that it has) speaks well not only for Respondent but for the system under which it operates.

2. There can be no doubt either that Respondent, in selling its product, operates in a milieu that defies description. Highly competitive, highly rewarding financially, imagination, not fact, appears to form the keystone of advertising's arch. The tools of the trade are strange indeed and their use stranger. Caprice covered with a thin veneer of information seems to be a principal characteristic. It is easy to work up a full head of sympathy for anyone engaged in such a broil who labors under any handicap. One can easily understand Respondent's concern lest the entry of a newcomer to its sphere of operation be fatuously construed by the powers that be in the advertising fraternity as a detriment to Respondent out of all proportions to its factual significance.

3. But admiration of and sympathy for Respondent cannot be the stuff of which determination here is to be fabricated. We must find out whether Respondent has established on this record if the public interest would suffer were Applicant to expand its service as proposed.

4. The record is absolutely void of any evidence that any advertiser, network, sales representative, or anyone else would alter commercial

relationship with Respondent, in any way, were Applicant to succeed here. If such had been the fact, Respondent could have proven it on this record. It did not. Instead, it dipped into the advertising trade, borrowed its tools and pattern of thought (see pars. 23–24), and attempted to piece together a mosaic of speculation running to the effect that injury to Respondent would inevitably occur were Applicant's proposed expansion to take place. When Respondent did attempt to introduce something in the nature of concrete evidence, it turned out to be conclusions arrived at through the rough and inadequate calculation of a highly interested party, and the testimony of an expert in one field arriving at conclusions in a field in which he is not an expert.

5. As Applicant points out, the area it wants to expand into is not an exclusive preserve of Respondent. It is also true that Applicant, whatever its past hardships have been, is now in an extremely affluent position. It certainly is not at all unlikely that Applicant's proposed move would result in an identifiable increase in competitive pressure. But, there is certainly no doubt that Respondent has ample resources to meet that pressure. Not only are those resources financial, but they also include opportunity, and doubtless ability, to improve programing and increase sales efforts. With such resources at hand and effectively employed, surely any injury that might result to Respondent from such pressure would be minuscule. That that injury could infect the public interest is incredible.

6. Applicant's claims for public interest benefit flowing from its nondirectional operation are modest but substantial (see par. 43, above). They stand on a foundation of fact and support resolution of the second issue favorably to Applicant.

7. The first issue is answered "impact unproven, if such occurs Respondent amply able to cope." The second issue is answered "on basis of record, removal of directionalization condition would serve public interest."

Accordingly, it is recommended, This 28th day of May 1965, that *No limitation* be imposed upon the pending construction permit of WHAS, Inc. (WHAS–TV), to require it to reduce effective radiated power in the direction of Lexington, Ky.

FCC 66R-302

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
WTCN TELEVISION, INC. (WTCN-TV), MINNEAPOLIS, MINN.	Docket No. 15841 File No. BPCT-2850
MIDWEST RADIO-TELEVISION, INC. (WCCO-TV), MINNEAPOLIS, MINN.	Docket No. 15842 File No. BPCT-3292
UNITED TELEVISION, INC. (KMSP-TV), MINNEAPOLIS, MINN.	Docket No. 15843 File No. BPCT-3293
TWIN CITY AREA EDUCATIONAL TELEVISION CORP. (KTCA-TV), ST. PAUL, MINN.	Docket No. 16782 File No. BPET-249
TWIN CITY AREA EDUCATIONAL TELEVISION CORP. (KTCI-TV), ST. PAUL, MINN.	Docket No. 16783 File No. BPET-250
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted August 4, 1966)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. The above-captioned applicants in this proceeding seek authority to relocate their transmitter sites in essentially the same area northeast of Minneapolis, near Shoreview, Minn., and to construct tall television towers.[1] KMSP-TV proposes to share the same tower with WCCO-TV. Associated Television Corp. (Associated), which is not a party to this proceeding,[2] requests the Review Board to direct the hearing examiner to make all grants in this proceeding subject to the condition that grantees on UHF channels 23 and 29 (allocated to Minneapolis-St. Paul) will be afforded the opportunity to utilize one of the tall towers which the VHF television stations in this proceeding propose to construct and utilize.[3]

2. The basis for Associated's petition is the decision released by the Commission's Review Board on April 7, 1964 (3 FCC 2d 332, 7 R.R. 2d 480), which affirmed an examiner's initial decision proposing a grant of Associated's application for channel 29 at St. Paul, Minn. This decision, states Associated, brings it within the class of applicants concerned with competitive problems in the Minneapolis-St. Paul area,

[1] The instant petition was filed prior to the recent Commission action consolidating in this proceeding the applications of two educational television stations, one VHF and one UHF (FCC 66-668, released July 26, 1966).

[2] By memorandum opinion and order, FCC 66M-832, released June 13, 1966, Hearing Examiner Jay A. Kyle denied a petition by Associated to intervene in this proceeding. The denial of Associated's petition to intervene, and its failure to appeal therefrom, would ordinarily warrant the dismissal of its instant petition for lack of standing. However, in view of the unique circumstances presented here, the Board will consider the pleading on its merits.

[3] Before the Review Board are: Petition for imposition of condition on grants, filed on May 24, 1966, by Associated Television Corp.; comments, filed June 3, 1966, by the Broadcast Bureau; statement of Association of Maximum Service Telecasters, Inc., filed on June 3, 1966; and reply, filed on June 15, 1966, by Associated.

including the matters of antenna site and antenna height. For the purpose of assuring that it, as permittee of channel 29, and Viking Television, Inc., a prospective permittee of channel 23,[4] may have the opportunity of using the tall television towers proposed herein on a fair and equitable basis, petitioner requests the conditioning of any grants made in this proceeding. As precedent for imposing the condition, petitioner cites *Chronicle Publishing Co. (KRON-TV)*, FCC 65–98, 4 R.R. 2d 579, wherein the Commission granted the application of KGO–TV to increase antenna height on the condition that the antenna structure be made available on a fair and equitable basis for use by present and future permittees and licensees of broadcast facilities in the San Francisco area who make a request therefor.

3. The Broadcast Bureau, although of the view that inclusion of the condition has merit, asserts that, contrary to the situation in *Chronicle*, petitioner has not made the showing required to justify imposition of the requested condition. The Bureau also expresses concern as to whether Associated intends to build its proposed station and commence operation as soon as possible at its presently designated site, or whether Associated plans to delay construction pending the outcome of the instant proceeding—which may take several years to resolve. In reply, Associated states that it has no plans to delay construction of its facilities at its presently designated site—the Foshay tower in Minneapolis, where the VHF applicants in this proceeding are now operating—but rather that it seeks only to maintain the same relative position in the event that the applicants herein are authorized to operate from the proposed tall towers.

4. The situation herein differs from that in *Chronicle*, where the Washington Airspace Panel of the Air Coordinating Committee had stated that "* * * only one of the two [tower] proposals could be tolerated from an aeronautical standpoint." *Chronicle*, supra, 4 R.R. 2d at 580. Moreover, questions as to the suitability of both the proposed site and the proposed tower had been raised (docket No. 12865, application for review of interlocutory ruling of Review Board, filed on June 11, 1964, by the Chronicle Publishing Co. (KRON-TV), pp. 11–13, pars. 26, 27, 30, attachment B; reply to opposition, filed on July 9, 1964, by *Chronicle*, p. 4, par. 11, exhibit D). In view of these and other differences between *Chronicle* and this proceeding, we do not view *Chronicle* as controlling. Our main concern here is whether the imposition of the requested condition is appropriate in the circumstances present as established by Associated's showing. Associated states (reply to Broadcast Bureau's comments, p. 2, par. 3) that it applied for and received permission to operate from the same site as do at least three of the VHF applicants herein—the Foshay tower site. Associated also states (petition, p. 3, par. 5) that it has contacted the same three applicants with a view to discussing possible terms whereby it could be accommodated on one of the proposed tall towers, and that these negotiations are continuing. Associated does not allege, and there is no indication in the pleadings herein, that those negotiations will not result in an appropriate arrangement to

[4] Viking is an applicant for channel 23 at Minneapolis, BPCT–3772.

accommodate the Associated antenna should one or more of the proposed tall towers be constructed. Moreover, Associated has not alleged that the tall tower applicants will not comply with the provisions of section 73.635 of the Commission's rules that:

> **No television license or renewal of a television license will be granted to any person who owns, leases, or controls a particular site which is peculiarly suitable for television broadcasting in a particular area and (a) which is not available for use by other television licensees; and (b) no other comparable site is available in the area; and (c) where the exclusive use of such site by the applicant or licensee would unduly limit the number of television stations that can be authorized in a particular area or would unduly restrict competition among television stations.**

Therefore, the Board is of the view that Associated has failed to establish that the imposition of the requested condition is warranted.

Accordingly, it is ordered, This 4th day of August 1966, that the petition for imposition of condition on grants, filed on May 24, 1966, by Associated Television Corp., *Is denied.*

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

FCC 66R-306

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of CENTRAL BROADCASTING CORP., MADISON, TENN.	Docket No. 16368 File No. BPH-3773
SECOND THURSDAY CORP., NASHVILLE, TENN. For Construction Permits	Docket No. 16369 File No. BPH-3778

MEMORANDUM OPINION AND ORDER

(Adopted August 8, 1966)

BY THE REVIEW BOARD:

1. The Review Board has before it a joint request for approval of agreement, filed June 6, 1966, by Central Broadcasting Corp. (Central) and Second Thursday Corp. (Thursday),[1] in which the parties have submitted an agreement to dismiss the Central application and to reimburse Central for expenses incurred in prosecuting its application. The proceeding was designated for hearing by order, FCC 65-1123, released December 20, 1965. The issues, among others, included a section 307(b) issue and a contingent comparative issue. Other than the prehearing conference, no hearing sessions have been held in this proceeding.

2. The agreement provides that Thursday will reimburse Central in the amount of $5,926.17 in payment of the legitimate and prudent expenses incurred by Central in the preparation, filing, and advocacy of its application. This sum includes: $1,074 for accounting services; $1,800 for engineering services of William Barry; and $900 for engineering services of Andrew Jones.

3. In its original response the Broadcast Bureau opposed approval of the agreement pending a further explanation of the fees charged to Central by William Barry, Andrew Jones, and the accounting firm. As a result of Central's further submission, the Bureau is now satisfied with the explanations given concerning Barry and Andrew Jones. However, the Bureau opposes, in part, approval of the $1,074 fee submitted by the accounting firm. The Bureau feels that the charges of $225 each in October of 1963 and in February of 1964, which the Bureau alleges were incurred for supplying cost estimates for proposed transmitter and antenna systems, were entirely unrealistic con-

[1] The pleadings before the Review Board are: (*a*) Joint request for approval of agreement relating to dismissal of application of Central Broadcasting Corp. and supporting affidavits, filed June 6, 1966, by Central Broadcasting Corp. and Second Thursday Corp.; (*b*) the Broadcast Bureau's comments on the request, filed June 15, 1966; (*c*) reply, filed by Central on July 5, 1966; (*d*) petition to accept supplemental pleading, filed July 15, 1966, by the Broadcast Bureau; and (*e*) the Broadcast Bureau's comments on reply, filed July 15, 1966. Although the rules do not make provision for this second pleading of the Broadcast Bureau, there was no objection filed by the parties and the Review Board has considered this pleading in reaching its decision.

sidering the minimal services involved. In this regard, the Bureau states, in its July 15, 1966, pleading, that "all it appears that [the accounting firm] did was to supply cost estimates for proposed transmitter and antenna systems." This, however, is mere speculation and fails to take into account other incidents of expense listed on the copy of the bill submitted by the accountant, such as consultations and phone calls. The Bureau has made an insufficient showing to challenge the sworn statements of the accountant and of Central's president. In view of this, the Board cannot say that the charges by the accounting firm were patently unreasonable. Therefore, the Board will approve reimbursement of Central's expenses.

4. In all other respects petitioners have complied with the requirements of section 1.525(a) of the Commission's rules. The joint request is adequately supported by facts relevant to the nature of the consideration involved, and details as to the initiation and history of the negotiations between the parties have been furnished. Approval of the agreement would be in the public interest in that it would avoid a costly and time-consuming hearing on section 307(b) and contingent comparative issues, and could enable Thursday to bring a new FM service to the Nashville public at an earlier date than would otherwise be the case.

5. There remains the question of whether petitioners should be required to comply with the publication requirements of section 1.525 (b) of the rules. The location of Central's proposed station is Madison, Tenn., which was an unincorporated community without precise boundaries and which was not a part of the city of Nashville when Central filed its application for the FM station on May 12, 1962. Subsequently, however, the charter of Nashville was amended to consolidate the county of Davidson, wherein Madison is located, and the city of Nashville to create a new metropolitan government. The area known as Madison was thereby merged into a new entity known as metropolitan Nashville. Thursday's 1-mv/m contour completely encompasses Central's 1-mv/m contour. Thursday's service would reach 538,876 persons within 3,365 square miles, while Central would serve 428,774 persons within 1,054 square miles. The area to be served by both applicants receives several AM, FM, and TV services. In view of the proximity of the communities involved, the regional channel at issue, and the similarity in proposed urbanized coverage, we believe that section 307(b) considerations would not be determinative in this proceeding. For the foregoing reasons the Board concludes that dismissal of the Central application would not defeat the objectives of section 307(b) of the Communications Act of 1934, as amended, and hence publication under section 1.525(b) of the rules is not necessary.

Accordingly, it is ordered, This 8th day of August 1966, that the petition to accept supplemental pleading, filed July 15, 1966, by the Broadcast Bureau, *Is granted;* that the joint request for approval of agreement, filed June 6, 1966, by Central Broadcasting Corp. and Second Thursday Corp., *Is granted;* that the agreement *Is approved;* and that the application of Central Broadcasting Corp. (BPH-3773) *Is dismissed.*

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

FCC 66R-311

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
LAFAYETTE BROADCASTING CO., INC., LAFAYETTE, TENN.	Docket No. 16653 File No. BPH-5009
STATE LINE BROADCASTING CO., INC., SCOTTSVILLE, KY.	Docket No. 16654 File No. BPH-5119
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted August 10, 1966)

BY THE REVIEW BOARD: BOARD MEMBER SLONE CONCURRING.

1. The Review Board has before it a joint request for approval of agreement, filed June 29, 1966, by Lafayette Broadcasting Co., Inc. (Lafayette), and State Line Broadcasting Co., Inc. (State Line), whereby Lafayette's application would be dismissed, State Line's application would be granted, and State Line would reimburse Lafayette to the extent of $1,500 for expenses legitimately and prudently incurred in the preparation, filing, and prosecution of its application.[1] The parties are mutually exclusive applicants for a construction permit for a new FM broadcast station on channel 257. The location of Lafayette's station would be at Lafayette, Tenn., while State Line would be situated in Scottsville, Ky. The Commission designated this proceeding for hearing by order, FCC 66-467, released May 31, 1966, to determine, under section 307(b) and contingent standard comparative issues, which of the proposals would better serve the public interest.

2. Petitioners have complied with the requirements of section 1.525 (a) of the Commission's rules. Facts relevant to the nature of the consideration involved, and details as to the initiation and history of the negotiations between the parties have been furnished. Disregarding 307(b) considerations, approval of the agreement would be in the public interest in that it would enable the inauguration of this new FM service at an earlier date than would otherwise be the case.

3. Contrary to the contention of the Broadcast Bureau that publication under section 1.525(b)(2) of the rules is required, the petitioners assert that publication is not necessary because approval of the agreement and grant of the State Line application would foster the objectives of section 307(b) of the act. They base their argument on the facts that both Lafayette, Tenn., and Scottsville, Ky., are served by local daytime AM stations; that the population of Scottsville exceeds

[1] The pleadings before the Review Board are: (1) Joint request for approval of agreement for withdrawal of application of Lafayette Broadcasting Co., Inc., filed June 29, 1966, by Lafayette Broadcasting Co., Inc., and State Line Broadcasting Co., Inc.; and (2) Broadcast Bureau's support of the joint request, filed July 13, 1966.

that of Lafayette; and that the service area of State Line contains a larger population than that of Lafayette. However, differences in population and total coverage are not the only considerations in resolving a section 307(b) issue. Cf. *WNOW, Inc.*, 37 FCC 961, 3 R.R. 2d 875. Although State Line's service will reach considerably more people than would Lafayette's, it is apparent from the engineering portion of the applications that most of the area that Lafayette would serve would not be served by State Line. The Commission has stated in its designation order that the availability of other FM services of at least 1 mv/m in the respective 1-mv/m service areas of the two proposals will be considered. Petitioners have made no showing concerning the availability of other FM services to their respective service areas. Without such a showing the Board cannot determine whether the dismissal of the Lafayette application would defeat the objectives of section 307(b) of the act. Cf. *James L. Hutchens*, —— FCC 2d ——, FCC 66R-297, released August 3, 1966. Therefore, publication pursuant to section 1.525(b)(2) of the rules will be required.

Accordingly, it is ordered, This 10th day of August 1966, that consideration of the joint request for simultaneous approval of the agreement, dismissal of the Lafayette Broadcasting Co., Inc., application and grant of the State Line Broadcasting Co., Inc., application, filed June 29, 1966, by Lafayette Broadcasting Co., Inc., and State Line Broadcasting Co., Inc., *Is held in abeyance;* that further opportunity be afforded for other persons to apply for the facilities specified in the application of Lafayette Broadcasting Co., Inc.; and that Lafayette Broadcasting Co., Inc., will therefore comply with the provisions of section 1.525(b)(2) of the Commission's rules.

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

FCC 66-649

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

CAROL MUSIC, INC. (WCLM), CHICAGO, ILL.

MEMORANDUM OPINION AND ORDER

(Adopted July 15, 1966)

BY THE COMMISSION: COMMISSIONERS COX, WADSWORTH, AND JOHNSON ABSENT.

1. The Commission has before it for consideration (1) a motion to stay the effective date of that portion of its revocation order of July 27, 1964, which terminates the authorization of Carol Music, Inc., 60 days after judicial affirmation of the Commission's decision, and (2) a petition to amend the Commission's order revoking the license of Carol Music, Inc., for FM broadcast station WCLM, Chicago, Ill. Both of these pleadings were filed on June 21, 1966, by Carol Music, Inc.[1]

2. In *Carol Music, Inc.*, 37 FCC 279, 3 R.R. 2d 477, the Commission revoked the license and subsidiary communications authorization of Carol Music, Inc., for FM broadcast station WCLM, Chicago, Ill. On November 25, 1964, the Commission denied the petition of Carol Music, Inc., for reconsideration of this action. *Carol Music, Inc.*, 37 FCC 979, 4 R.R. 2d 188. On November 18, 1965, the Court of Appeals for the District of Columbia Circuit (No. 19089) dismissed an appeal by Carol Music, Inc., from the Commission's action, and that court, on January 4, 1966, and January 13, 1966, respectively, denied a request for stay and a request for reconsideration and oral argument. On June 6, 1966, the Supreme Court denied Carol Music, Inc.'s petition for a writ of certiorari.

3. In the pleadings now before us, Carol Music, Inc., is in substance requesting that it be given an opportunity of submitting to the Commission an application for assignment of its license, that following grant of such request it be afforded 90 days within which to submit such application, and that the Commission's order of revocation, supra, be stayed until the application for assignment is approved.

4. In support of its request, Carol Music, Inc., cites the actions taken by the Commission in granting purportedly similar relief to the licensees involved in *WMOZ, Inc.*, 3 FCC 637, 7 R.R. 2d 373, and in *Melody Music, Inc.*, 2 FCC 958, 6 R.R. 2d 973. Carol Music, Inc., submits that the equities favoring the relief requested are at least as great as those present in *WMOZ, Inc.*, and in *Melody Music, Inc.* In support of this contention, Carol Music, Inc., sets forth the financial status of

[1] Responsive pleadings which relate to these requests are set forth in memorandum opinion and order of this date (FCC 66-650).

the stockholders of Carol Music, Inc., and of their dependents and close relatives, and it argues that their life savings and economic security are at stake. Carol Music, Inc., further contends that the rule infractions which led to the revocation of its license are morally no more reprehensible than those involved in *WMOZ, Inc.*, and *Melody Music, Inc.* In addition, Carol Music, Inc., contends the Commission's action revoking its license was unduly severe, when compared to the Commission's actions in other cases in which only a monetary forfeiture was imposed. Finally, Carol Music, Inc., contends that it was inadequately represented by counsel before the court of appeals.

5. First, we point out that petitioner's reliance upon *Melody Music* and *WMOZ, Inc.*, is misplaced. In both cases, the matter had been remanded to the Commission, and the Commission, upon its further consideration, had determined that an assignment to a new party would be consistent with the public interest on grounds which are not at all present here. In *Melody Music*, for example, there was the important factor that "the misconduct of applicant's principals with respect to their television quiz program was neither related to nor reflected in the operation of their own station, WGMA [; t]here is no evidence of any misconduct of any kind in the operation of WGMA; and, on the contrary, the record and the findings show that the operation [of] WGMA has been not only acceptable but commendable" (6 R.R. 2d at 977). In *WMOZ*, we were urged to permit an assignment of the two station licenses involved, because the petitioner was seriously ill. We pointed up the applicable policy considerations, and then held (7 R.R. 2d at p. 376):

> We believe, in view of this flagrant misconduct in the stewardship of WMOZ, that Estes does not possess the requisite character qualifications to be a broadcast licensee, and would ordinarily revoke the license of WPFA also. However, taking into account all of the circumstances of this case, we have determined to exercise our discretion and temper our decision in this respect and to permit Estes to assign that station's license. We note here that the deterrent aspect of our policy is furthered by our action as to WMOZ, the station at which all the misconduct occurred, and that the other aspect of the policy is maintained by the requirement that the license of station WPFA be assigned to an unrelated assignee who is fully qualified to operate the station in the future.

6. The situation here is markedly different. The misconduct here occurred in the operation of the station. Thus, the *WMOZ* case, far from supporting petitioner, calls for revocation of license, on the grounds set forth in our previous decisions. See also *Harry Wallerstein*, 1 FCC 2d 91 (1965). We wish to stress another aspect of the matter. This case has been through the process of agency proceedings and, on appeal, was disposed of on procedural considerations involving violation of the court's rules. Clearly, the end of the judicial process cannot be regarded simply as a signal to begin anew with pleas to the agency. It has been urged to us that we lack jurisdiction to consider such pleas. We do not decide that question. We state here that only a strong and compelling case would, in any event, warrant taking up the matter again after there has been the completion of the agency and judicial process. No such showing has been made here. See *Eleven Ten Broadcasting Corp.*, public notice 47614, 47753, 1 R.R. 2d 967.

Accordingly, it is ordered, That the motion to stay effective date of revocation order, and the petition to amend revocation order, both of which were filed on June 21, 1966, by Carol Music, Inc., *Are denied.*

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

FCC 66-717

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of FRED L. KEYSER, D.B.A. KEY WEST AERO, KEY WEST, FLA.	Docket No. 16811
ISLAND CITY FLYING SERVICE, KEY WEST, FLA. For Aeronautical Advisory Station To Serve the Key West International Airport	Docket No. 16812

ORDER

(Adopted August 10, 1966)

BY THE COMMISSION: COMMISSIONERS LOEVINGER AND WADSWORTH ABSENT.

At a session of the Federal Communications Commission held at its offices in Washington, D.C., on the 10th day of August 1966, the Commission had under consideration the above-entitled applications.

1. The Commission's rules (sec. 87.251(c)) provide that only one aeronautical advisory station will be authorized at any landing area. This restriction is necessary from a safety standpoint. The above-captioned applications both seek Commission authority to operate an aeronautical advisory station at the Key West International Airport, Key West, Fla., and, therefore, are mutually exclusive.

2. The owner of the landing area, Monroe County, Fla., has not sought an aeronautical advisory station and has indicated to the Commission that no one has been given the sole and exclusive right to establish and maintain an aeronautical advisory station as required by section 87.251(d) to serve Key West International Airport. In the interest of aviation safety and in order to allow for advisory service at the landing area, the requirements of section 87.251(d) are waived with respect to applicants for a station at this landing area. Except for the issues specified herein, each applicant is otherwise qualified.

3. Inasmuch as the applications are mutually exclusive, the Commission, under section 1.971(a) of the rules, is unable to grant either application without a hearing.

4. In view of the foregoing, *It is ordered*, That, pursuant to the provisions of section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications are hereby designated for hearing in a consolidated proceeding at a time and place to be specified in a subsequent order on the following issues:

(*a*) To determine which applicant would provide the public with the better aeronautical advisory service based on the following considerations:

(1) Location of the fixed-base operation and proposed radio station in relation to the landing area and traffic patterns;

106-507—66——6

(2) Hours of operation;
(3) Personnel available to provide advisory service;
(4) Experience of applicant and employees in aviation and aviation communications;
(5) Ability to provide information pertaining to primary and secondary communications as specified in section 87.257; and,
(6) Proposed radio system including control and dispatch points and the availability of the radio facilities to other fixed-base operators.

(*b*) To determine in light of the evidence adduced on the foregoing issue which, if either, of the applications should be granted.

5. *It is further ordered*, That, to avail themselves of an opportunity to be heard, Fred L. Keyser, d.b.a. Key West Aero, and Island City Flying Service, 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 hearing and present evidence on the issues specified in this order.

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

FCC 66–738

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
APPLICATION FROM THE CITY OF FORT LAUDERDALE, FLA., FOR AN AIRDROME CONTROL STATION LICENSE AND ACCOMPANYING REQUEST FOR WAIVER OF SECTION 87.403(b)(1) OF THE COMMISSION'S RULES TO PERMIT THE LISTENING WATCH TO BE MAINTAINED ON 122.6 MC/S IN LIEU OF 122.5 MC/S

ORDER

(Adopted August 17, 1966)

BY THE COMMISSION:

1. At a session of the Federal Communications Commission, held at its offices in Washington, D.C., on the 17th day of August 1966, the Commission considered the above-captioned matters.

2. The Commission's rules, section 87.403(b)(1), provided that the licensee of an airdrome control station shall maintain a continuous listening watch during the hours of operation on the frequency 122.5 Mc/s. Fort Lauderdale Executive Airport is less than 10 nautical miles from Fort Lauderdale-Hollywood International Airport, which is served by an airdrome control station maintaining a continuous listening watch on 122.5 Mc/s.

3. The city of Fort Lauderdale, with the concurrence of the Federal Aviation Agency, has indicated that Fort Lauderdale Executive Airport would better aviation safety by maintaining a listening watch on the frequency 122.6 Mc/s in lieu of 122.5 Mc/s.

4. The Commission is of the opinion that the listening watch on 122.6 Mc/s at Fort Lauderdale Executive Airport will be in the interest of general aviation safety.

5. In view of the foregoing, *It is ordered* that the provisions of section 87.403(b)(1) of the Commission's rules are waived with respect to a listening watch on 122.5 Mc/s; and the city of Fort Lauderdale *Is authorized* to maintain a listening watch on 122.6 Mc/s.

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

FCC 66-736

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of NEW YORK-PENN MICROWAVE CORP. For Microwave Facilities To Serve CATV System in Jamestown, N.Y., and Warren and Bradford, Pa.	Files Nos. 6643-C1-P-65, 6644-C1-P-65, 6645-C1-P-65

MEMORANDUM OPINION AND ORDER

(Adopted August 17, 1966)

BY THE COMMISSION: COMMISSIONER COX DISSENTING AND ISSUING A STATEMENT; COMMISSIONER WADSWORTH ABSENT; COMMISSIONER JOHNSON NOT PARTICIPATING.

1. The Commission has before it for consideration (1) a petition for reconsideration and a petition for stay, filed on May 20, 1966, by Trend Radio, Inc. (Trend), applicant for a construction permit for a new UHF commercial television broadcast station at Jamestown, N.Y. (BPCT-3665); (2) a petition for reconsideration and special relief and a petition for interim relief and stay, filed on June 1, 1966, by Dispatch, Inc. (Dispatch), licensee of television station WICU-TV, Erie, Pa.; (3) a petition for reconsideration of grant of application without hearing, filed on June 1, 1966, by Jet Broadcasting Co., Inc. (Jet), permittee of station WJET-TV, Erie, Pa.;[1] and (4) related responsive pleadings.[2]

2. On April 29, 1966, the Commission granted the captioned applications which proposed three channels of microwave service to existing CATV systems in Bradford (Bradford TV Cable Co.) and Warren (Warren Television Corp.), Pa., and a recently franchised system in Jamestown (Jamestown Cablevision, Inc.), N.Y., in order to supply the signals of independent television stations WNEW-TV (channel 5), WOR-TV (channel 9), and WPIX-TV (channel 11), all of New York City, to those CATV systems. Subsequently, the above petitions for reconsideration and stay were filed. While the petitions are directed to the applications as a whole, the focus of their concern is with

[1] On June 26, 1966, Jamestown Cablevision, Inc., applicant's customer in Jamestown, and Jet filed a pleading entitled joint request for no action on petition for reconsideration asking that, in light of the private agreement entered into by the parties, no further action be taken with respect to the petition filed by Jet. This request will be granted.

[2] The additional pleadings filed are the oppositions filed by Jamestown Cablevision, Inc. (Cablevision), on June 2, 1966, to Trend's petitions; the oppositions filed by New York-Penn Microwave Corp. (New York-Penn) on June 2, 1966, to Trend's petitions; the replies filed by Trend on June 9, 1966; the supplements to New York-Penn's oppositions, filed on June 16, 1966; the petition for leave to file additional pleading and the supplemental reply, filed by Trend on June 22, 1966; Cablevision's oppositions to Dispatch's petitions, filed on June 14 and June 17, 1966; New York-Penn's oppositions to Dispatch's petitions, filed on June 14 and June 16, 1966; and Dispatch's replies thereto, filed on June 21 and June 29, 1966.

the effect of the proposed service to the Jamestown CATV system. That system presently carries the following signals: WGR–TV (channel 2, NBC), WKBW–TV (channel 7, ABC), and WBEN–TV (channel 4, CBS), all Buffalo, N.Y.; WICU–TV (channel 12, NBC) and WSEE–TV (channel 35, CBS), both Erie, Pa.; WPSX–TV (channel 3, educational), Clearfield, Pa.; CKCO–TV, CPFL–TV, and CHCH–TV, all Canadian stations; and a local automated time and weather channel. The system is in the process of adding the signals of WNED–TV (channel 17, educational), Buffalo, N.Y., and WJET–TV (channel 24, ABC), Erie, Pa., for a total of 12 channels of service. Three of the nonnetwork signals now carried or to be carried on the system will be deleted and the three New York independent stations' signals will be substituted in their place as a result of the April 29th grant of the captioned applications.

3. In its petition, Trend alleges that it did not file a pregrant petition to deny because it had proposed, when it filed its application for channel 26 on November 19, 1965, a programing schedule based upon an affiliation with the ABC Television Network, and, consequently, it did not wish to oppose the grant of an application which would bring independent programing to the Jamestown area. Subsequently, Trend alleges, "* * * it gradually became apparent * * * that a network affiliation was not feasible, since Jamestown now receives service from the three networks directly and through the existing CATV system from the adjacent Buffalo and Erie markets." Thus, on April 23, 1966, Trend states it filed an amendment to its application under which it proposed independent programing. Trend states that, although it intended to file appropriate pleadings opposing the captioned applications, the applications were granted before it was able to take action. Trend alleges further that the importation of the three New York independent signals will fragmentize the audience of the local independent UHF station, create a high degree of unfair competition, and have a serious and adverse economic impact upon such station. It contends that the nonduplication provisions of the rules will afford only illusory protection to an independent Jamestown UHF operation and that, accordingly, reconsideration of the grant is required.

4. Dispatch, in its petition, alleges that in light of the fact that the proposed new UHF station in Jamestown will be independent in operation, the Commission must reconsider its grant of the New York-Penn applications to determine the impact on such station of the importation of the three New York independent stations. Dispatch also alleges that its station, WICU–TV, depends upon its entire coverage area for audience support and that any CATV system which would divert viewers from WICU–TV, as would the Jamestown system, would cause a reduction of the station's revenues and the quality of its programing. Dispatch states that the rationale for the hearing provisions of section 74.1107 of the Commission's rules was that it was in the top 100 markets, where UHF was most likely to develop and where the problems raised by CATV were most acute; and that while the problems were not nearly as significant in the markets below the top 100, the Commission nevertheless recognized that there could be

substantial problems in such markets (and provided for hearings in appropriate cases) where the CATV system proposed to extend the signals of broadcast stations beyond their grade B contours. Dispatch points out that there is considerable UHF activity in and around the Erie-Jamestown area by way of UHF applications in Jamestown and Buffalo, and allocations in areas such as Altoona and Clearfield, and that the Erie market (which includes Jamestown), although ranked 103d in net weekly circulation, is 99th in total homes and 97th in total households. In light of these facts, Dispatch contends that the situation presented here is precisely the type of situation contemplated by the Commission, where an evidentiary hearing is warranted even though the market is below the top 100. Accordingly, Dispatch requests the Commission to vacate its grant of the captioned applications and designate said applications for hearing.

5. The oppositions filed against the Trend petition allege that Trend has failed completely to make the necessary showing of newly discovered evidence as required by section 1.106(c) of the Commission's rules[3] and that the petition is accordingly untimely. It is alleged, with supporting affidavit, that Trend was advised by letter of January 14, 1966, from the ABC Television Network,[4] that ABC was not interested in affiliating with Trend because the network received adequate circulation in the county from its Buffalo affiliate (87 percent), and that this coverage was to be supplemented through coverage of the new UHF station in Erie, Pa. Trend's failure to file a pregrant petition to deny until 136 days after it knew it would not get an ABC affiliation, it is alleged, is fatal to its claim of good cause and does not comply with the provisions of section 1.106(c). Further, it is contended that reconsideration is not required in the public interest pursuant to section 1.106(c)(3) of the rules. It is alleged that Trend has wholly failed to factually support its claims that the action complained of will cause it economic injury or have an adverse effect on the public interest. To the contrary, it is claimed that the addition of the signals of the three New York independent stations to the signals of the nine other stations carried could not possibly enhance the competition offered by the CATV system; that the New York signals could not and would not be as popular as the local UHF station; that carriage of the local station on the system will be beneficial to it; and that CATV is needed to bring in the Erie stations.

6. In its reply, Trend alleges that it had planned originally upon a portion of its programing based upon a fourth television network, and that it was not until late in March 1966, after the NAB convention, that Trend realized that plans for a fourth network were not going to be-

[3] Sec. 1.106(c) of the Commission's rules provides:
"A petition for reconsideration which relies on facts which have not previously been presented to the Commission or to the designated authority, as the case may be, will be granted only under the following circumstances:
"(1) The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters;
"(2) The facts relied on were unknown to petitioner until after his last opportunity to present such matters, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or
"(3) The Commission or the designated authority determines that consideration of the facts relied on is required in the public interest."

[4] The Jan. 14 letter was attached as exhibit A to Trend's reply to the oppositions to petition for stay.

come a reality and that a Jamestown television station would have to operate on an independent basis without affiliation with any nature of a network; thereafter, Trend alleges, it promptly amended its application. Trend further alleges that since Cablevision knew that ABC did not plan to affiliate with Trend, it had an obligation to amend the applications of New York-Penn to reflect this fact. In a supplemental pleading, New York-Penn submitted an affidavit from the president of Cablevision in which it is stated that he did not learn until May 20, 1966, the date Trend's petitions were filed, that ABC was not interested in affiliating with Trend.

7. The oppositions filed against the Dispatch petitions generally repeat the arguments set forth above and additionally point out that although Dispatch was on notice since April 30, 1965, of the filing of the New York-Penn applications, it waited approximately 13 months before filing the subject petition. Dispatch states, in its reply, that the amendment of Trend's application for a UHF station to delete the proposed ABC affiliation and substitute independent programing constitutes good cause for the filing of the petition for reconsideration.

8. The petitions of Trend and Dispatch will be denied. We do not think that the petitioners have demonstrated good cause for nonparticipation earlier in this proceeding nor have they made a sufficient showing of changed or unknown circumstances. We think that it has been conclusively demonstrated that Trend became aware shortly after January 14, 1966, that ABC was not interested in affiliating with Trend's proposed new station, and we are not persuaded by Trend's allegations concerning its proposed affiliation with a fourth network and when it learned that such a network was not realistic. It alleges that it learned late in March of 1966 that such a network was not going to become a reality, yet it did not amend its application until some 4 weeks later and did not file the instant petition until May 20, 1966. In view of the fact that New York-Penn's applications have been on file since May 24, 1965, we do not think that Trend has acted with ordinary diligence or that it has complied with the provisions of section 1.106(c) of the Commission's rules.

9. As to Dispatch, we note that, pursuant to the Commission's rules, New York-Penn notified Dispatch on April 30, 1965, of the filing of the instant applications. There was no application on file then for a UHF station in Jamestown. Not until 13 months after receiving such notice, and after the Commission had acted, did Dispatch make known its objection to the applications. In the circumstances, we find that Dispatch has failed totally to comply with the provisions of section 1.106(c) of the Commission's rules. We note that the petition was also filed by Dispatch pursuant to the provisions of newly adopted section 74.1109 of the rules which contemplates, in part, the filing of petitions requesting additional or different relief in markets below the top 100. It is clear, however, that section 74.1109 cannot be used to support a petition which is defective under section 1.106(c) of the rules. In any event as indicated in paragraph 10, infra, the matters raised by Dispatch were considered by the Commission. Accordingly, in view of the above, we find that neither Trend nor Dispatch have established good cause for the failure to file pregrant objections. *Springfield Tele-*

vision Broadcasting Corp. v. *F.C.C.*, 328 F. 2d 186; *Valley Telecasting Co., Inc.* v. *F.C.C.*, 336 F. 2d 914.

10. Nor in the circumstances do we believe reconsideration is required on the merits. The Commission previously considered the issue of impact upon UHF when it granted these applications (see, e.g., letter of April 19, 1966, from counsel for Capital Cities Broadcasting Corp., licensee of station WKBW–TV, Buffalo, N.Y., and dissenting statement of Commissioner Kenneth A. Cox, public notice B, May 2, 1966, report No. 5981). The pending petitions add nothing new of substance on this issue that was not before the Commission when it granted the applications. Furthermore, at this posture, as the court held in *Valley*, supra, the Commission should measure allegations of injury to the public contained in a petition for reconsideration by a more exacting standard than might be required in a petition to deny. That more exacting standard has clearly not been met here by either petitioner, both of whom have relied essentially on conclusionary statements.

Accordingly, *It is ordered*, This 17th day of August 1966, that the petition for reconsideration, filed by Trend Radio, Inc., *Is denied;* the petition for reconsideration and special relief, filed by Dispatch, Inc., *Is denied;* and the petition for reconsideration of grant of application without hearing, filed by the Jet Broadcasting Co., Inc., *Is dismissed.*

It is further ordered, That the petition for stay, filed by Trend Radio, Inc., *Is dismissed* as moot; and that the petition for interim relief and stay, filed by Dispatch, Inc., *Is dismissed* as moot.

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

DISSENT OF COMMISSIONER KENNETH A. COX

I dissent. I believe that Trend Radio's final decision to shift to independent programing coincided so nearly with the Commission's action in this matter that it should be recognized as having encountered changed circumstances within the meaning of section 1.106(c)(1) of the rules. In any event, for the reasons stated in my dissent to the grant of these applications, I believe that consideration of the matters raised—even though admittedly very belatedly—is required in the public interest.

FCC 66-729

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re UNITED TRANSMISSION, INC., ROARING SPRING, MARTINSBURG, FREEDOM TOWNSHIP, AND GREENFIELD TOWNSHIP, PA. Request for Waiver of Section 74.1107 of the Commission's Rules	CATV 100-4

MEMORANDUM OPINION AND ORDER

(Adopted August 17, 1966)

BY THE COMMISSION: COMMISSIONERS LEE AND WADSWORTH DISSENTING; COMMISSIONER COX DISSENTING AND ISSUING A STATEMENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has before it for consideration a request for waiver of the evidentiary hearing requirement in section 74.1107(a) of the rules.[1] The request was filed March 24, 1966, by United Transmission, Inc. (hereinafter "United"), and was placed on public notice on March 31, 1966 (public notice B, report No. 2, mimeo. No. 81851).

2. United was granted franchises to establish CATV systems in Roaring Spring, Martinsburg, Greenfield Township, and Freedom Township, Pa. The foregoing communities are located within the grade A contours of stations WFBG-TV (CBS-ABC), Altoona, and WJAC-TV (NBC-ABC), Johnstown, and the grade B contour of station WARD-TV (CBS), Johnstown, Pa. These stations are in the Johnstown-Altoona, Pa., market which, according to American Research Bureau (ARB) television market ratings on the basis of net weekly circulation, is ranked 41st in the United States. Petitioner proposes to extend, beyond their grade B contours, the signals of the following television broadcast stations: WTTG-TV (independent) and WMAL-TV (ABC), both Washington, D.C. (channels 5 and 7, respectively); WGAL-TV (NBC), Lancaster, Pa. (channel 8); WIIC-TV (NBC), KDKA-TV (CBS), and WTAE (ABC), Pittsburgh, Pa. (channels 11, 2, and 4, respectively); WSTV (ABC-CBS), Steubenville-Wheeling, W. Va. (channel 9). Carriage of these signals is proposed on each CATV system. Because the CATV systems pro-

[1] Section 74.1107 provides in pertinent part that:
"(a) No CATV system operating 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. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made."

pose to carry distant signals as defined in section 74.1101(i), unless a waiver is granted, an evidentiary hearing would be required.

3. The communities of Roaring Spring, Martinsburg, Greenfield Township and Freedom Township are located 10 to 13 miles from Altoona in Blair County. According to the 1960 U.S. census, Blair County had a population of approximately 137,270 persons. Populations of the relevant communities are: Roaring Spring, 2,937; Martinsburg, 1,772; Greenfield Township, 3,702; and Freedom Township, 2,127; totaling 10,538 persons. There are approximately 39,200 TV homes in that county.[2] There are four unassigned UHF channels in the market. These are channels 31, 48, and *57 allocated to Altoona (application pending for 31), and channel *28 to Johnstown.

4. United contends that the importation of distant signals to the above communities would serve the public interest since: (1) The areas are, by virtue of mountainous terrain, deprived of good signal reception; (2) there is a substantial demand for CATV services; and (3) establishment of CATV systems will actually aid UHF by enabling households in the area to receive UHF signals otherwise unobtainable because of terrain factors. Additionally, United states that the CATV operations "would provide color reception to an area where color is virtually nonexistent because of weak and refracted signals." Further, United argues that it is not likely that cable service will adversely affect existing stations, since the CATV systems will only serve about 2,000 homes in areas where off-the-air reception is marginal. United also notes that its proposals have not been protested by local broadcasters.

5. From the facts presented, the Commission is of the opinion that this unopposed request for waiver of the evidentiary hearing requirement of section 74.1107(a) of the rules should be granted. The total population of the communities in which the CATV systems are to operate is only about 10,500, or slightly more than 2,000 households. By contrast, Blair County, the county in which these communities are located, has a population of over 137,000. Further, the communities are between 10 and 15 miles from Altoona, a community of almost 70,000 people, with an operating CATV system bringing in distant signals, and roughly 30 miles from Johnstown, a city of 54,000, which also has an operating CATV system bringing in distant signals. Further, operation of the CATV systems as proposed would give viewers in these communities, like Altoona and Johnstown, a choice of full network services for the first time. In view of all these factors, we believe that a hearing is unnecessary and that waiver of the hearing requirement would be consistent with the public interest.

---

[2] The net weekly circulation of television broadcast station WJAC–TV, Johnstown, for March 1965 was 434,400, and 221,400 for station WFBG–TV, Altoona. The net weekly circulation for station WARD–TV is 10,600 in Cambria County. All or part of Blair County is located within the grade A contours of these stations. The net weekly circulation in the market is 434,400 (ARB, 1965), and there are 1,195,600 TV homes in the 41st market.

6. Accordingly, *It is ordered*, This 17th day of August 1966, that the petition for waiver of hearing, filed by United Transmission, Inc., on March 24, 1966, *Is granted;* the evidentiary hearing provision of section 74.1107 of the Commission's rules *Is waived;* and United Transmission, Inc., *Is authorized* to commence operation as proposed, subject to the provisions of section 74.1103 of the Commission's rules.

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

DISSENTING STATEMENT OF COMMISSIONER KENNETH A. COX

I dissent. Section 74.1107 of the rules provides that no CATV system operating within the predicted grade A contour of a television station in the 100 largest markets shall extend the signal of a television station beyond the latter's grade B contour except upon a showing, in a full evidentiary hearing, that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. This rule applies here and the applicant seeks a waiver.

An application for waiver, especially where it seeks to obviate a hearing which the rule calls for in order to determine the facts, must make an extremely strong showing. After all, the rule reflects a basic policy decision by the Commission, and one seeking to avoid its application should be required to make an extremely persuasive case. That is simply not true here. It may be that applicant could prevail in a hearing, though it seems unlikely to me. But it certainly has not shown enough to obviate a hearing and receive a grant in the face of the rule.

Johnstown-Altoona is the 41st television market in the United States. The four communities involved here are from 10 to 13 miles from Altoona and are well within the grade A contours of WFBG–TV in Altoona and WJAC–TV in Johnstown, and also within the grade B contour of WARD–TV, a UHF station in Johnstown. Applicant proposes to carry the local station but wishes to add the signals of WTTG and WMAL–TV from Washington, D.C. (some 125 miles away), WGAL–TV from Lancaster, Pa. (some 110 miles away), WSTV from Steubenville-Wheeling (some 125 miles away), and WIIC–TV, KDKA, and WTAE, all from Pittsburgh (some 75 miles away). None of these stations provide grade B service to the communities in question. The rule therefore clearly applies.

There is one operating UHF station in Johnstown and there are four unassigned UHF channels in the Johnstown-Altoona market—two commercial and two educational. One of the commercial channels has been applied for. Presumably this applicant will provide an independent service, trying to present programs not carried by the existing network-affiliated stations. It is precisely this kind of service which is most directly and seriously affected by the importation of the sig-

nals of distant stations likely to be carrying many of the programs the local independent will be bargaining for in the program market. This is particularly true of the importation of independent service from larger markets, such as WTTG in Washington, which applicant proposes to carry on its systems. An application is pending which proposes to transmit the signal of WPIX–TV, an independent station in New York City, to the Altoona area. I see nothing in the majority's opinion which suggests grounds for distinguishing one distant signal from another, so there is no basis for assuming that it would not approve the importation of WPIX and other New York City signals. It seems to me that the inevitable result will be to reduce the likelihood that additional viable UHF service will be provided to the Johnstown-Altoona area, with consequent stunting of the free service available to all in order to provide a pay service for those who can afford it—and who live in built-up areas where it can be provided economically. This is precisely what our new rules are designed to prevent.

Let us consider the grounds advanced by the applicant in support of its waiver request. First, it argues that the areas involved do not have good signal reception because of the mountainous terrain in which they are located. This is a sound reason for contending that a CATV system which would improve the reception of signals locally available would be in the public interest, but has absolutely nothing to do with the importation of distant signals which would not normally be receivable in the locality even under good reception conditions.

Applicant's second argument is that there is substantial demand for CATV services. Again, this is not a valid ground for waiver of the rules, which were designed to apply whether demand for cable service is slight or great. The rules are intended to prevent adverse impact, contrary to the interests of the viewing public, on the operations of existing or prospective local stations. Since the impact of CATV operations would be greatest in areas where cable service is very popular, it is in precisely those situations that the protection of the rules is needed most. The rules are designed to permit CATV operators to provide their valuable supplemental role, but to prevent them from damaging our hard-won local television service. In the major markets, one of the means devised was to bar the importation of distant signals except upon a showing that local service would not be impaired. Obviously, the popularity of applicant's service is irrelevant—otherwise the decision whether to waive the rules would depend on the success of the cable operator's sales promotion campaign rather than on the basic public interest considerations underlying the rules.

In the third place, applicant contends that its CATV systems will actually aid UHF by enabling households in the area to receive UHF signals otherwise unobtainable because of terrain factors. It is true that a CATV system simply carrying the local Johnstown-Altoona stations would: (1) Extend the coverage of the existing UHF station, as well as any to be built in the future; (2) improve the quality of their

pictures in areas of difficult reception; and (3) thereby tend to equalize competition with the local VHF stations. But none of that involves the importation of distant signals. In fact, if such importation is allowed, the inevitable result will be fragmentation of the local stations' audiences, including those of the UHF stations. This argument was advanced in the proceedings leading to adoption of the rules and was rejected by the Commission. See, for example, paragraph 123 of the second report and order in dockets Nos. 14895, 15233, and 15971. I know of no reason for reversing that conclusion here.

Applicant next argues that its CATV systems would provide color reception to an area where color is virtually nonexistent. This is simply a minor variant of the first argument, and the answer to that contention given above is equally applicable here. Let the systems provide good reception of the color signals of the local stations. The fact that such a service is in the public interest does not mean, ipso facto, that the importation of distant color signals in violation of the rule should be authorized.

Applicant further contends that its cable service is not likely to affect the existing stations adversely because its systems will only serve about 2,000 homes. This is the only basis for the waiver request which has any relevance to a rational decision of the matter—and it is deceptive. If we view the problem of impact on potential UHF development as a result of importation of distant signals on a community by community basis, we are likely to miss the real consequences to local television. We can't afford to isolate this case, but must consider cumulative impact.

The 2,000 homes applicant expects to serve represent 5.1 percent of the TV homes in the home county of WFBG–TV. But these are not the only CATV homes in the market. Altoona (population 69,407) has a cable system with 16,500 subscribers, to whom it furnishes the signals of WFBG–TV, Altoona, WJAC–TV, in Johnstown, and WIIC, KDKA–TV, and WTAE, all Pittsburgh. Johnstown (population 53,949) has a similar system which furnishes WARD–TV and WJAC–TV, Johnstown, WFBG–TV, Altoona, and WIIC, KDKA–TV, and WTAE, all Pittsburgh, to 9,760 subscribers. In addition, there are at least 25 communities with populations of more than 1,000 in the grade A contours of the stations in the Johnstown-Altoona market. These communities—together with 39 other communities of comparable size also located within the grade A contours of the Johnstown-Altoona stations which apparently have CATV potential—have a total population of over 222,000.[1] If the majority is right here, then

[1] These facts are derived from the Television Digest CATV Atlas.

I don't know how they can hold the line at this point. If they proceed piecemeal to authorize the importation of seven distant signals into all or most of these communities, then it seems clear to me that substantial impact on the local stations—and on the development of UHF in the area—will result.

Applicant's final argument is that its proposals have not been protested by the local broadcasters. Since the Commission has adopted rules which clearly deal with this situation, it seems to me that our licensees—including the Johnstown-Altoona stations—are entitled to assume that we will enforce them, rather than routinely grant waivers to everyone who asks for one, no matter how trumped up. Waivers should be granted only where it is made clear that the application of the rule would produce an unsound result—and that is certainly not the case here. No self-respecting agency can permit the erosion of its carefully adopted rules by casual waivers for reasons which were rejected in adopting the rules themselves.

The majority relies on the lack of opposition by the local stations and on the assertedly small number of TV homes involved—both of which are dealt with above. But it adds one reason which was apparently not urged by the applicant—and which badly distorts the truth. It says that these four communities are near Altoona and Johnstown, which have operating CATV systems "bringing in distant signals," and that grant of the application will give these communities, like Altoona and Johnstown, "a choice of full network services for the first time." What this conceals, more than it reveals, is that the Johnstown and Altoona systems bring in only the three Pittsburgh stations—which provide a predicted grade B signal to Johnstown and very nearly to Altoona. But they do not bring in the four additional signals from Wheeling-Steubenville, Lancaster, and Washington, D.C., which applicant proposes to import. I would not object to bringing in the Pittsburgh signals to these four communities, if that were all that was involved because this would give them parity with the residents of the two bigger cities. But the majority turns things topsy-turvy by giving the small communities nearby more than the bigger cities now have. As I have indicated in earlier dissents, I think this will create inexorable pressure to do the same thing for the central cities—and if we allow this, and then permit the importation of WPIX–TV from New York City, then what will be left of our rules, and of the hoped-for expansion of local television service they were designed to promote?

The reference to full network service is also misleading. The people of this whole area have very substantial network service from the three local stations, though they do not have the normal situation of each of the three having an affiliation with a single network. But any gaps in their network service can be fully made up by bringing in the three Pittsburgh stations. The four more distant stations will not, under our nonduplication rule, provide much, if any, network programs. They will, however, bring in additional feature films and syndicated rerun programing to further fragment the local stations' audiences.

I do not believe this is a waiver for valid reasons. Rather, it appears to me a virtual abandonment of the rule without looking ahead to see where this sort of thing will lead us. I do not think the applicant has even made a sufficient showing to justify a hearing—much less an immediate grant without examining its claims on an evidentiary record. I therefore dissent.

FCC 66-549

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

June 22, 1966.

BUCKEYE CABLEVISION, INC.,
541 Superior Street,
Toledo, Ohio 43604

GENTLEMEN: This refers to your proposal, contained in counsel's letter of June 14, 1966, to begin carrying the signal of station WTVS (channel 56, educational), Detroit, Mich., when station WGTE-TV (channel 30, educational), Toledo, Ohio, goes off the air, beginning July 1, 1966, for the summer months. You request a temporary waiver of section 74.1107 of the Commission's rules during this period of time "in order to maintain continuity of educational telecasting on the system." Station WTVS would only be carried during the period of time when station WGTE-TV is not on the air during the summer months. The licensee of station WGTE-TV supports your proposal.

We have considered your request and agree that the public interest would clearly be served in these circumstances by a waiver of the rules to permit carriage of station WTVS as you propose. In view of the time element involved, prompt action is necessary. Accordingly, pursuant to section 1.3 of the Commission's rules, sections 74.1107 (a) and (b) of the Commission's rules *Are temporarily waived*, commencing July 1, 1966, and terminating on September 6, 1966, to permit carriage of station WTVS on your Toledo CATV system.

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

FCC 66–766

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202, TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS (GLENS FALLS, N.Y.)	Docket No. 16714 RM–963

REPORT AND ORDER

(Adopted August 24, 1966)

BY THE COMMISSION: COMMISSIONER WADSWORTH ABSENT.

1. The Commission has before it for consideration its notice of proposed rulemaking, FCC 66–540, issued in this proceeding on June 16, 1966 (31 F.R. 8638), inviting comments on a proposal to add FM channel 296A to Glens Falls, N.Y., as follows:

City	Channel No.	
	Present	Proposed
Glens Falls, N.Y.	240A	240A, 296A

This proposal was advanced by Olean Broadcasting Corp., licensee of station WBZA (AM), Glens Falls, N.Y., and applicant for the sole FM channel in Glens Falls. The stated purpose of the proposal was to eliminate the need for a lengthy and expensive comparative hearing with a second applicant for channel 240A (Normandy Broadcasting Corp., licensee of station WWSC (AM), Glens Falls), and to provide Glens Falls with a second FM service at the earliest possible date.

2. Glens Falls has a population of 18,580 persons and its county (Warren) has 44,002 persons. WWSC (class IV) and WBZA (daytime only) are the only two radio stations in the community. Olean submits that there are a number of other sizable communities within a 3-mile radius of Glens Falls, which, together with Glens Falls, have a combined population of 36,000 people. At the present time there are no FM stations serving the area and only one nighttime aural service. As to the technical feasibility of channel 296A, Olean states that this assignment meets all the required minimum spacings, provided a site is located about 4 miles north of the community. Normandy Broadcasting Corp. supports the Olean proposal. No oppositions to the proposal were filed. The Canadian Government has concurred in the assignment of channel 296A to Glens Falls.

3. We are of the view that the proposed additional assignment to Glens Falls would serve the public interest and should be adopted.

106–508—66——1

This community is large enough to warrant a second FM channel. The proposed assignment will permit the institution of FM service to the area at an early date without the burden to the parties and the Commission of a comparative hearing and without adversely affecting any other station or assignment.

4. Authority for the adoption of the amendments contained herein is contained in sections 4(i), 303, and 307(b) of the Communications Act of 1934, as amended.

5. In view of the foregoing, *It is ordered*, That, effective October 3, 1966, section 73.202 of the Commission's rules and regulations, the FM Table of Assignments, *Is amended* to read, insofar as the community named is concerned, as follows:

City	*Channel No.*
Glens Falls, N.Y.	240A, 296A

6. *It is further ordered*, That this proceeding *Is terminated*.

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

FCC 66–770

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.606(b) (TABLE OF ASSIGNMENTS FOR TELEVISION BROADCAST CHANNELS) OF THE COMMISSION RULES AND REGULATIONS TO ADD A COMMERCIAL UHF CHANNEL TO SOMERSET, KY.	Docket No. 16608 RM–903

REPORT AND ORDER

(Adopted August 24, 1966)

BY THE COMMISSION: COMMISSIONER WADSWORTH ABSENT.

1. On April 28, 1966, the Commission issued a notice of rulemaking (FCC 66–390) proposing to assign channel 16 to Somerset, Ky., upon request of Oris Gowen, Dr. A. B. Morgan, and Beecher Frank, all of Somerset; Dr. Thomas Penn, of Grundy, Va.; and Hogan Teater, of Lancaster, Ky., who indicated they would apply for a UHF channel upon its assignment to Somerset.

2. In our fifth report in docket No. 14229 (FCC 66–137), channel 29 was assigned to Somerset but was reserved for noncommercial, educational use. Somerset, with a 1960 population of 7,112, is located in southeastern Kentucky approximately 70 miles south of Lexington, and is the county seat of Pulaski County, with a 1960 population of 34,403. It receives no direct television service, the closest stations being in Lexington. A CATV system is in operation in Somerset providing reception from WATE–TV and WAVE–TV, Louisville, Ky.; WSIX–TV, Nashville, Tenn.; and WLEX–TV and WKYT, Lexington, Ky.

3. After reviewing the request, we determined by use of the electronic computer that channel 16 would be the most efficient assignment to Somerset and thereupon issued the notice of proposed rulemaking. No comments, either for or against the proposal, were filed.

4. We stated in paragraph 7 of our fifth report that our conclusion at that time not to make an assignment to a particular community meant only that we were postponing such a decision until we could be reasonably certain that such an assignment represented an actual need and would serve the public interest. Under the above circumstances, we are of the view that the assignment of channel 16 to Somerset, Ky., would serve the public interest. However, this has been done on the basis of representations that petitioners are prepared to file promptly an application for authority to construct and operate a new UHF television broadcast station and, if awarded an authorization, will proceed diligently with such construction and operation. Failure to

do so may result in the removal of the assignment to restore flexibility to the table.

5. Authority for the amendment adopted herein is contained in sections 4(i), 303, and 307(b) of the Communications Act of 1934, as amended.

6. In view of the foregoing, *It is ordered*, That, effective October 3, 1966, section 73.606(b) of the Commission's rules and regulations is amended, insofar as the city listed below is concerned, to read as follows:

City	*Channel No.*
Somerset, Ky	16, *29

7. *It is further ordered*, That this proceeding *Is terminated.*

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

FCC 66-769

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.606(b) OF THE COMMISSION RULES AND REGULATIONS TO ADD A COMMERCIAL UHF TELEVISION BROADCAST CHANNEL TO WAYNESVILLE, N.C.	Docket No. 16671 RM-911

REPORT AND ORDER

(Adopted August 24, 1966)

By THE COMMISSION: COMMISSIONER WADSWORTH ABSENT.

1. On June 3, 1966, the Commission issued a notice of rulemaking (FCC 66-491) proposing to assign channel 59 to Waynesville, N.C., upon request of Video Cable Co., Inc. (Video), which stated it would apply for a UHF channel upon its assignment to Waynesville.

2. In support of its petition, Video indicated that there are no television stations or assignments in Waynesville or Haywood County, in which it is located. Video operates a CATV system in Waynesville and, according to the 1966 edition of the "TV Factbook," brings in the signals of WBTV, Charlotte, and WLOS-TV, Asheville, N.C.; WFBC-TV, Greenville, and WSPA-TV, Spartanburg, S.C.; WBIR-TV, Knoxville, and WJHL-TV, Johnson City, Tenn.; WCYB-TV, Bristol, Va.; and WGTV, Athens, Ga. Video claims that a UHF facility would enable it to expand its service to the public and provide a means for local expression to Waynesville and Haywood County.

3. Waynesville is located in the western part of North Carolina, approximately 25 miles west and south of Asheville. Its 1960 population was 6,096 and Haywood County's was 39,711. Its economy is based upon agriculture, manufacturing, and tourist and resort trade. The annual value of agricultural products is more than $6 million; the annual industrial payroll is in excess of $34 million, and the annual income from tourist and resort trade exceeds $7 million.

4. Upon review of the petition, we determined by use of the electronic computer that channel 59 would be the most efficient assignment at Waynesville, and proposed the addition of that channel in our notice of rulemaking. Comments in support of the petition were filed by Video, which again asserted its intention to apply for channel 59 if it is assigned to Waynesville.

5. We stated in paragraph 7 of our fifth report that our conclusion at that time not to make an assignment to a particular community meant only that we were postponing such a decision until we could be reasonably certain that such an assignment represented an actual need and would serve the public interest. Under the above circum-

stances, we are of the view that the assignment of channel 59 to Waynesville, N.C., would serve the public interest. However, this has been done on the basis of representations that petitioner is prepared to file promptly an application for authority to construct and operate a new UHF television broadcast station and, if awarded an authorization, will proceed diligently with such construction and operation. Failure to do so may result in the removal of the assignment to restore flexibility to the table.

6. Authority for the amendment adopted herein is contained in sections 4(i), 303, and 307(b) of the Communications Act of 1934, as amended.

7. In view of the foregoing, *It is ordered*, That, effective October 3, 1966, section 73.606(b) of the Commission's rules and regulations is amended, insofar as the city listed below is concerned, to read as follows:

City	*Channel No.*
Waynesville, N.C.	59

8. *It is further ordered*, That this proceeding *Is terminated.*

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

FCC 66–767

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.606(b) OF THE COMMISSION RULES AND REGULATIONS (TABLE OF ASSIGNMENTS FOR TV CHANNELS) TO PROVIDE A COMMERCIAL UHF ASSIGNMENT FOR MARTINSVILLE, VA.	Docket No. 16622 RM–897

REPORT AND ORDER

(Adopted August 24, 1966)

BY THE COMMISSION: COMMISSIONER WADSWORTH ABSENT.

1. The above-entitled rulemaking proceeding was instituted by the Commission on May 4, 1966 (FCC 66–408), pursuant to a petition for rulemaking (RM–897) by Martinsville Broadcasting Co., Inc. The channel proposed for assignment to Martinsville, Va., differed from the channel requested in the petition for rulemaking because the assignment of channel 16 to Martinsville and the associated change of assignments to Greensboro, N.C., which were suggested in the petition in order to make channel 16 available at Martinsville, were based upon the pattern of channel assignments adopted in the fourth report and order in docket No. 14229, and that assignment plan was replaced by a corrected assignment plan by the amendment adopted in the fifth report and memorandum opinion and order in docket No. 14229, adopted February 9, 1966 (FCC 66–137). These facts were set forth in the first paragraph of the notice of proposed rulemaking in this proceeding.

2. In comments filed in response to the notice of proposed rulemaking, Martinsville Broadcasting Co., Inc., reiterates its request for the assignment of channel 16 to Martinsville by deleting it from Greensboro and substituting therefor channel 22 and states "For reasons known only to the Commission, no treatment was given to the possibility of assigning channel 16 to Martinsville by substituting channel 22 for the presently assigned channel 16 at Greensboro even though this was the crux of the WMVA petition." In paragraph 3 of its comments, the petitioner refers to our statement that the corrected table adopted in the fifth report and memorandum opinion and order altered the pattern of assignments, but claims that the revised table has little or no effect upon its original request.

3. In the present Table of Assignments, channel 16 is not assigned to Greensboro but is assigned to Burlington, N.C., and is, therefore, not available for assignment to Martinsville. Greensboro is currently assigned channels 48 and 61. The use of channel 16 at Martins-

ville is further precluded by the assignment of channel 15 to Roanoke, Va., at a distance of approximately 40 miles from Martinsville. The required adjacent channel spacing for UHF channels is 55 miles. Even if those problems did not exist, channel 22 could not be used as a substitute for channel 16 at Burlington because it is assigned to Raleigh, N.C. It is thus apparent that the revised assignment table adopted in the fifth report and memorandum opinion and order in docket No. 14229 does have a substantial effect upon the original request of the petitioner, making it impractical to engage in the extensive shuffling of channels that would be necessary to assign channel 16 to Martinsville if, indeed, it could be accomplished at all.

4. The petitioner concludes its comments with the statement that, based upon information it has solicited from consulting engineers and equipment manufacturers, a UHF operation on channel 65 at Martinsville does not appear feasible at this time because of the problems implicit to an operation on such a "high channel." The problems were not described. We conclude, therefore, that for undisclosed reasons the petitioner is unwilling to venture into an operation on channel 65 in Martinsville, and there is no basis for assigning a UHF channel to Martinsville at this time. No other comments were filed in this proceeding.

5. Accordingly, *It is ordered*, That this proceeding *Is terminated*.

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

FCC 66-757

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 91, INDUSTRIAL RADIO SERVICES, SECTION 91.351, OF THE COMMISSION'S RULES GOVERNING ELIGIBILITY IN THE FOREST PRODUCTS RADIO SERVICE	Docket No. 16386 RM-689

REPORT AND ORDER

(Adopted August 24, 1966)

BY THE COMMISSION: COMMISSIONER WADSWORTH ABSENT.

1. By virtue of our order in this document, the Forest Products Radio Service rules are amended to reflect the eligibility of (1) persons who perform specialized hauling functions under contract to, and exclusively for, persons engaged in woods operations; and (2) persons who have a dual eligibility in the Forest Products and Manufacturers Radio Services.

2. This proceeding commenced with the adoption of a notice of proposed rulemaking on December 22, 1965. That notice was published in the December 30, 1965, edition of the Federal Register at volume 30, page 16270. The time within which comments and reply comments, in response to our invitation to comment, might be filed has now expired.

3. The following persons filed original comments: Diamond National Corp., Willamette Valley Lumber Co., Southern Oregon Timber Industries Association, Central Committee on Communication Facilities of the American Petroleum Institute (API), National Association of Manufacturers Communications Committee (NAM), Forest Industries Radio Communications (FIRC), Anaconda Alloys Corp., Coos Head Timber Co., Emerald Loggers Radio Association.

Only Forest Industries Radio Communications (FIRC), the petitioner in this proceeding, filed reply comments.

4. This proceeding was generated by a petition for rulemaking, filed by FIRC in November of 1964. The amendments proposed in our notice were designed to enhance the efficiency and safety of the day-to-day operations of persons engaged in tree logging, tree farming, and related woods operations. The comments that were filed generally endorsed our proposal. Two parties, however, the API and the NAM, expressed certain objections.

5. A number of the frequencies available to the Forest Products Radio Service are also available to the Petroleum and Manufacturers Radio Services on a shared basis. API objected to our proposal to make log haulers eligible in the Forest Products Radio Service, because

this might increase the use of these frequencies away from the geographic areas where forest products licensees operate, to such areas as the Gulf of Mexico where petroleum licensees are concentrated. FIRC, in reply, argues that this fear is not well founded because logs normally are not transported to great distances. It states that logs are usually hauled to mills located within 25 to 30 miles from the tree farm, that they are never transported over 100 miles, and claims that the area of forestry usage of the shared frequencies would not be extended appreciably. Furthermore, FIRC argues that log haulers need radio service for safety purposes, and this need outweighs whatever additional load may be placed on the shared frequencies.

6. We agree that log haulers have a need for radio facilities closely related to those operated by the forest products industry. We also agree that the impact on petroleum and manufacturer users of the shared frequencies would not be significant enough to offset the anticipated improved radio service in the forestry industry.

7. The NAM's opposition to our proposed rules changes centers about frequency coordination procedures. The NAM would have us require that any dual-eligible who elects to become licensed in the Forest Products Radio Service, at least on any of the 15 frequencies that are shared with the Manufacturers Radio Service, "* * * coordinate the use of that frequency for manufacturing purposes with the Manufacturers Radio Service." Under our present rules, no formal interservice coordination of the type suggested by the NAM is required. When frequencies are shared by different services, these services ordinarily cooperate with one another in exchanging appropriate information regarding frequency selection, base station location, etc. This has certainly been the case since 1958, when the Manufacturers Radio Service was established and was given shared access to a total of 15 frequencies in the 153- and 158-Mc/s bands with the Forest Products and Petroleum Radio Services. The informal procedures employed by the Manufacturers, Forest Products, and Petroleum Radio, with regard to their commonly shared frequencies, have been effective. Thus, it does not appear to be necessary to make interservice coordination mandatory in this particular situation.

8. In view of the foregoing, and pursuant to authority contained in sections 4(i) and 303 of the Communications Act of 1934, as amended, *It is ordered*, That, effective October 3, 1966, part 91 of the Commission's rules *Is amended*, and the proceedings in docket No. 16386 *Are terminated.*

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

FCC 66D–33

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of NEW SOUTH BROADCASTING CORP., MERIDIAN, MISS. For Construction Permit	Docket No. 16318 File No. BPH–4818

APPEARANCES

Harry J. Daly and *Leonard S. Joyce, Esqs.*, on behalf of New South Broadcasting Corp.; and *Joseph Chachkin, Esq.*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER ISADORE A. HONIG

(Effective August 16, 1966, Pursuant to Section 1.276)

PRELIMINARY STATEMENT

1. The applicant, New South Broadcasting Corp. (hereinafter New South), seeks authorization for a new FM broadcast station to operate on channel No. 246 at Meridian, Miss. New South is controlled by Joseph W. Carson and Frank E. Holladay, each of whom has a 50-percent stock interest in the applicant. These individuals, through their combined stock interests (50.66 percent) in the corporate licensee of station WNSL–FM, Laurel, Miss., also control this broadcast facility. In view of these facts as to their controlling ownership interests in the Laurel FM station and the proposed Meridian FM station, the Commission viewed the above-captioned application as presenting the question whether significant improvement in the facilities of station WNSL–FM and the proposed station could be achieved without causing 1-mv/m overlap in contravention of section 73.240 (a) (1) of the rules.[1] Accordingly, the Commission designated the application of New South for hearing upon the following issues:

> 1. To determine the extent to which "duopoly" considerations may preclude future expansion of WNSL–FM and the Meridian proposal and, in light of the evidence adduced in response to this question, whether this proposal represents an efficient use of the channel within the meaning of section 307 (b) of the Communications Act of 1934, as amended.
>
> 2. To determine, in the light of the evidence adduced pursuant to the foregoing issue, whether a grant of the application would serve the public interest, convenience, and necessity.

Except for the matters indicated by the above-specified issues, the Commission found the applicant to be legally, financially, technically, and otherwise qualified to construct and operate the proposed FM station.

[1] Sec. 73.240(a) (1) of the rules prohibits the grant of a license for a new FM station to an applicant who owns or controls an existing FM station where the grant will result in any overlap of the predicted 1-mv/m contours of the existing and proposed stations.

2. A prehearing conference was held on January 5, 1966, and the hearing was held and the record closed on March 8, 1966.[2] Proposed findings of fact and conclusions were filed by the parties on April 12 and 22, 1966, with applicant's submission being accomplished on the first-mentioned date. A reply was filed by New South on May 2, 1966, but none was filed by the Broadcast Bureau.

3. At the time of hearing and of the subsequent filing of proposed findings of fact and conclusions by the parties, there was no FM broadcast station authorized for Meridian, Miss. Evidence at the hearing established that a first FM service would be provided by the New South proposal to nearly 80,000 persons. In the reply to the Bureau's proposed findings and conclusions filed by New South on May 2, it was brought to the attention of the examiner that the Commission had granted on April 26, 1966, an application (BPH–4764) of Broadcasters and Publishers, Inc., of York, Ala., and thereby authorized a new class C FM station at Meridian to operate on channel 267 with a power of 28.5 kw and an antenna height above average terrain of 105 feet. In light of this development, the examiner issued an order on May 11, 1966, reopening the record and scheduling a hearing conference to consider the impact of the above-mentioned grant on this proceeding. The hearing conference was held on May 12, at which time official notice on the record was taken of the recent FM station authorization in Meridian, and of the indication in the application therefor that the proposal was designed to serve 69,587 persons in 756 square miles (Tr. 93–94). A further hearing session was scheduled for June 7, 1966, to afford applicant the opportunity to supplement the evidential record so as to take into account the newly authorized FM operation. On May 23, 1966, counsel for the applicant notified the hearing examiner by letter that this party did not propose to present any additional evidence in this proceeding concerning coverage data for the recent Meridian FM grant. The examiner then issued an order on May 24, 1966, affording counsel for the Broadcast Bureau the opportunity until June 1 to reply to the applicant's May 23 communication, as well as to comments in the New South reply of May 2 (pp. 5–6) concerning the significance for this proceeding of the Commission's authorization of an FM station in Meridian since the original closing of the record herein. The Bureau submitted nothing further either by way of reply comment or procedural proposal in response to the examiner's order of May 24. Accordingly, the examiner issued an order sua sponte on June 2, 1966, canceling the further hearing that had been scheduled for June 7 and again closing the record with a view to preparing an initial decision without the filing by the parties of additional posthearing pleadings.

FINDINGS OF FACT

4. The application of New South Broadcasting Corp. proposes a new class C FM station at Meridian, Miss., for operation on channel

[2] At the outset of the hearing the examiner found that the applicant had complied with the local publication and notification requirements of sec. 1.594 (a) and (g) of the Commission's rules (Tr. 31).

246 (97.1 Mc/s), with an effective radiated power of 40.3 kw and antenna height above average terrain of 186 feet.[3] The FM antenna will be sidemounted on a 125-foot tower to be constructed atop the Greater Mississippi Life Building in Meridian. The 125-foot tower is the maximum height that the building owner will allow; this limitation has been imposed for structural as well as esthetic reasons. Since the building has a height of 188 feet, the top of the tower will be 313 feet above ground level. The radiation center of the sidemounted Collins type 37M–8 FM antenna would be 277 feet above ground level. Studio facilities will be housed in the Greater Mississippi Life Building, which is also the location of the studios of applicant's licensed AM station WOKK in Meridian. WOKK is a class IV station operating on the frequency 1450 kc/s with a power of 1,000 w daytime and 250 w nighttime. This station utilizes a vertical radiator having a height above ground of 180 feet, at a site location in Meridian about 1.5 miles to the north of the Greater Mississippi Life Building.

5. The applicant, New South Broadcasting Corp., is controlled by Frank E. Holladay and Joseph W. Carson, who each own 50 percent of the stock in that corporation and are its officers and directors. Messrs. Holladay and Carson each own a 25.33-percent interest in Voice of the New South, Inc., the licensee of station WNSL–FM, Laurel, Miss., and are officers and two of the four directors of this corporation. In addition, they each own 50 percent of the stock in New South Communications, Inc., permittee of station WVMI–FM, Biloxi, Miss., and are the officers and two of the four directors in that corporation, the other two directors being their wives. Similarly, Holladay and Carson each own 50 percent of the stock of Louisville Broadcasting Corp., permittee of station WLSM–FM, Louisville, Miss., and, in addition to being its officers, serve as two of the four directors of that corporation, the remaining two directors being their wives.

6. Through their ownership interests in other corporations than the applicant herein, Frank E. Holladay and Joseph W. Carson control broadcast stations in three other communities, all in Mississippi, as follows:

Community	*Facility*
Laurel	WNSL–FM, 4.8 kw/170 feet, channel 262, class C
	WNSL (AM), 1260 kc/s, 5 kw, day, class III
Biloxi	WVMI–FM, 3 kw/300 feet, channel 292, class A
	WVMI (AM), 570 kc/s, 1 kw, day, class III
Louisville	WLSM–FM, 3 kw/200 feet, channel 296, class A
	WLSM (AM), 1270 kc/s, 5 kw, day, class III

In each instance the FM radiator is mounted on the tower employed as the antenna for the AM station. Under Commission rules (see sec. 73.211) a class A FM station, which is "a station designed to render service to a relatively small community, city, or town and the surrounding rural area" (sec. 73.206(a)(2)), may operate with an effective radiated power of not more than 3 kw and an antenna height not to exceed 300 feet above average terrain. On the other hand, a class

[3] "A class C (FM) station * * * is designed to render service to a community, city, or town, and large surrounding area." (Sec. 73.206(b)(4) of the rules.)

C FM station may utilize a maximum power and height combination of 100 kw and 2,000 feet. The rules do not specify any minimum antenna height for an FM station but do require a class A FM station to operate with an effective radiated power of not less than 100 w and a class C FM station with no less than 25 kw.[4] It should be noted in the table above that WNSL–FM at Laurel operates with an effective radiated power of 4.8 kw, or about one-fifth of the minimum power permissible for a class C FM station.[5]

7. Applicant's proposal is for one of two class C FM channels assigned to Meridian, Miss. The other channel assigned to Meridian, channel 267, has been authorized (April 26, 1966) to Broadcasters and Publishers, Inc., for operation with a power of 26.2 kw and an antenna height above average terrain of 105 feet. Standard (AM) stations located at Meridian are: WOKK, 1450 kc, 1 kw daytime, 250 w night (and licensed to applicant herein); WCOC, 910 kc, 5 kw daytime, 1 kw night; WDAL, 1330 kc, 1 kw, daytime only; WMOX, 1010 kc, 10 kw daytime, 1 kw night; and WQIC, 1390 kc, 5 kw, daytime only.[6]

8. The only FM channel (No. 262) allocated to the community of Laurel, Miss., is used for the operation of station WNSL–FM. The following AM stations are located at Laurel, Miss.: WAML (1340 kc, 1 kw daytime, 250 kw night); WLAU (1430 kc, 5 kw, daytime only); and WNSL, the AM affiliate of WNSL–FM (1260 kc, 5 kw, daytime only).[7]

9. Meridian is located in the east-central part of the State about 17 miles west of the Mississippi-Alabama border. With respect to Meridian, Louisville lies 55 miles to the north-northwest, and Laurel lies 53 miles to the south-southwest. Biloxi, on the gulf coast, lies 138 miles to the south of Meridian and 90 miles south-southeast of Laurel. Louisville is situated 100 miles north of Laurel and about 190 miles north of Biloxi. Each of the above-mentioned communities is the largest in its county. However, none is part of an urbanized area.[8] Population data for these communities and their various related counties follow:

	Population
Meridian	49,374
Lauderdale County	67,119
Laurel	27,889
Jones County	59,542
Louisville	5,066
Winston County	19,246
Biloxi	44,053
Harrison County	119,489

[4] A class B FM station operates in the power range from 5 to 50 kw and utilizes an antenna height above average terrain of not more than 500 ft. Only class A and class C FM stations may be authorized in Mississippi. (See sec. 73.206 of the rules.)

[5] WNSL–FM was authorized prior to the adoption of the rules which created class C stations for the first time and for this reason may continue to operate with less than the minimum power now specified in the rules for a class C FM station.

[6] Four television channels are assigned to Meridian. Of these, channel 20 will be utilized by station WCOC–TV, with an antenna height above average terrain of 560 ft., and channel 11 is already in use by station WTOK–TV, with the same antenna height.

[7] Television station WDAN–TV (channel 7) has a station location of Laurel-Hattiesburg; its antenna is 510 ft. above average terrain and 575 ft. above ground. Television channel 35 is assigned to Laurel, but no application for it has been submitted.

[8] All population data reflect the 1960 U.S. census.

10. With respect to New South's proposed transmitter site in Meridian, the WNSL–FM site is located 53 miles to the south-southwest, the WLSM–FM site 56 miles to the north-northwest and the WVMI–FM site 137 miles to the south. The WVMI–FM site also lies south-southeast from WLSM–FM and WNSL–FM at distances of 190 and 91 miles, respectively. The WLSM–FM site lies 100 miles north of the WNSL–FM site.

11. The predicted 1-mv/m contour of New South's station under its proposed operation would fall at distances from the transmitter varying from 16 to 24 miles, to enclose an approximately circular area containing 1,340 square miles and a population therein of 79,663. Except for an area of 15 square miles containing 296 persons in the western sector that lies within the 1-mv/m contour of station WQST (FM) at Forest, Miss., the remainder of the area (79,367 persons in 1,340 square miles) lies outside the 1-mv/m contour of other existing FM stations. The recent grant of an application for an FM station at Meridian, Miss., to operate on channel 267 with the power of 26.2 kw and antenna height above average terrain of 125 feet, will necessarily reduce the area and population to be served exclusively by the proposed FM station of New South. The community of Meridian (49,374 persons) will be removed from the "white" area category as will also the surrounding rural area outside the city. Assuming, as has been predicted in the application (BPH–4764) for the channel 267 FM facility, that this station would serve 69,587 persons in 756 square miles and assuming too that this area lies entirely within the predicted 1-mv/m contour of the instant proposal, then the New South station would afford 9,870 persons in 584 square miles their only FM service after operation on channel 267 is inaugurated. Moreover, under the same assumption, the advent of the New South station would provide a choice of FM service for the other 69,883 persons within the predicted 1-mv/m contour of the New South station. The posture of the record herein, namely, the absence of any direct evidential showing as to the area to be served exclusively by the channel 267 station and the area to be served in common by it and New South, prevents the examiner from making findings on the precise extent of exclusive ("white area") or second ("gray area") service a New South station would furnish if the recent channel 267 grant is reckoned with. Nevertheless, it can unequivocally be found that the New South proposal would provide at least a second FM service to nearly 80,000 persons in 1,340 square miles, and also would assure the community of Meridian of more than 1 local transmission outlet in the FM broadcast service.

12. The 1-mv/m contour of WNSL–FM, the Laurel station, extends from 11 to 14 miles from the transmitter, to encompass a nearly circular area of 461 square miles including 51,325 persons therein. The respective 1-mv/m contours of the proposed New South station and WNSL–FM are separated by a distance of at least 21 miles. Should both New South and WNSL–FM increase effective radiated power to 100 kw without changing antenna height above average terrain, the proposed 1-mv/m contour of the Meridian station would fall at distances varying between 20.5 to 28.5 miles from its transmitter and that of WNSL–FM between 23 to 28 miles from its transmitter. Thus, the

separation between the respective 1-mv/m contours would be reduced to about 5.5 miles. Also, under this mode of operation New South's 1-mv/m contour would fall short of the 1-mv/m contour of WLSM–FM at Louisville by at least 14 miles, and the WNSL–FM 1-mv/m contour would be separated from the 1-mv/m contour of WVMI–FM at Biloxi by almost 50 miles.[9]

13. Assuming operation of the proposed New South FM station and station WNSL–FM (Laurel) with maximum power of 100 kw, an increase in the antenna height of either station, or of both, by several hundred feet would require the use of sites with greater separation than now proposed in order to avoid 1-mv/m overlap. For example, operation by each with a power of 100 kw and antenna height above average terrain of 500 feet would require transmitter sites separated by a distance of about 76 miles in order to avoid overlap of 1-mv/m contours. In such case, New South could select a site about 5 miles northeast from the center of Meridian, and WNSL–FM would operate at a site about 19 miles southwest of the center of Laurel and 8.5 miles north of Hattiesburg, Miss. A station at these site locations would meet the mileage separations required by section 73.207 of the rules and would provide a signal of at least 3.16 mv/m to its principal city, as specified in section 73.210(c) of the rules. Actually, a Meridian station could locate anywhere in a 280-square-mile trapezoidal-shaped area adjacent to the city to the northeast and east, and still meet mileage and principal city coverage requirements. Likewise, a Laurel station could be located in a semicircular area of 811 square miles that extends from southeast clockwise to northwest of the city.[10] In any event, if the stations were constructed and operated as indicated above, the 1-mv/m contour of New South's station at Meridian would include 153,212 persons in 4,080 square miles and the 1-mv/m contour of the Laurel station would embrace 209,703 persons in 4,080 square miles. In each instance, the 1-mv/m service radius would extend out to 37 miles from the transmitter site.

14. The maximum facility that may be employed at Meridian and Laurel without overlap of the 1-mv/m contours of the stations under the common control of the applicant and still be in compliance with mileage separation and principal city coverage requirements of the rules is one which utilizes a power of 100 kw, an antenna height above average terrain of 850 feet,[11] and a site separated from that of the other station by approximately 90 miles. The Meridian station would operate from a site about 16 miles east-northeast from the city and the Laurel station from a site near Hattiesburg, Miss., some 28 miles south-southwest of Laurel (WOKK exhibit 1, pp. 3, 4, and 9). Land

[9] Maximum class A FM facilities (3 kw/300 ft.) are assumed for the Louisville station. WVMI–FM at Biloxi is authorized to operate with maximum class A facilities.

[10] See WOKK exhibit 2, p. 3, for map drawing of the two general areas in question.

[11] Operation at both Meridian and Laurel with the maximum facilities permitted a class C FM station, namely, 100 kw and antenna height above average terrain of 2,000 ft., and observing spacing requirements would require sites about 130 miles apart in order to avoid 1-mv/m overlap of WWSL–FM and the Meridian proposal. However, such operation would be violative of sec. 73.240(a)(1) of the rules in that the Meridian station's 1-mv/m contour would include all the area enveloped by WLSM–FM's contour including Louisville and the Laurel station's 1-mv/m contour would include Biloxi and most of the area enclosed by WVMI–FM's 1-mv/m contour (WOKK exhibit 1, pp. 7 and 8). If overlap of 1-mv/m contours is to be avoided, then sites for the Meridian and Laurel stations would be in violation of the mileage separation requirements of sec. 73.207 of the rules.

is available for purchase (at from $50 to $200 per acre) or rental in both areas. Moreover, the land in these areas is not restricted by zoning.

15. Another approach to the feasibility of future expansion of station facilities at both Meridian and Laurel would give consideration to the use of existing tall structures as support for the FM antennas. The record discloses that station WTOK–TV (channel 11) at Meridian operates with an antenna height above average terrain of 560 feet, utilizing a 315-foot tower, at a site about 3 miles south of the center of the city. The evidence reflects too that station WDAM–TV at Laurel-Hattiesburg operates with an antenna height above average terrain of 510 feet, utilizing a 576-foot tower, at a site about 18 miles south-southwest of the center of Laurel and 70 miles southwest of the WTOK–TV site (see WOKK exhibit 9, pp. 1 and 2). Assuming these television towers are structurally suitable, the Meridian and Laurel FM stations could operate with a power of 100 kw and antenna height above average terrain of as much as 400 feet without overlap of 1-mv/m contours between the two or with the 1-mv/m contours of the Biloxi and Louisville stations,[12] and would also respect the applicable mileage separation and principal city coverage requirements. The 1-mv/m contours of the Meridian and Laurel stations operating as indicated would reach to distances of 34 miles from the respective sites and include areas of 3,633 square miles (Bureau exhibit 1, exhibit 2).

16. In the Meridian area, the land is relatively flat and few hills exceed a height of 250 feet above terrain. Therefore, to attain a tower height of 2,000 feet above average terrain in the Meridian area, the height of the tower could be no less than 1,750 feet. Similarly, in the Laurel area few elevations exceed 100 feet above average terrain, and, therefore, to obtain a tower height which would be 2,000 feet above average terrain it would be necessary for a tower of approximately 1,900 feet to be employed. Gates Radio Co. furnished the applicant on February 16, 1966, with an equipment quotation of $245,000 for a Utility Tower Co. 2,000-foot guyed steel tower, completely furnished, installed, lighted, and painted per specifications of the Federal Communications Commission; this figure included the installation, but not the purchase price, of a 12-bay FM antenna and the required transmission line (WOKK exhibit 6). In addition, Gates quoted the price of $12,000 for 2,000 feet of transmission line, thereby bringing the total cost, exclusive of the cost of the antenna, to $257,000 (ibid.).

17. Comparison of the proposed New South facility at Meridian (40.3 kw and antenna height above average terrain of 186 feet) with existing and proposed class C FM stations within the State of Mississippi can be made from the following tabulation:

[12] TV and FM station licensees are required to make their sites available for use by other applicants and licensees under stated conditions. See secs. 73.239 and 73.635 of the rules; also, see *Chronicle Publishing Company (KRON–TV)*, 4 R.R. 2d 579, 587 (1965); petition for reconsideration denied, 5 R.R. 2d 635, 639 (1965).

106-508—66——3

Existing	ERP (kw)	HAAT [1] (ft.)
Call letter and station location:		
WQST—Forest	28.5	215
WSWG—Greenwood	100	220
WFOR-FM—Hattiesburg (CP)	70	275
WHSY-FM—Hattiesburg (CP)	50	130
WJDX-FM—Jackson	77	[2] 1,450
WSLI-FM—Jackson (CP)	80	[2] 1,420
WWHO—Jackson	100	330
WKOZ-FM—Koskiusko	28.5	165
WNSL-FM—Laurel	4.8	170
WPMP-FM—Pascagoula	26	185
WRPM-FM—Poplarville (CP)	100	140
WELO-FM—Tupelo (CP)	100	380
WQMV—Vicksburg	56	310
New (Old South Broadcasting Co.)—Natchez (CP)	[3] 100	330
New (Rebel Broadcasting Co.)—Jackson (CP)	100	280
New (New Albany Broadcasting Co.)—New Albany (CP)	36	79
Pending:		
New (WCPC Broadcasting Co.)—Houston [4]	100	460

[1] In certain instances horizontal and vertical antennas are proposed. In such instances, the HAAT (height above average terrain) listed is the higher of the 2.
[2] Antenna mounted on licensees' television towers (WLBT-TV and WJTV-TV).
[3] Power erroneously reported as 211 kw at WOKK exhibit 10. Official notice is taken of correct power, 100 kw.
[4] CP granted June 20, 1966.

18. Except for the recent grant of a construction permit for an FM station on channel 267 at Meridian, there are no FM stations authorized or FM channels assigned to communities within applicant's proposed 1-mv/m contour. Nor does WNSL–FM's 1-mv/m contour encompass any other existing FM station or assignment location. At the various assumed powers and antenna heights, the 1-mv/m contours of the proposed New South station and station WNSL–FM at Laurel do encompass other communities that have FM stations and channel assignments. At 100 kw (and with present antenna height), WNSL–FM's 1-mv/m contour would include Hattiesburg, which has two FM stations authorized for it; at 100 kw/500 or 850 feet, WNSL–FM would serve (in addition to Hattiesburg) Columbia, Miss., which has two FM channels assigned, and the Meridian proposal would serve Butler, Ala., which has one FM channel assigned.[13] At assumed maximum power and antenna height, the proposed Meridian station's 1-mv/m contour would encompass the Mississippi communities of Macon, Columbus, West Point, Starkville, Butler, Forest, Kosciusko, and Louisville, and Demopolis, Butler, and Tuscaloosa, in Ala. Each of these communities has an FM channel assignment.[14] At assumed maximum power and antenna height, station WNSL–FM (Laurel) would serve the Mississippi communities of Magee, Waynesboro, Hattiesburg, Columbia, Biloxi, Bogalusa, McComb, and Gulfport; each of these places has at least one FM channel assignment, with McComb and Hattiesburg each having two FM station assignments.[15]

[13] Applications are pending for the Columbia channels, but none has been submitted for Butler. The information set forth in applicant's exhibits as to existing and proposed FM stations in Mississippi has been updated by taking official notice of current data in Commission licensing files.
[14] Tuscaloosa, Ala., has been assigned two FM channels.
[15] Applicant did not supply for the record any evidence reflecting the areas and populations served by existing and authorized FM stations located in communities other than Meridian and Laurel.

CONCLUSIONS

1. The applicant, controlled by Frank E. Holladay and Joseph W. Carson, seeks authorization for a new class C FM station at Meridian, Miss., to operate on channel 246, with an effective radiated power of 40.3 kw and antenna height above average terrain of 186 feet. Holladay and Carson also control station WNSL–FM, a class C FM station at Laurel, Miss., which is located 53 miles south-southwest from the site proposed for the new FM station in Meridian. WNSL–FM operates on channel 262 with an effective radiated power of 4.8 kw and an antenna height above average terrain of 170 feet. Additionally, Holladay and Carson also control WVMI–FM, a class A FM station at Biloxi, Miss., and WLSM–FM, a class A FM station at Louisville, Miss. Biloxi lies 138 miles to the south of Meridian and 90 miles south-southeast of Laurel; and Louisville is situated 100 miles north of Laurel and about 190 miles north of Biloxi and 55 miles to the north-northwest of Meridian.

2. Section 73.240(a)(1) of the Commission's rules provides that no license for an FM broadcast station shall be granted to any party where such party directly or indirectly owns, operates, or controls one or more FM broadcast stations, and the grant of such license will result in any overlap of the predicted 1-mv/m contours of the existing station WNSL–FM in Laurel by at least 21 miles. Thus, the proposed operation of the New South station with its proposed facilities (power of 40.3 kw and antenna height above average terrain of 186 ft.) does not conflict with the overlap prohibition of section 73.240(a)(1) noted above. However, under section 73.211 of the Commission's rules, a class C FM station (New South's proposed facility) may utilize a maximum power and height combination of 100 kw and 2,000 feet above average terrain. It would not be possible for a New South station and the Laurel FM station to operate with maximum facilities at the transmitter sites now contemplated without overlap of the respective 1-mv/m contours. Accordingly, the issues specified for hearing call for determination of: (*a*) The extent to which "duopoly" considerations may preclude future expansion of the proposed New South station in Meridian and station WNSL–FM; (*b*) in light of the adduced evidence on the first question, whether the New South proposal represents an efficient use of the channel in question within the meaning of section 307(b) of the Act; and (*c*) whether a grant of the subject application would serve the public interest.

3. The facilities now proposed by New South exceed the minimum requirements of the Commission for operation of a class C station. Section 73.211(a) of the rules requires that the effective radiated power shall be not less than 25 kw; no minimum antenna height above average terrain is specified. But, as noted above, the New South station would operate with higher power of 40.3 kw and with an antenna height above average terrain of 186 feet, which is somewhat above that which could be attained by sidemounting of an FM antenna on the tower of station WOKK (AM). Thus, from the standpoint of the operating requirements of the Commission's rules applicable to all applicants, it is apparent that New South's instant proposal would

constitute an efficient utilization of the FM channel for which it is applying. In this connection, the record shows that the proposed 1-mv/m contour of New South's station would fall at distances from the transmitter varying from 16 to 24 miles, so as to encompass an area of 1,340 square miles with a population of 79,633 persons therein. The city of Meridian, Miss., inhabited by 49,374 persons, and surrounding nonurbanized area containing approximately another 30,000 persons, would be served by the proposed station. In light of the recent grant of an authorization for an FM station (class C) to operate in Meridian, Miss., on channel 267 with a power of 28.5 kw and an antenna height above average terrain of 105 feet, the New South station cannot be regarded as one that would serve a nearly all "white" area. Nonetheless, it would afford a second FM service to the bulk of its anticipated coverage area and would also provide the only FM service to the remaining portion thereof.[16] At the same time it would make available to the community of Meridian a second FM transmission facility.

4. The power and antenna height above average terrain being proposed by New South not only more than meet minimum Commission requirements but also compare favorably with the facilities being employed by over a third of the existing and authorized class C FM stations in Mississippi.[17] It is noteworthy in this regard that applicant proposes more power and greater antenna height above average terrain than would be employed for the newly authorized class C Meridian station on channel 267. Also, another station in the construction permit category has been authorized with substantially lesser facilities than those of the present applicant (i.e., a lower power of 36 kw and a height above average terrain of only 79 ft.). Thus, a comparison between the facilities proposed in the New South application, and those heretofore approved for more than a half-dozen other class C stations in Mississippi, strengthens the conclusion that the proposed New South operation represents an efficient utilization by applicant of the FM channel involved, apart from any possible impact of the duopoly regulations on future expansion.

5. Station WNSL–FM, the class C station in Laurel, Miss., also owned by the stockholders of New South, operates with a power of only 4.8 kw, while utilizing an antenna height above average terrain of 170 feet. However, this station was authorized prior to promulgation of the present minimum power requirement (25 kw) of section 73.221(a) of the rules, and pursuant to section 73.211(d) is permitted to continue operation with its present power. Indeed, under section 73.211(d), WNSL–FM could propose a power increase to below the present 25-kw minimum of the rules and, nevertheless, obtain approval therefor. The existing operation of station WNSL–FM is defined by the location of its 1-mv/m contour at distances ranging between 11 and 14 miles from the transmitter; this contour includes an area of

[16] Data on the "white area" coverage to be furnished by applicant's Meridian station was not introduced in evidence. Reference to information in the application for the recently authorized channel 267 FM station in Meridian (BPH–4764) suggests that the "white area" population to be served by New South's proposal could be approximately 9,900 persons.

[17] The total number of 17 class C stations in Mississippi (with licenses or construction permits) does not include WNSL–FM in Laurel, which operates with a power below 25 kw.

461 square miles in which 51,325 persons reside. The population served by station WNSL–FM is comprised of the residents of Laurel (27,889 persons) and the remaining more than 23,000 persons in the surrounding area. WNSL–FM is the only broadcast facility in the FM service authorized for operation within the 1-mv/m contour of the station.

6. Attention is now focused on the question of the extent to which the existing broadcast ownership interests of New South's stockholders could restrict future expansion of their proposed Meridian station as well as their Laurel FM station. The problem is first considered with respect to the feasibility of modification of facilities without change of tower locations. By reason of a height limitation imposed by the owner of the building atop which the tower would be located, the antenna height for the Meridian station cannot be increased at the proposed site. But effective radiated power of the Meridian station can be increased at the proposed location to the maximum permissible power of 100 kw without overlap of the resultant 1-mv/m contour with that of the Laurel station, also operating with the power of 100 kw and without change in tower location and antenna height. Under the assumed operation of both stations with maximum power but no increase in antenna height above average terrain, the 1-mv/m contour of the Meridian station would be extended 4.5 miles in all directions so as to fall at distances from its transmitter varying between 20.5 to 28.5 miles; the pertinent contour of the Laurel station would be extended 12 to 14 miles and would fall at distances varying between 23 to 28 miles from its transmitter. The proposed 26-mile separation between the respective 1-mv/m contours would therefore be reduced to about 5.5 miles; at the same time there would be substantial separation between the 1-mv/m contours of the New South station and WLSM–FM in Louisville, and between the 1-mv/m contours of the Laurel station and WVMT–FM at Biloxi. The expanded coverages attainable by the Meridian and Laurel stations under the above-assumed operating conditions have not been spelled out by the applicant in quantitative terms of the additional areas and populations that would be served. But it is clear that the new areas to be served would be substantial and especially so in the case of the Laurel station which, for historical reasons, presently operates below the generally prescribed minimum power.

7. For operation at maximum power coupled with a significant increase in antenna height of either the proposed Meridian station or the Laurel station, or of both, the abandonment of the existing site of the Laurel station and of the proposed site of the Meridian station would be required in order to avoid 1-mv/m overlap. For example, operation by each with a power of 100 kw and antenna height above average terrain of 500 feet would require transmitter sites separated by about 76 miles, rather than the presently proposed 53 miles, in order to avoid overlap of 1-mv/m contours. To utilize an antenna height above average terrain of 500 feet for both stations and still operate in full compliance with all applicable Commission regulations for the four stations controlled by applicant's stockholder, New South could select a site about 5 miles northeast from the center of Meridian and

the Laurel station could operate at a site about 19 miles southwest of the center of Laurel. Indeed, in keeping with all Commission requirements the Meridian station's assumed 500-foot antenna could be located anywhere within a 280-square-mile area adjacent to the city on the northeast and east, and a Laurel station antenna, if similar height above average terrain, could be placed anywhere in an 811-square-mile area that extends from southeast clockwise to northwest of that city. If the two stations were constructed with 500-foot antennae and operated with maximum power of 100 kw, then the Meridian station would practically double the population now proposed to be served by it, and its 1-mv/m contour would encompass about three times the area its instant proposal would serve; and the Laurel station would serve more than fourfold the population now proposed to be served by it and would expand the area of service more than eightfold. If both stations were relocated at the sites specified above, their respective service areas would then extend 37 miles in all directions from the related transmitter site.

8. Perhaps a more practical approach than that indicated above for the future expansion of service by the Meridian and Laurel FM stations at new transmitter locations would be to utilize the existing tall television towers of stations serving these communities.[18] Assuming their structural suitability, the towers now employed by station WTOK–TV at Meridian and station WDAM–TV at Laurel-Hattiesburg would permit the FM stations in question to operate with power of 100 kw and antenna height above average terrain of 400 feet without overlap or departure from mileage separation and principal city coverage requirements for all FM stations controlled by applicant's stockholders. The resultant 1-mv/m contours of the Meridian and Laurel FM stations encompass expanded service areas of more than 3,600 square miles as compared with service areas of 4,080 square miles under assumed operations with maximum power and antenna above average terrain of 500 feet placed on towers erected by the FM station licensees.

9. Assuming operation with power of 100 kw each, the maximum antenna height above average terrain that may be utilized by the Meridian and Laurel stations without 1-mv/m contour overlap of the stations under the common control of the applicant and in compliance with mileage separation and principal city coverage requirements is 850 feet. The separation required between the sites of the Meridian and Laurel stations would be approximately 90 miles: the Meridian station would be located about 16 miles east-northeast from that city and the Laurel station would operate from a site about 28 miles to the southwest of this city. Land at both of these locations not restricted by zoning is available for purchase at low cost, or can be leased.

---

[18] The possible use of the existing higher television towers for relocation of the FM stations' antennae was pointed out by the Broadcast Bureau (Bureau exhibits 1, 2). The applicant did not investigate the actual availability of the WTOK–TV and WDAM–TV television towers for such purpose. But the practice of sidemounting FM antennae on TV or AM towers is not an uncommon one, and in this case the Bureau's suggested alternative is deemed worthy of consideration under the issues.

10. Of the 17 class C FM stations (not including Laurel station WNSL–FM) authorized or proposed for operation in Mississippi, only 3 have sought to operate with an antenna height in excess of 380 feet above average terrain, and 2 of these 3 stations use antennae sidemounted on television towers of affiliated television stations at the State's capital, Jackson. The third station proposes to operate with an antenna height above average terrain of 460 feet. Less than half of the 17 class C FM stations have sought approval to operate with maximum power of 100 kw. With the exception of the one station that has proposed operation with an antenna height of 460 feet, the stations using a power of 100 kw operate with an antenna height of 380 feet or less.

11. As has been indicated above, duopoly considerations would preclude operation of the proposed New South FM station in Meridian and the Laurel FM station with assumed maximum facilities (i.e., power of 100 kw and antenna height above average terrain of 2,000 ft.). While these two stations could attain maximum power at various locations, which include those presently proposed as well as other assumed places, the maximum antenna height for both that could be reached by resorting to sites other than those now proposed would be 850 feet. By utilizing existing television towers, assuming their structural suitability, the two FM stations in question could operate at maximum power with antennae of 400 feet in height, which is somewhat less than the maximum height that could be employed in each instance absent duopoly restrictions. The critical question to be resolved is whether the admitted limitations on the expansion capabilities of the proposed New South station and the Laurel station require denial of applicant's proposal as not constituting an efficient utilization of the FM channel involved within the meaning of section 307(b) of the Communications Act.[19]

12. This is the first proceeding in which issues of the precise kind herein involved are being resolved through the decisional process of an evidentiary hearing. These issues have their genesis in the Commission's report and order in docket No. 14711 adopting the revised multiple ownership rules (*In the Matter of Amendment of Multiple Ownership Rules*, 2 R.R. 2d 1588) where the Commission discarded its original proposal to base prohibited overlap of commonly owned or controlled FM stations on assumed maximum facilities and instead approved a rule barring overlap of the 1-mv/m contours produced by the actual existing or proposed facilities of the stations involved. In so doing, the Commission declared its intention "to examine uncontested applications for highly restricted facilities with great care to determine whether duopoly considerations may restrict future expansion" (ibid.). In a subsequent memorandum opinion and order released November 5, 1965, in *Huntingdon Broadcasters, Inc., et al.*, 1 FCC 2d 1087, the Commission made reference to this policy with

[19] Sec. 307(b) of the act provides: "In consideration of applications for licenses, * * *, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each."

respect to uncontested applications for "restricted facilities."[20] But in neither instance were any specific criteria enunciated for guidance in reaching the determination whether a particular proposal by an applicant already controlling one or more stations to employ less than maximum facilities would be an efficient use of FM frequency. It is of course true that in its above-mentioned report and order revising the multiple-ownership rules the Commission cited as a drawback of the originally proposed overlap rule based on assumed maximum FM facilities the conclusion "that any assumed set of contours (for FM stations) would be unrealistic in many cases." In a related discussion of its reasons for not adopting a rule barring overlap of grade B contours of television stations operating at assumed maximum facilities, the Commission noted: "* * * Although numerous stations—particularly in zone II and III—do operate substantially below maximum permissible antenna height, future height increases are often unlikely owing to flat terrain, FAA problems, or a lack of foreseeable need for greater area coverage."

13. Since the closing of the record in this proceeding and the filing of posthearing pleadings by the parties the Commission has had occasion to indicate in an unlitigated matter at least some of the factors which bear on the efficiency question presented by an FM proposal for less than maximum facilities in a duopoly situation. In its memorandum opinion and order only recently released on June 15, 1966, in *Fidelity Broadcasting Co., Inc.*, docket No. 16464, FCC 66–507, the Commission granted a petition for reconsideration and grant without hearing of an FM application contemplating less than maximum facilities for the proposed station and an existing station of the applicant. In concluding that a hearing on the application of Fidelity for a class A station with maximum power but less than maximum antenna height was not required and that a grant thereof would serve the public interest, the Commission took account "of the potential (as shown by the factual data in the engineering study submitted by Fidelity) for a very substantial expansion of the coverage of the existing and proposed stations without overlap of their 1-mv/m contours." Also, the Commission observed that the proposed operation would provide Monticello, Ind., which has a population of over 4,000 and is the county seat of White County, with its first local outlet. This was deemed another and "an important consideration favoring a grant." As stated by the Commission in its memorandum opinion and order in *Fidelity*, the rationale of its decision therein was: "If the proposal for less than maximum facilities is otherwise in the public interest, it may be granted upon the basis of an application and supporting factual data which establish that no significant limitation upon future expansion will result by reason of duopoly considerations."[21]

14. The engineering showing of the applicant has established beyond peradventure that duopoly considerations would not preclude very

[20] The last-mentioned case, which includes a duopoly issue like the one herein, is now pending an initial decision by this examiner.

[21] Commission action in *Fidelity*, supra, was not by a unanimous decision; the dissent apparently found the engineering showing of the applicant "inadequate to support a waiver." This reference to a waiver is construed as meaning obtaining from the Commission approval for a proposed station which could not achieve assumed maximum facilities without violating the overlap prohibition of sec. 73.240(a)(1) of the rules.

substantial expansion in coverage by both the proposed Meridian station and the existing Laurel station owned by applicant's principals. As compared with the proposed service by the New South station at Meridian to 79,633 persons in 1,340 square miles and the present service by the Laurel station to 51,325 persons in 425 square miles, these stations could provide service to 153,212 persons in 4,080 square miles and 209,703 persons in 4,080 square miles, respectively, by operating with maximum power of 100 kw and antenna height above average terrain of 500 feet at other assumed sites in keeping with the Commission's overlap and other applicable regulations concerning mileage separations and principal city service. These assumed operations at sites specified in the record, with a 500-foot antenna for each, would extend the 1-mv/m contours to a distance of 37 miles in all directions from the respective transmitters. Moreover, the applicant demonstrated the feasibility of attaining antenna heights of as much as 850 feet for these two stations under assumed 100-kw operations from other sites than those presently proposed without overlap of their resulting 1-mv/m contours or contravention of other pertinent regulations. While the utilization of 850-foot antennae would afford even more extensive coverage than could be realized under the assumed 500-foot antennae, the applicant did not essay in its engineering showing to define the height of 850 feet in terms of aggregate populations and areas served thereunder.

15. None of the seven class C FM stations in Mississippi that are authorized to operate with the maximum power of 100 kw have sought to utilize an antenna height of as much as 500 feet. Only one of these seven stations operates with an antenna height above average terrain in excess of 380 feet. It may be noted too that less than half of the class C stations in Mississippi operate with power of 100 kw. Thus, the circumstance that the antenna height of applicant's proposed station and the Laurel station operating with the assumed power of 100 kw would be limited to 850 feet above average terrain by duopoly considerations is by no means indicative of an inefficiency of frequency utilization with regard to these two stations. Obviously, the generally flat terrain characteristic of the region in which the two stations will be operating has permitted the installation of other FM services without dependence upon antenna heights anywhere near 850 feet above average terrain. The same consideration applies equally to possible future requirements for expanded coverage by applicant's stations. For the wide coverage to the extent of a 37-mile radius in all directions from their transmitter sites that could be obtained with a 500-foot antenna makes it unlikely that either the proposed Meridian station or the Laurel station would require any higher antenna height over 500 feet above average terrain in the foreseeable future. Nor is it amiss to point out also that the necessity for an estimated expenditure in the neighborhood of a quarter of a million dollars to erect a supporting structure tall enough to accomplish an antenna height of 2,000 feet above average terrain poses a most formidable economic obstacle to the use of such a facility by any FM station in Mississippi in the reasonably near future. In point of fact, the Commission rules do not prescribe even a minimum antenna height above average terrain

106-508—66——4

for a class C FM station, so that the provision in the rules for a maximum antenna height above average terrain of 2,000 feet represents a ceiling on antenna height rather than a desirable operating goal for all class C FM stations.

16. Not to be ignored too is the important factor of the relative need for the service the proposed Meridian station would furnish. See *Fidelity Broadcasting Co., Inc.*, supra. In view of the recent grant of another application for an FM station in Meridian, it now appears that the instant proposal will provide a second FM outlet for the city of Meridian, and will make available FM reception service to perhaps as many as 70,000 persons in a "gray" area and to an undetermined number of inhabitants of a "white" area that may contain an additional nearly 10,000 persons. In any event, the proposed New South station could serve as a vehicle for responding to the FM programing needs of an underserved area, and this prospect considerably enhances the efficiency of the proposed operation from the standpoint of the intendment of section 307(b) of the Communications Act. *WKYR, Inc.*, 3 R.R. 2d 1, 12 (1964).

17. Summing up now the conclusions that have been reached above with respect to the question of whether the New South proposal represents an efficient use of the FM frequency involved, it has been determined that: (1) The applicant's proposed operation of a Meridian station with power of 40.3 kw and antenna above average terrain of 186 feet is not one initially inhibited by duopoly considerations, since it represents an efficient proposal in terms of the actual facilities employed measured against minimum requirements under the rules and of the substantial coverage it would provide, and since the specified facilities compare favorably with the facilities of other class C FM stations in Mississippi, including those of the recently authorized Meridian station; (2) it would be feasible for applicant's New South station and the Laurel station to achieve operations utilizing maximum power of 100 kw and antenna height up to 850 feet for both stations at assumed sites without overlap of their 1-mv/m contours, and consequently the New South proposal possesses the potential for a very significant increase in service for both the proposed Meridian and the existing Laurel FM stations; the wide coverage (37 miles in all directions from the transmitters) that could be provided with lesser antennae of 500 feet above average terrain makes it improbable that even the permissible maximum antennae of 850 feet, consistent with duopoly and other restrictions, will be either required or desirable for the 2 stations in the reasonably near future; (4) the generally flat nature of the terrain in the region where the 2 stations controlled by applicant would be located, coupled with the inordinate expenditure which would be required for installation of the antennae at an assumed maximum height of 2,000 feet, renders unrealistic the application of this standard in judging the merit of the instant proposal from the standpoint of efficiency; and (5) the New South proposal will afford a second FM outlet for the fairly populous community of Meridian while at the same time providing a new FM programing service to nearly 80,000 underserved inhabitants of either "white" or "gray" areas. All of these considerations combined em-

phatically warrant the conclusion that the New South proposal represents an efficient use of the FM channel in question within the meaning of section 307(b) of the Communications Act. Hence, it follows that a grant of the New South application will serve the public interest, convenience, and necessity, and it is concluded accordingly that this application should be granted.

In view of the foregoing and based upon consideration of the record as a whole, *It is ordered*, This 24th day of June 1966, that, unless an appeal to the Commission from this initial decision is taken 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 application (file No. BPH–4818) of New South Broadcasting Corp. for a construction permit for a new FM broadcast station to operate on channel No. 246 at Meridian, Miss., with an effective radiated power of 40.3 kw and antenna height above average terrain of 186 feet *Is granted.*

FCC 66R-322

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of SEMO BROADCASTING CORP., SIKESTON, MO.	Docket No. 16649 File No. BPH-5087
SIKESTON COMMUNITY BROADCASTING CO., SIKESTON, MO. For Construction Permits	Docket No. 16650 File No. BPH-5161

ORDER

(Adopted August 24, 1966)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

The Review Board having before it a joint request for approval of agreement, filed July 12, 1966, by Semo Broadcasting Corp. (Semo) and Sikeston Community Broadcasting Co. (Community); a statement in support of the joint request for approval of agreement, filed July 21, 1966, by the Broadcast Bureau; and a supplemental affidavit, filed August 3, 1966, by Community;

It appearing, That, under the terms of the agreement submitted for approval, the application of Community would be dismissed, the application of Semo would be granted, and Community would be reimbursed by Semo in the amount of $1,500 in partial payment of the legitimate and prudent expenses incurred in the prosecution of its application; and

It further appearing, That the petitioners have supplied all of the information required by section 1.525 of the rules, and that expenses incurred by the dismissing applicant are substantiated by affidavits on file; and

It further appearing, That dismissal of Community's application would moot the hearing issues and permit a grant of the Semo application, thus expediting inauguration of the first local FM service to Sikeston, Mo., and that therefore approval of the agreement would be in the public interest;

It is ordered, This 24th day of August 1966, that the joint request for approval of agreement, filed July 12, 1966, by Semo Broadcasting Corp. and Sikeston Community Broadcasting Co., *Is granted;* that such agreement *Is approved;* that the application of Sikeston Community Broadcasting Co. (BPH-5161) *Is dismissed* with prejudice; that the application of Semo Broadcasting Corp. (BPH-5087) for a construction permit for a new FM station in Sikeston, Mo., *Is granted;* and that this proceeding *Is terminated.*

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

FCC 66R-321

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of RICHARD O'CONNOR, ALBANY, N.Y.	Docket No. 16454 File No. BPH-4329
KOPS COMMUNICATIONS, INC., ALBANY, N.Y. For Construction Permits	Docket No. 16455 File No. BPH-4625

MEMORANDUM OPINION AND ORDER

(Adopted August 24, 1966)

BY THE REVIEW BOARD:

1. On June 7, 1966, the Review Board released a memorandum opinion and order, FCC 66R-213, 3 FCC 2d 907, granting a joint petition for approval of agreement, dismissing the application of Richard O'Connor, and granting the application of Kops Communications, Inc. (Kops). Although the joint petition requested approval of reimbursement to O'Connor in the amount of $744.20, the Board approved reimbursement of only $644.20, disallowing reimbursement of the alleged expenditure of $100 for "deposit on equipment" because this item was not properly substantiated. Presently before the Board is a limited petition for reconsideration in which O'Connor requests the Board to allow reimbursement for this expenditure, and a petition for late acceptance of the limited petition for reconsideration.[1]

2. In support of his request for reconsideration, O'Connor has submitted an affidavit in which he states, among other things, the nature of the equipment, the name of the proposed seller, and the date of the payment; and a photocopy of the back of a canceled check endorsed by the proposed seller. In support of his request to accept the late filing of the petition for reconsideration, O'Connor states that the petition for reconsideration was filed 1 day later than the 30 days allowed by the rules because his counsel was absent from his office and under a doctor's care for nearly a week prior to filing the petition. O'Connor also notes that there is pending before the Commission a petition for review of the Board's action, filed by the Broadcast Bureau.

3. The Board is of the opinion that O'Connor has established good cause for the 1-day tardiness in filing his limited petition for reconsideration, and the petition will therefore be accepted. However, O'Connor has not set forth adequate reasons for a grant of the petition. As pointed out in the Bureau's opposition, the Bureau's original

[1] The Review Board has the following pleadings under consideration: (*a*) Petition for late acceptance, filed July 8, 1966, by O'Connor; (*b*) limited petition for reconsideration, filed July 8, 1966, by O'Connor; and (*c*) opposition filed July 15, 1966, by the Broadcast Bureau.

objections to the approval agreement (filed April 27, 1966) specifically noted a number of deficiencies, including that involving the $100 for "deposit on equipment," and suggested that supplementary information could be supplied. While Kops filed a reply to the Bureau's opposition, stating that the expenses listed by O'Connor were reasonable, O'Connor did not file a reply. Rule 1.106(c) states that a petition for reconsideration which relies on facts not previously presented will be granted only if the facts relied on relate to circumstances which have changed since the last opportunity to present such matters, the facts were unknown to petitioner until after his last opportunity to present such matters, or consideration of the facts is required in the public interest. The facts now relied upon by O'Connor were not previously presented to the Board. Clearly, these facts were not unknown at the time O'Connor had his last opportunity to present such facts. Since O'Connor had adequate notice of the deficiency and ample time to correct it prior to the Board's original action, and since O'Connor's petition does not meet the requirements of section 1.106(c) of the rules, it will be denied.

4. Without regard to the procedural deficiency discussed above, the petition must be denied on the merits. Thus, although it has now been established that O'Connor spent the $100, it has not been established that the deposit paid on equipment is a "legitimate and prudent" outlay within the contemplation of section 1.525 of the Commission's rules.

Accordingly, it is ordered, This 24th day of August 1966, that the petition for late acceptance, filed on July 8, 1966, by Richard O'Connor, *Is granted;* and that the limited petition for reconsideration, filed on July 8, 1966, by Richard O'Connor, *Is denied.*

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

FCC 66–775

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF HIGH FIDELITY STATIONS, INC., LICENSEE OF RADIO STATION KAHR, REDDING, CALIF.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted August 24, 1966)

BY THE COMMISSION: COMMISSIONER WADSWORTH ABSENT; COMMISSIONER JOHNSON ABSTAINING FROM VOTING.

1. The Commission has under consideration (1) its notice of apparent liability, dated September 24, 1965, addressed to High Fidelity Stations, Inc., licensee of radio station KAHR, Redding, Calif., and (2) responses to the notice of apparent liability, filed November 2 and November 4, 1965.

2. KAHR was inspected on January 27 through January 29, 1965, inclusive. The inspection revealed the following apparent violations of the Commission's rules which, briefly identified and in numerical order, were as follows: The remote antenna was not calibrated (73.39(d)(2)); the base antenna meter's functions were not shown on the instruments or adjacent panel (73.39(i)); the remote antenna meter did not meet requirements (73.39(d)(4)); complete prior and/or current set of equipment performance measurements were not available during inspection (73.47(b)); the station was overmodulating (73.55); at the time of the inspection operating power was excessive (73.57(a)); on January 29, 1965, from 6 to 7:20 a.m., the station was operated in excess of the authorized presunrise power of 48 w (73.57(a)); the frequency monitor was defective at the time of the inspection (73.60(a)); the remote control equipment could not vary the transmitter power output to compensate for factors which might affect power output (73.67(a)(4)); log entries of tower light inspection were not made for several months (17.38(d)); the beacon light-flashing mechanism was not functioning, and station records failed to record the malfunction and contained no indication that the FAA had been notified (17.38(c)).

3. In addition to the violation of 73.57(a) observed on January 29, 1965, for which the licensee was cited, preinspection monitoring of KAHR on January 27, 1965, also revealed operation by KAHR in excess of its authorized presunrise power of 48 w. Following receipt

of the licensee's reply to the official notice of violation, a notice of apparent liability in the amount of $2,000 was issued based upon the 11 violations identified in the violation notice and the additional violation of 73.57(a) observed on January 27. The licensee's responses to the notice of apparent liability are discussed in the following paragraphs.

4. We turn first to the licensee's presunrise operation of KAHR on January 27 and 29, 1965, with power considerably in excess of the authorized power of 48 w, in violation of section 73.57(a) of the rules. Licensee alleges with respect to the unauthorized operation on January 27, 1965, that it "has been unable to arrive at any explanation as to how this could possibly have occurred"; that the licensee was able to activate the auxiliary transmitter from the remote control point at a power of 48 w only; that in order to raise the auxiliary to higher output a manual adjustment would have been required at the transmitter site; that such adjustments were not in fact made on or before January 27, 1965;[1] that if, as found by the Commission's inspector, the relative field intensity quadrupled when KAHR increased power to its authorized daytime power of 5,000 w the auxiliary transmitter would have had to have been operating at a power of 312.5 w and that even after careful adjustment the maximum output obtainable from the auxiliary is 310 w.

5. Regardless of the licensee's inability to understand or explain the quadrupling of field intensity when KAHR increased power to 5,000 w, the fact remains that on the morning of January 27, 1965, KAHR appeared to have been operating far in excess of its authorized presunrise power. Although the precise amount of excessive power is not of prime decisional importance, technical information available to the Commission indicates that KAHR's auxiliary transmitter is capable of operating at or near a power of 312.5 w. And, as pointed out above, licensee acknowledges that the auxiliary is capable of an output of 310 w.

6. Licensee's response to the notice of apparent liability acknowledges KAHR's unauthorized presunrise operation in excess of 48 w on January 29, 1965. But, apparently treating the unauthorized operation an January 29 as separate and distinct from the same violation observed only 2 days earlier, the licensee alleges that the unauthorized operation on January 29 was an "inadvertent, isolated occurrence, which never happened before, and is highly unlikely to happen again." In mitigation, the licensee contends that the violation was due to the inattention of the operator on duty whose "judgment and ability to manipulate controls was temporarily impaired" because of his receipt of news only a few minutes before sign-on of a close friend's death.

7. It thus appears that on two separate occasions only 2 days apart KAHR was operated with power far in excess of that authorized by the Commission. In our opinion, licensee's arguments do not ade-

[1] Licensee alleges that, at the suggestion of the inspecting engineer, on the evening of Jan. 28, 1965, KAHR made certain changes to the auxiliary transmitter equipment which permitted the auxiliary to be raised to 250 w (or lowered to 48 w) by remote control.

quately explain or justify the violations observed on January 27 and January 29, 1965. Licensee's conduct in failing to prevent two such serious violations fell well below the standard of care expected of all broadcast licensees. We find that these violations were both willful and repeated. *In the Matter of Fay Neel Eggleston*, 1 FCC 2d 1006.

8. Licensee was cited for apparent violation of section 73.39(d)(4) of the rules because the remote antenna meter utilized with the auxiliary transmitter had a full scale range reading five times the normal indication. In its response to the notice of apparent liability the licensee acknowledges the violation but contends, among other things,[2] that it did not believe that KAHR had an "optional remote antenna meter" according to its understanding of section 73.39(d)(4) and that in arriving at this interpretation the licensee relied upon advice of the manufacturer of the remote control equipment.

9. Licensee's response does not justify the failure to observe the requirements of section 73.39(d)(4), since the responsibility for compliance with the Communications Act and the Commission's rules rests upon the licensee and not upon the manufacturer of equipment. It is not the responsibility of the manufacturer to know what KAHR's operating parameters are. Because the licensee appears to have been in violation of section 73.39(d)(4) since installation of the remote control equipment, we find this violation to have been repeated.

10. With respect to the violation of section 73.47(b) (a complete set of current and/or prior equipment performance measurements were not available), licensee in its response acknowledges that the prior set of measurements was incomplete in that the "family of curves were missing" and that the current set was incomplete in that "a statement regarding 73.47(a)(5) was missing from the * * * report." Because of its alleged corrective activities subsequent to taking the prior measurements, the licensee alleges that it has "demonstrated, in a practical way, its serious intent in this matter."

11. However, it should be pointed out with respect to the prior measurements that the licensee was cited after an inspection of KAHR on October 9, 1963, because the then available performance measurements were not signed by the engineer making the measurements, were not dated, and the required curves were not provided. On November 29, 1963, the licensee responded to the citation, stating that "all information was contained in the reports and the graphs have been drawn." Nevertheless, during the January 27–29, 1965, inspection of KAHR it was discovered that the measurements in question were in the identical condition as during the October 1963 inspection (i.e., no curves, no signatures) and the results did not indicate compliance. In our opinion the licensee's admitted failure to have available complete equipment performance measurements was both willful and repeated.

12. With respect to the licensee's apparent failure to make log entries of tower light inspections for several months in violation of section 17.38(d) of the rules, the licensee "admit[s] failure to note the

[2] Licensee also contends that it "interpreted the applicable regulation with respect to this matter as being 73.67(a)(4)." The relevancy of such argument is not clear, since licensee has not shown how the violation of sec. 73.39(d)(4) is related to sec. 73.67(a)(4).

quarterly inspections on the log itself." The licensee contends, however, that it complied with "the spirit of this regulation" because, although the quarterly inspections were made (under a maintenance contract with a tower company) and the results kept in a folder at the station, the licensee simply failed to call the inspection results to the attention of the Commission's inspector. Assuming licensee's allegations to be true, the requirements of section 17.38(d) of the rules are specific. Licensee's repeated negligence cannot support waiver of the specific requirements of the rules for its benefit.

13. The licensee also acknowledges that KAHR's beacon-flashing mechanism was not functioning, that the malfunction was not entered in the station's logs, and that the FAA was not notified, in violation of section 17.38(c) of the rules. Licensee contends, "as a possible mitigating circumstance," that since the code beacon was lit but was not flashing it was the licensee's mistaken interpretation of the rules that it was not necessary to enter the malfunction in the logs or notify the FAA. Licensee also alleges that it had discovered the malfunction of the lamp-flashing mechanism 3 days before the inspection and had contacted the tower company, but that because of bad weather the tower company was unable to make the repairs until February 4, 1965.

14. The licensee is responsible for knowledge of Commission rules, and its alleged ignorance of the basic requirements of part 17 of our rules and regulations cannot be excused. We find licensee's violation of section 17.38(c) to have been both willful and repeated.

15. On the basis of licensee's explanations in its response we have decided not to hold the licensee liable for those violations in the notice of apparent liability not dealt with above. Licensee requests either that no forfeiture be imposed or that the amount of the forfeiture be reduced from the $2,000 apparent liability, citing, among other things, its alleged financial problems. After careful consideration of licensee's response we have decided to impose a forfeiture of $1,000. Although we have considered licensee's financial condition, our decision is based mainly upon our acceptance of the licensee's explanations for certain violations contained in the notice of apparent liability. We find licensee's conduct with respect to all violations for which explanation is not accepted to have been lax and deficient.

16. In view of the foregoing, *It is ordered*, This 24th day of August 1966, that High Fidelity Stations, Inc., the licensee of station KAHR, Redding, Calif., *Forfeit* to the United States the sum of $1,000 for willful and repeated failure to observe the provisions of sections 73.47(b), 73.57(a), and 17.38(c) of the rules and for repeated failure to observe the provisions of sections 73.39(d)(4) and 17.38(d) 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'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.

17. *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 High Fidelity Stations, Inc., the licensee of station KAHR, Redding, Calif.

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

FCC 66-774

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF ARCADIA-PUNTA GORDA BROADCASTING CO., INC., LICENSEE OF RADIO STATION WAPG, ARCADIA, FLA.

MEMORANDUM OPINION AND ORDER

(Adopted August 24, 1966)

BY THE COMMISSION: COMMISSIONER WADSWORTH ABSENT.

1. The Commission has under consideration (1) its notice of apparent liability dated June 28, 1966, addressed to the Arcadia-Punta Gorda Broadcasting Co., Inc., licensee of radio station WAPG, Arcadia, Fla., and (2) the response to the notice of apparent liability filed July 12, 1966.

2. The notice of apparent liability was issued for willful or repeated failure to observe section 73.114, in that the licensee failed to keep a maintenance log. The notice provided that pursuant to section 503 (b) (2) of the Communications Act of 1934, as amended, the licensee was subject to a forfeiture of $100.

3. The material facts leading to issuance of the notice of apparent liability are as follows: On March 4, 1966, station WAPG was inspected, and as a result thereof cited for two rule violations, including failure to keep a maintenance log in accordance with section 73.114 of the Commission's rules. Although the licensee had ample opportunity to explain the violation fully in response to the official notice of violation, the response merely stated that "the log was now being kept." However, in response to the notice of apparent liability, the licensee's chief engineer explained that the information required to be logged by section 73.114 of the rules was being logged in a combined transmitter and maintenance log. The response further stated that a separate maintenance log is now being maintained.

4. We have considered all the circumstances of this case and have decided that a forfeiture is not warranted. However, it should be pointed out that the licensee could have forestalled issuance of the notice of apparent liability by responding fully to the official notice of violation issued March 4, 1966.

5. In view of the foregoing, *It is ordered*, This 24th day of August 1966, that the Arcadia-Punta Gorda Broadcasting Co., Inc., is hereby relieved of liability for the matters which were specified in our notice of apparent liability dated June 28, 1966.

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 Arcadia-Punta Gorda Broadcasting Co., Inc., licensee of radio station WAPG, Arcadia, Fla.

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

4 F.C.C. 2d

FCC 66-744

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Revocation of License and Subsidiary Communications Authorization of CAROL MUSIC, INC., FM BROADCAST STATION WCLM, CHICAGO, ILL.	Docket No. 14743

MEMORANDUM OPINION AND ORDER

(Adopted August 17, 1966)

BY THE COMMISSION: COMMISSIONERS COX AND JOHNSON NOT PARTICIPATING.

1. The Commission has before it for consideration a motion to stay, in letter form, filed August 2, 1966, on behalf of Carol Music in the above-captioned proceeding. In effect, the movant seeks a continuation of operating authority through November 4, 1966, for "winding up the affairs of WCLM * * *." The request is supported by telegram of August 3, 1966, from Ferrari, Inc., background music distributor for Carol Music.

2. By order adopted July 24, 1964 (37 FCC 379), the Commission revoked Carol Music's license and subsidiary communications authorization, to become effective 60 days after denial of any petition for reconsideration and/or judicial affirmance of the decision. Reconsideration was denied by the Commission on November 25, 1964 (37 FCC 979), and the licensee's judicial remedies were exhausted on June 6, 1966, by denial of certiorari by the Supreme Court (86 S. Ct. 1864). The resulting deadline on operations by Carol Music was August 5, 1966.

3. On August 4, 1966, the Chief, Broadcast Bureau, extended the August 5 deadline to August 17, 1966, thereby preserving the status quo until the instant request could be considered on its merits by the full Commission. A parallel request for stay was denied by the U.S. Court of Appeals (D.C. Circuit) on August 3, 1966.

4. As justification for further stay, movant alludes to the problem of transferring background music accounts now served through Carol Music's facilities to another FM broadcast station and, in conjunction therewith, to the time factor involved in making the necessary technical adjustments to approximately 300 multiplex receivers. In addition, movant cites advertising contracts "on which commissions have already been paid for programing on WCLM's main channel * * *."

5. As indicated above, the movant has known for more than 2 years of the probable disposition of its appeal by the courts. All administrative and judicial remedies available to it have been exhausted. It

follows that in the absence of overriding public interest considerations, the extraordinary relief now requested must be denied.

6. No such considerations are here presented. On the contrary, the resolution of a serious second adjacent channel interference problem in the Chicago area would be delayed by Carol Music's continued operation on FM channel 270.

In view of the foregoing, *It is ordered*, That Carol Music's motion to stay of August 2, 1966, *Is hereby denied.*

It is further ordered, That, in order to allow for an orderly termination of operations, Carol Music may, at its discretion, operate through normal signoff August 27, 1966.

It is further ordered, That, effective August 28, 1966, the call letters WCLM and all license records pertaining thereto *Are deleted.*

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

FCC 66-760

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

August 24, 1966.

MR. THOMAS N. DOWD,
PIERSON, BALL & DOWD,
1000 Ring Building,
Washington, D.C. 20036

DEAR MR. DOWD: This is in response to your letters of February 14 and March 3, 1966, advising the Commission of the appointment of Mr. Charles Smithgall to the Board of Regents of the University System of Georgia, which holds the license of station WGST, Atlanta, Ga., for and on behalf of the Georgia Institute of Technology. Your letter of February 14 further requests a waiver of the duopoly provisions of section 73.35 of the Commission's rules in the event the Commission is of the opinion that Mr. Smithgall's controlling interest in station WATY, North Atlanta, Ga., and his connection with WGST constitute a violation of those provisions in view of the fact that WATY will serve a substantial portion of the area now served by WGST.

The Commission finds that, since Mr. Smithgall has a controlling interest in WATY and is a member of the board which holds the license of WGST, Mr. Smithgall's broadcast connections constitute noncompliance with the Commission's duopoly rule. However, since you advise that Mr. Smithgall will abstain from participation in any decision made by the board of regents which might affect the operation of WGST, the Commission finds, in this instance, that a waiver of section 73.35 of the rules to permit Mr. Smithgall to serve as a member of the board of regents is warranted.

Accordingly, your request for waiver of section 73.35 of the Commission's rules on behalf of Charles Smithgall is hereby granted.

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

FCC 66-778

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of FOSTERING EXPANDED USE OF UHF TELEVISION CHANNELS (STOCKTON AND MODESTO, CALIF.) In re Application of KLOC BROADCASTING CO., INC. (KLOC-TV), MODESTO, CALIF. For Modification of Construction Permit	Docket No. 14229 File No. BMPCT-6126

MEMORANDUM OPINION AND ORDER

(Adopted August 26, 1966)

BY THE COMMISSION: COMMISSIONERS COX AND WADSWORTH ABSENT; COMMISSIONER JOHNSON NOT PARTICIPATING.

1. The Commission has before it for consideration: (1) Its actions of April 29, 1966, amending section 73.606 of the Commission's rules (the Television Table of Assignments) to remove channel 19 from Stockton to Modesto, Calif. (substituting channel 31 in Stockton in lieu thereof), modifying the construction permit of television broadcast station KLOC-TV to specify operation on channel 19 in Modesto instead of channel 17, and granting the application (BMPCT-6126) of KLOC-TV to specify a transmitter site on Mount Oso, about 22 miles southwest of Modesto (FCC 66-396, 3 FCC 554, 7 R.R. 2d 1587); (2) a petition for reconsideration, filed May 31, 1966, by Royal Bear Broadcasters, Inc. (Royal Bear), licensee of standard radio broadcast station KWG, Stockton, Calif., and various pleadings filed in connection therewith.[1]

2. A review of the sequence of events in this proceeding will help to place our decision herein in proper perspective. The Television Table of Assignments in effect prior to June 1965 assigned channels 17 and 58 to Modesto, Calif., and channels 36 and *42 (reserved for noncommercial educational use) to Stockton, Calif. On November 12, 1964, the application (BPCT-3312) of KLOC's predecessor, Redchester Broadcasting Co., for a construction permit for a new television broadcast station to operate on channel 17, Modesto, Calif., was granted. Subsequently, grant by the Commission of assignment and transfer applications in mid-1965 made KLOC Broadcasting Co., Inc. (KLOC), the permittee. In June 1965, the Commission adopted the fourth report and order in docket No. 14229 (FCC 65-504, 5 R.R. 2d 1587) assigning channels 17 and *58 to Modesto and channels 19 and 66 to Stockton. On July 1, 1965, KLOC filed the above-captioned ap-

[1] The Commission also has before it for consideration an opposition, filed June 13, 1966, by KLOC and a reply thereto, filed June 23, 1966, by Royal Bear.

106-509—66——1

plication (BMPCT–6126) requesting modification of its construction permit to specify operation from a site on Mount Oso, about 18 miles from its authorized site. KLOC applied for, and was granted, extensions of time within which to complete construction of the station. On August 13, 1965, an objection was filed against the application by the Association of Maximum Service Telecasters, Inc. (AMST), alleging that the proposed operation would not comply with section 73.698 of the Commission's rules because it would not meet the minimum spacing requirements set forth therein. The proposed operation would be short spaced to the site of station KSAN–TV, channel 32, San Francisco, Calif. KLOC stated that it was unaware of this problem and, on September 13, 1965, filed a responsive pleading requesting a waiver of the rule and indicating a willingness to accept any conditions which might be imposed by the Commission on a grant of the application.

3. On September 16, 1965, the Commission issued a public notice (FCC 65–813, 1 FCC 2d 820) indicating that an error had been discovered in the computer program used to develop the Table of Assignments promulgated by the fourth report. On February 11, 1966, the fifth report and memorandum opinion and order in docket No. 14229 (FCC 66–137, 2 FCC 2d 527, 6 R.R. 2d 1643) was released allocating, inter alia, channels 17 and *23 to Modesto and channels 19 and 58 to Stockton. On March 14, 1966, KLOC filed a petition for reconsideration of the fifth report, asking that channel 19 be allocated to Modesto and that its construction permit be modified to specify operation on Mount Oso on channel 19. The principal reason for the request was that operation on Mount Oso with channel 17 was not possible because of the short spacing to channel 32 in San Francisco, and the proposed operation on channel 19 would comply with all of the Commission's rules. Public notice (report No. 533, March 21, 1966) was given by the Commission of the filing of the petition for reconsideration, showing the docket number, date of filing, and by whom the request was made (attorneys for KLOC). The petition was unopposed. In response to this petition, the Commission, on April 29, 1966, issued its memorandum opinion and order (FCC 66–396, supra) making the channel changes requested, granting the KLOC application, and modifying its authorization to specify operation on channel 19. Royal Bear requests reconsideration of these actions.

4. Royal Bear alleges that it was preparing to file an application for a construction permit for a new television broadcast station to operate on channel 19, Stockton, using a site on Mount Oso, and is thus aggrieved by our actions removing that channel from Stockton and authorizing KLOC to operate on it from Mount Oso. No other formal objection has been filed in connection with this matter, although various interested individuals and official organizations in Stockton have expressed concern over the removal of channel 19 from Stockton. Prior to the Commission's actions of April 29, 1966, no interest had been expressed in the Stockton channel, nor had any opposition been expressed in connection with KLOC's petition for reconsideration.

5. Royal Bear alleges that it did not participate in the earlier stages of this proceeding because it was satisfied with the allocation of channel 19 to Stockton and was preparing an application for the use of that

channel in Stockton. It urges several grounds for reversal of our actions.

6. Royal Bear states that it had neither actual nor constructive notice of the KLOC request for reconsideration until a summary of the Commission's actions of April 29, 1966, appeared in the trade press. It is urged that the public notice which was given contained no indication that the petition requested a shift of channel 19 from Stockton, and that the only public notice which had been given respecting a change in the authorized facilities of KLOC was that involving the KLOC application for modification of its construction permit to specify a site on Mount Oso (public notice of July 14, 1965, No. 70873). That notice contained no reference to channel 19, but identified KLOC's request only with channel 17.

7. Royal Bear asserts that the channel shift achieved by grant of the petition for reconsideration violates section 4 of the Administrative Procedure Act and sections 1.402 through 1.407 (particularly sec. 1.403) of the Commission's rules, providing for notice and public proceedings before effecting a substantive change in the rules. Petitioner states that interested persons and organizations in Stockton should have been afforded an opportunity to oppose removal of the channel and if such an opportunity had been given, it would have been shown that channel 58, which had been moved from Modesto to Stockton by the fourth report and retained there by the fifth, could be returned to Modesto and used by KLOC from the Mount Oso site.

8. Royal Bear further alleges that our actions violated section 308 of the Communications Act because there was no application on file by KLOC specifying operation on channel 19 when we granted the application for modification of the construction permit to specify a site on Mount Oso and modified it to specify operation on channel 19. It alleges also that section 309(b) of the act was violated because no public notice was given of the acceptance for filing of a substantial amendment to a pending application and there was no 30-day waiting period observed or, alternatively, that our actions violated section 316 of the act, because if the action is regarded as a modification pursuant to section 316, no show cause order was issued to KLOC. Finally, Royal Bear argues that grant of the KLOC petition for reconsideration was improper because KLOC had not made the requisite showing, pursuant to section 1.106(b) of the rules, of good cause why it did not participate earlier in the rulemaking proceedings. KLOC, it is alleged, could have sought reconsideration of the fourth report which made the allocation of channel 19 to Stockton, and it cannot now seek reconsideration of the fifth report which retained the channel in Stockton because it was not aggrieved nor adversely affected by anything contained in the fifth report. Royal Bear alleges that KLOC's relief, if any is to be had, must be accomplished through a new rulemaking proceeding.

9. Various other matters are raised in the pleadings. Royal Bear urges that the lower UHF frequencies are preferred from a competitive standpoint as well as from the standpoint of public acceptance and by advertisers. This, it asserts, is the reason KLOC is probably unwilling to operate on channel 58. This point, it is stated, is par-

ticularly important for a Stockton station because it must compete with Sacramento and Stockton-Sacramento VHF stations and a Mount Oso site is necessary for this purpose. Moreover, Royal Bear points out that a Modesto station operating from Mount Oso would have greater coverage than a Stockton station operating elsewhere, but that the populations to be served by a Stockton station far exceed those to be served by a Modesto station.[2] KLOC, in its March petition for reconsideration, urged a grant of its request for channel 19 so that it could quickly bring a new television service to the area. To that end, it had nearly completed a building on Mount Oso suitable for housing a transmitter and had taken steps to construct its studio, hire staff, order equipment, and make other commitments. Royal Bear charges that the construction of the transmitter building on Mount Oso constitutes premature construction in violation of section 319(a) of the Communications Act and that the grant of KLOC's application must, therefore, be rescinded. KLOC insists that this did not constitute premature construction because nothing but a bare building had been erected, although wiring and transmitting equipment was already on hand. Such construction, KLOC urges, is no more premature than ordering equipment or constructing a studio and it did, after all, have a construction permit and no reason to anticipate opposition to its application for modification. Royal Bear, however, insists that a building constructed on Mount Oso by KLOC could have no other purpose except to house a transmitter and bore no relationship to any other activities of KLOC, either in connection with its radio station (KLOC, Ceres, Calif.) or its authorization to operate on channel 17 from its authorized site.

10. We do not believe that the procedures followed in this case are defective. We gave appropriate notices of the general subject matter—UHF television channel allocations. See section 4, Administrative Procedure Act. Upon the basis of the notices, we issued a report making certain assignments in the areas here involved. That report was subject to petitions for reconsideration and modification thereof under the provisions of section 405 of the Communications Act. Such a petition was publicly and timely filed and it was incumbent upon those interested to respond to the petition. The report was modified as a result of the petition and this modification was again subject to a petition for reconsideration (and any other related requests). See section 405 of the Communications Act. Royal Bear has filed such a petition and there have been subsequent pleadings (in opposition and in reply thereto). We believe that our procedures here followed the provisions of the Administrative Procedure Act and the Communications Act, and have afforded Royal Bear and other interested parties the opportunity to present their views. We turn, therefore, to the merits of the matter. In that connection, we note that we have before us the extensive arguments of the interested parties, thus enabling us to render an informed decision on this matter.

[2] City of Stockton 1960 census: 86,321; urbanized area, 141,064; Modesto City, 36,585. More recent estimates quoted by Royal Bear are Stockton City, 97,100, and Modesto City, 47,700; San Joaquin County (Stockton), 273,800, and Stanislaus County (Modesto), 173,600.

11. With respect to Royal Bear's argument that KLOC could have, but did not, petition for reconsideration of the fourth report, we do not believe that such a failure is fatal. KLOC was unaware of the short-spacing problem until it was called to the permittee's attention by AMST in August 1965. It promptly requested a waiver of the rule, but in the face of the Commission's notice in September that the Television Table of Assignments would have to be changed because of the error discovered, we cannot consider KLOC's failure to request reconsideration as lack of diligence. It acted promptly after promulgation of the fifth report. Furthermore, we believe that a party can be as aggrieved by an action (the fifth report) which fails to make a change as by an action (the fourth report) which makes a change. We conclude, therefore, that KLOC acted timely in requesting reconsideration of the fifth report although it did not request reconsideration of the fourth report.

12. Prior to our actions of April 29, 1966, channels 17 and *23 were allocated to Modesto and channels 19 and 58 were allocated to Stockton. KLOC had a construction permit to construct a new television station on channel 17 and, so long as KLOC held that construction permit, channel 19 would not be available for use of a Stockton station on Mount Oso because such a use would have violated the 20-mile "taboo" separation required by section 73.698 of the rules applicable to UHF stations two channels removed. Our actions of April 29, 1966, left Stockton with the same number of channels which it had prior to those actions, and there is virtually no technical difference between channel 31, which is now allocated, and channel 19, which was removed. Whatever disadvantages would accrue to potential Stockton applicants, therefore, would be attributable either to (1) the asserted superiority of channel 19 over channel 31 in terms of advertiser and viewer acceptance or (2) the fact that channel 31 could not be used on Mount Oso. As we have stated, however, channel 19 could not be used on Mount Oso either, so long as KLOC had its permit for channel 17. Royal Bear asserts that a lower channel is particularly important to Stockton to enable a Stockton UHF station to compete effectively with the Sacramento VHF stations. It insists that a Stockton UHF station must be able to obtain extensive coverage in the San Joaquin Valley, from a site west or southwest of Stockton, and Mount Oso is particularly well suited for this purpose. KLOC points out that it is ready to go on the air and that Modesto should not be deprived of this opportunity, particularly when Stockton already has one station in operation (station KOVR, channel 13). Moreover, KLOC asserts, wide coverage in the San Joaquin Valley is more necessary for a station assigned to Modesto than by a station assigned to the much larger city of Stockton, because the population of the Stockton area constitutes a market of substance by itself.

13. We are of the view that the reassignment of channel 19 from Stockton to Modesto and the modification of the KLOC permit to specify channel 19 was the proper course of action in the public interest and must be reaffirmed. A Stockton station, operating on channel 31, would appear to be at no greater disadvantage vis-a-vis the Sacramento and Stockton VHF stations than if [illegible] operating

on channel 19. Channel 31 offers a great choice of suitable sites closer to Stockton and Sacramento than a site on Mount Oso and would not involve the receiver orientation problems which an operation on Mount Oso would entail. A channel 31 station would have the same relative position in the Stockton-Sacramento market as a channel 19 station insofar as low channel numbers are concerned. It would be higher than channel 15 in Sacramento (for which two applications are now pending) and lower than Sacramento channel 40 (construction permit issued). We are not persuaded that a station operating on channel 31 from a site other than Mount Oso could not be economically viable for reasons solely related to a particular channel and site.[3]

14. The wide coverage which Royal Bear asserts is necessary for a Stockton station would be equally desirable for a station serving either community. We are not convinced, however, that the economic viability of a Stockton UHF station would be dependent upon these particular facilities, and we find no merit in the argument that section 307(b) of the act requires that a location providing such extensive coverage (assuming, arguendo, that Mount Oso is the only such location) should be made available to a station in a larger city (Stockton) than to one in a smaller city (Modesto). Neither the act nor logic compels such a conclusion. Logic would appear to require that the Mount Oso location be associated with a station at Modesto, about 22 miles away, rather than with a station at Stockton, 34 miles away and in the direction away from the other stations in the Sacramento-Stockton market. We also believe that there is merit in KLOC's contention that extensive coverage of the San Joaquin Valley, such as is possible from a site on Mount Oso, is more important to the viability of a station assigned to the relatively small community of Modesto than for one licensed to the larger center of Stockton. We cannot assume, as Royal Bear apparently does, that the entire area between Sacramento and Fresno can support only one UHF station, with wide area coverage to the south possible only from Mount Oso using a low number channel.

15. Channel 58, allocated to Stockton, can be used at Mount Oso with substantially the same coverage as a channel 19 station. It appears that there are numerous high locations to the east which might be available and suitable, and channel 31 could be used at such locations consistent with the separation requirements. The only significant limitations on a channel 31 location would be with respect to the channel *23 reference point in Modesto (20 miles), channel *16 at Santa Cruz (75 miles), and channel 38 at San Francisco (60 miles). Our actions of April 29, 1966, removed channel 17 from the area, but there appears to be a possibility that it could be reallocated to Stockton for use by a station operating to the east or southeast of Stockton.[4] This is another reason that we do not believe that any injury

[3] According to American Research Bureau (ARB) figures in the 1966 edition of "Television Factbook," Sacramento-Stockton is the 27th TV market in net weekly circulation (535,000 homes) with 882,000 TV homes. One smaller market (Harrisburg-Lancaster-Lebanon, Pa.) is the 33d market in net weekly circulation and has had five stations in operation for several years.

[4] The significant limitations on a channel 17 location would be to channel 32 at San Francisco (75 miles) and to the Fort Bragg cochannel reference point, about 145 miles northwest of Stockton. A location east of Stockton could meet both requirements. Fort Bragg is in an area where numerous other UHF allocations could be made, so that the existing allocation could be changed through rulemaking if requested.

results to Royal Bear or the Stockton community by our actions. While Mount Oso might be the most desirable site, it is certainly not the only suitable one.

16. This controversy does not arise out of a dearth of available television channels in Stockton, but rather out of a desire by a prospective applicant for a particular channel, i.e., a "low number channel." Royal Bear has not shown in this proceeding, nor has it been shown in any other proceeding, that there is a significant technical difference in UHF channels, particularly those as close as 19 and 31. Neither Royal Bear nor any other prospective Stockton applicant has been deprived of the opportunity to operate a television station on a low number channel (31) nor are they precluded from utilizing a site on Mount Oso (using channel 58). We have not reduced the number of available channels in Stockton. No person, organization, or community, however, has a vested right to any particular number UHF channel, although we have tried to accommodate specific requests where feasible. We are not convinced that such an accommodation is required here in the public interest, but we believe, rather, that the public interest requires, in the context of this controversy, that we make available the desired channel and location to a permittee who is prepared to inaugurate at an early date a new local television broadcast service to an area which has no local outlet.

17. Having considered the comments of the parties with respect to the rulemaking aspect of this proceeding and having reached the conclusion that our actions of April 29, 1966, were correct, we turn to a consideration of whether the Commission committed legal error in the manner in which KLOC's construction permit was modified to specify channel 19. Modification of KLOC's construction permit to specify operation on channel 19 was accomplished pursuant to section 316 of the act. It was not necessary to issue a show cause order to KLOC because the action was done pursuant to KLOC's request, was accepted by KLOC, and KLOC has indicated that it would, in any event, waive whatever rights it may have had to such notice and a waiting period. The show cause and waiting period provisions of section 316 are for the protection of the licensee or permittee affected, not other parties.[5] In recent years, when changes in television channels allocated to a community have been made and an authorization is involved, the Commission has modified the authorization without issuing a show cause order where the change was requested by the licensee or permittee. Where, as here, the permittee has urged an action, no benefit accrues to Royal Bear or the public by requiring the Commission to engage in the pointless exercise of compelling KLOC to show why an action it urged should not be accomplished. With respect to Royal Bear's charge that the Commission unlawfully modified the permit without an application specifying channel 19 pending before it, the simple answer is that the Commission has power, under section 316(a) of the act, to modify a license (or permit) without an applica-

[5] Sec. 316, by its terms, clearly contemplates and states that the licensee or permittee shall be given written notice "* * * and shall have been given reasonable opportunity, in no event less than 30 days, to show cause by public hearing, if requested, why such order of modification should not issue." There is no requirement that public notice be given of the issuance of a show cause order.

tion for the modification having been made by the licensee or permittee. *Peoples Broadcasting Co.* v. *United States*, 209 F. 2d 286 (D.C. Cir. 1953), 9 R.R. 2045. We find no procedural defect in the modification of KLOC's authorization. Public notice was given (July 14, 1965) of the acceptance for filing of the KLOC application for modification of its construction permit to specify the Mount Oso site, but no amendment was filed in connection therewith specifying channel 19, nor, for the reason stated above, was one necessary. Therefore, Royal Bear's argument that our actions violated section 309(b) of the act is without merit.

18. Royal Bear alleges that KLOC has engaged in premature construction in contravention of section 319(a) of the Communications Act. KLOC states that it started construction of a building on Mount Oso suitable for use as housing for its transmitter. It did not wire the building nor was the transmitting equipment, which was on hand, installed; no foundations were laid for the antenna. We agree, under the circumstances, that this construction does not constitute premature construction within the meaning of section 319 of the Communications Act. See *Jefferson Radio Co.*, FCC 60–1214, 29 FCC 873, 20 R.R. 851. See also *Cherry & Webb Broadcasting Co.*, FCC 56D–99, 14 R.R. 873; *WSAV, Inc.*, 10 R.R. 402. Moreover, in cases where the Commission finds premature construction commenced in contravention of section 319(a), rescission of a grant is not mandatory, but the construction commenced prior to authorization simply would not be licensed and could not be used.

In view of the foregoing, the Commission concludes that reconsideration of its actions of April 29, 1966, and reversal thereof is not warranted.

Accordingly, *It is ordered*, That the petition for reconsideration, filed herein by Royal Bear Broadcasters, Inc., *Is denied.*

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

FCC 66D-34

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of AMERICAN TELEPHONE & TELEGRAPH CO. For a Construction Permit To Add New Facilities to Station KQF58 in the Domestic Public Point-to-Point Microwave Radio Service at West Unity, Ohio	Docket No. 16565 File No. 114-C1-P-66
For a Construction Permit To Establish New Facilities in the Domestic Public Point-to-Point Microwave Radio Service at Bluffton, Ohio	Docket No. 16566 File No. 122-C1-P-66
For a Construction Permit To Establish New Facilities in the Domestic Public Point-to-Point Microwave Radio Service at Ayersville, Ohio	Docket No. 16567 File No. 123-C1-P-66

APPEARANCES

Norman C. Frost, *George E. Ashley*, *Robert W. Jeffrey*, on behalf of American Telephone & Telegraph Co.; *Edward H. Laylin*, *George C. McConnaughey*, *Jr.*, and *Frank T. Quatman*, on behalf of the Northwestern Telephone Service Corp., party respondent; and *Howard A. White*, *Norman D. Schwartz*, and *Thomas Lee*, on behalf of the Common Carrier Bureau of the Commission.

INITIAL DECISION OF HEARING EXAMINER ELIZABETH C. SMITH

(Effective August 19, 1966, Pursuant to Sec. 1.276)

PRELIMINARY STATEMENT

1. This proceeding involves three applications filed by the American Telephone & Telegraph Co. (A.T. & T.) on July 12, 1965, for authority to modify the facilities of station KQF58 at West Unity, Ohio, and to construct new facilities at Bluffton and Ayersville, Ohio, all in the Domestic Public Point-to-Point Microwave Radio Service.

2. The Commission, by order released April 12, 1966, designated the above-styled applications, together with four applications filed by the United Telephone Co. (United) on November 30, 1965, requesting authority to modify microwave relay stations KQI71, KQI72, and KQI73 at West Unity, Napoleon, and Ottawa, Ohio, respectively, and to construct new facilities at Bluffton, Ohio. Thereafter, A.T. & T. and United entered into a stipulation providing for interconnection of A.T. & T. facilities with those of United at Toledo Junction and West

106-509—66——2

Unity for the interchange of certain specified interstate private line services, and for the use of A.T. & T. towers and buildings at Toledo Junction, Ayersville, and West Unity, at normal rental rates, for construction of the microwave system of United. As a result of such stipulation, the applicants and the respondent, on June 22, 1966, filed a joint pleading requesting dismissal of the United applications and a grant of the A.T. & T. applications involved in this proceeding. The petition insofar as it requested dismissal of the United applications was granted by order of the hearing examiner dated June 24, 1966 (FCC 66M–900, 86018). Thus, there remains for consideration in this proceeding the grant of the above-styled applications for A.T. & T. only.

3. In the order of designation the Commission found A.T. & T., the remaining applicant herein, to be legally, financially, technically, and otherwise qualified to render the proposed services, except for the matters specifically placed at issue in the order of designation.

4. A prehearing conference was held on April 27, 1966. The evidentiary hearing on the A.T. & T. applications was held on June 22, 1966, and the record closed on that date. All counsel waived the right to file proposed findings and conclusions, as well as the right to request corrections to the transcript, and also agreed to an immediate consideration and grant of the A.T. & T. applications.

FINDINGS OF FACT

5. The stipulation[1] between the applicants and the resultant dismissal of the United applications have rendered moot the issues predicated upon the conflicts between the A.T. & T. and United applications.

6. A.T. & T. is basically qualified to construct, own, and operate the facilities proposed in the instant applications.

7. The three subject applications request construction permits to add new facilities to station KQF58 at West Unity and to construct new microwave facilities at Bluffton and Ayersville, Ohio, whereby A.T. & T. proposes to establish a radio relay route between West Unity and Toledo Junction (near Bluffton), Ohio. West Unity is a junction of a main transcontinental radio relay route and a north-south radio relay route, and Toledo Junction is a junction of a new transcontinental coaxial cable route to be placed in service about July 1, 1966, and an existing coaxial cable between Toledo and Dayton.

8. The proposed West Unity-Toledo Junction link will provide: (*a*) A connection by which circuits routed over the new coaxial cable, either east or west of Toledo Junction, can leave the cable at Toledo Junction and be connected to any of the radio relay routes which terminate in West Unity; (*b*) a connection between the radio relay routes junctioning at West Unity and the AUTOVON[2] switch to be located near Toledo Junction, and (*c*) facilities for further growth in A.T. & T.'s interstate services from the area of Detroit, northern Michigan, and Canada to the rest of the United States.

9. The West Unity-Toledo Junction link will also permit wide band

[1] Terms of stipulation are set forth in joint pleading filed June 22, 1966, requesting, inter alia, dismissal of the applications of United.

[2] AUTOVON is an acronym for Automatic Voice Network, and interstate private line network of the Defense Department.

channel interconnections between the various radio routes at West Unity and the coaxial cables at Toledo Junction, which will provide increased flexibility and rerouting possibilities for restoration purposes.

10. The proposed facilities will also be used as required to furnish channels for any of the various interstate services provided by A.T. & T. between points served by its network, including message telephone, WATS, TWX, private line telephone, private line telegraph, and various other services such as data transmission and video. The rates and practices which will apply to provision of these services are those contained in the interstate tariffs of A.T. & T. on file with the Commission.

11. Originally, it was expected that the initial use of the proposed route would be for AUTOVON with other uses, such as nationwide message and private line network, coming later, and when the applications were filed, it was anticipated that the AUTOVON switch would be placed in service about June 1, 1967. It now appears that this AUTOVON switch will not be in operation until 1967 at the earliest. In the meantime, AUTOVON switching will be handled on existing switches at Norway, Ill., and Hillsboro, Mo. Now, however, since both the AUTOVON switch and the construction of the route have been delayed, it appears that the initial service needs will be for general network purposes, while AUTOVON requirements will come at about the same time or possibly even later. The circuits to be routed over this link, in connection with the anticipated service to and from the AUTOVON switch as well as for general A.T. & T. interstate services, extend far beyond the limits of the West Unity-Toledo Junction area. With the establishment of this route, A.T. & T. will be able to bypass the Toledo target area with the services that do not have to go there for termination, in the same way as Washington, New York, Atlanta, and other metropolitan areas are bypassed.

CONCLUSIONS

1. American Telephone & Telegraph Co. is legally, financially, technically, and otherwise qualified to own, construct, and operate the proposed facilities requested in the instant applications and no bar to grant of its applications has been shown to exist in connection with the dismissal of applications of the United Telephone Co. originally designated for hearing in this consolidated hearing, or otherwise, and it has been shown that the public interest, convenience, and necessity will be served by grant of the subject applications.

It is, accordingly, ordered, This 29th day of June 1966, that unless an appeal from this initial decision is taken by one 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 instant applications of A.T. & T. for construction permits (1) to add new facilities to station KQF58 in the Domestic Public Point-to-Point Microwave Radio Service at West Unity, Ohio, (2) to establish new facilities in the Domestic Public Point-to-Point Microwave Radio Service at Bluffton, Ohio, and (3) to establish new facilities in the Domestic Public Point-to-Point Microwave Radio Service at Ayersville, Ohio, *Be and the same are hereby granted.*

FCC 66–761

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of DAN HEATH AND MARION REASONER, D.B.A. HEATH-REASONER BROADCASTERS, LOCKHART, TEX. Requests: 1060 kc, 250 w, DA–Day, Class II	File No. BP–16726
BENJAMIN J. CONROY, JR., TR/AS MEDINA BROADCASTING CO., HONDO, TEX. Requests: 1060, kc, 500 w, Day, Class II For Construction Permits	File No. BP–16769

MEMORANDUM OPINION AND ORDER

(Adopted August 24, 1966)

BY THE COMMISSION: COMMISSIONER WADSWORTH ABSENT.

1. The Commission has under consideration the above-captioned applications and a joint agreement submitted by the parties seeking approval of a plan whereby Medina Broadcasting Co. would withdraw its application for 1060 kc.

2. The applications of Heath-Reasoner Broadcasters and Medina Broadcasting Co. are mutually exclusive in that simultaneous operation on 1060 kc would result in mutually destructive interference. To remove the conflict and to expedite consideration of the Heath-Reasoner application, the applicants entered into an agreement providing for amendment of Medina's application to specify 1460 kc. Heath-Reasoner has agreed to pay $500 in engineering fees incurred by Medina.

3. The Commission finds that the parties have complied with the requirements of section 1.525 of the rules. An affidavit filed in support of the agreement establishes that $500 was paid to a consulting engineer for professional service. Since Medina has filed an application for facilities to serve Hondo on another frequency, no questions are raised with respect to undue impedance of section 307(b) of the Communications Act of 1934, and no publication will be required. Thus, the Commission finds, pursuant to section 311(c) of the act, that $500 was legitimately and prudently expended in the preparation and prosecution of the Medina application.[1] Since consummation of the agreement would remove an existing engineering conflict between two applicants seeking to bring first local standard broadcast services to their

[1] We do not reach the question of the appropriateness under sec. 311(a) of payment for engineering services for preparation of the Medina amendment to change frequency.

respective communities, we find that approval of the agreement would serve the public interest, convenience, and necessity.

4. We have examined the Heath-Reasoner application and find that the applicant is fully qualified to construct, own, and operate its proposed station. We have also examined the amendment tendered by Medina for a change in frequency and find it acceptable for filing. Under section 1.571(j) (1) of the rules, the Medina application must be assigned a new file number and placed in the processing line as a new application.

Accordingly, *It is ordered*, That the joint agreement submitted by the above parties *Is approved;* that the amendment of Medina Broadcasting Co., filed June 21, 1966, *Is accepted for filing;* and that the application of Heath-Reasoner Broadcasters *Is granted*, subject to the terms and conditions specified in the construction permit.

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

FCC 66R-329

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of DWIGHT L. BROWN, TR/AS BROWN RADIO & TELEVISION CO. (WBVL), BARBOURVILLE, KY. For Renewal of License	Docket No. 15769 File No. BR-3228
BARBOURVILLE-COMMUNITY BROADCASTING CO., BARBOURVILLE, KY. For Construction Permit	Docket No. 15770 File No. BP-16297

MEMORANDUM OPINION AND ORDER

(Adopted August 30, 1966)

BY THE REVIEW BOARD:

1. Dwight L. Brown, tr/as Brown Radio and Television Co. (hereafter referred to as Brown), is the licensee of standard broadcast station WBVL, Barbourville, Ky. Brown timely filed his application for renewal of station license. Barbourville-Community Broadcasting Co., Barbourville, Ky. (hereinafter referred to as Barbourville), filed its application for a standard broadcast station utilizing the same frequency and power as that used by Brown. The applications were thereafter designated for hearing by Commission order, FCC 64-1198, released December 31, 1964. The Commission found both applicants were basically qualified to be the licensee of a radio broadcast station, and the only issues in the proceeding were the standard comparative issue and ultimate public interest issue. Those issues later were enlarged, see infra. There is now before this Board a partial appeal from presiding officer's adverse ruling, filed July 1, 1966, by the Broadcast Bureau, and related pleadings.[1]

2. In order to place the subject appeal into proper perspective, it will be necessary to outline in some detail the procedural background of this case. Numerous pleadings have been filed but only those pertinent to review of the appeal here under consideration will be noted. Barbourville, by a petition filed January 21, 1965, sought to enlarge the issues with respect to Dwight L. Brown in several respects. Pertinent to our consideration was its request for issues concerning errone-

[1] The pleadings under consideration by the Review Board at this time are Broadcast Bureau's partial appeal from presiding officer's adverse ruling, filed July 1, 1966; Barbourville-Community's opposition to the Broadcast Bureau's partial appeal, filed July 8, 1966; supplement to Barbourville-Community's opposition to the Broadcast Bureau's partial appeal, filed July 11, 1966, by Dwight L. Brown; Broadcast Bureau's reply to Barbourville-Community's opposition and Dwight L. Brown's supplement to Barbourville-Community's opposition, filed July 20, 1966; a letter from counsel for Barbourville-Community Broadcasting Co., dated July 22, 1966; and a document entitled, reply to Broadcast Bureau's partial appeal, filed July 29, 1966, by Dwight L. Brown.

ous, improper, or false entries made in the program logs for station WBVL, and to determine whether Dwight L. Brown has the requisite character qualifications to be a licensee of this Commission. This petition was denied by Review Board memorandum opinion and order, FCC 65R–179, released May 19, 1965, 5 R.R. 2d 288. On May 26, 1965, the Bureau filed an application for review of the Board's memorandum opinion and order denying the petition to enlarge issues with respect to Brown. After the filing of the motion to enlarge issues but prior to the Board's decision denying the motion, the parties had submitted on April 16, 1965, a joint request for approval of agreement, which looked toward the purchase of Brown's assets including radio station WBVL, his home in Barbourville, and a retail store owned and operated by Brown in Barbourville, for the sum of $95,000. By Review Board order, FCC 65R–220, released June 15, 1965, the joint request for approval of agreement was certified to the Commission. At this juncture, the Commission took the entire matter under advisement. In its memorandum opinion and order, FCC 65–622, released July 20, 1965, 1 FCC 2d 71, 6 R.R. 2d 105, the Commission granted the Bureau's application for review, finding that the requested issues centered around charges and countercharges made by Brown and Powell (the owner of Golden East Broadcasting Co., Inc., an applicant for a new standard broadcast station in Barbourville, Ky.) concerning entries in WBVL's program logs during the period 1958–60. The Commission there noted that because of the significance of the representations made, the application of Golden East should be consolidated with the applications of Brown and Barbourville for the purpose of exploring the truthfulness of those allegations and their effect upon the qualifications of Brown and Powell to be licensees of this Commission. The Commission therefore enlarged the issues in this proceeding with respect to Brown as follows:

> (*a*) To determine the facts and circumstances concerning the improper logging practices followed at WBVL between 1958 and 1960, inclusive;
>
> (*b*) To determine, in the light of the evidence adduced pursuant to the foregoing issue, whether Dwight L. Brown has made misrepresentations to the Commission or has in any manner attempted to deceive or mislead the Commission;
>
> (*c*) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Dwight L. Brown possesses the requisite character qualifications to be a broadcast licensee; and
>
> (*d*) To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application of Dwight L. Brown, tr/as Brown Radio and Television Co. (WBVL), for renewal of license would serve the public interest, convenience, and necessity.

Like issues with respect to Golden East Broadcasting Co., Inc., were also included. In the same memorandum opinion and order the Commission considered the joint request for approval of agreement. It thereupon concluded that in view of the unresolved character issues with respect to Dwight L. Brown, the agreement looking toward assignment of the license of WBVL from Brown to Barbourville must be denied.

3. The public hearing on the character issues added by the Commission was held in Barbourville, Ky., January 25, 1966, through

January 27, 1966.[2] Further hearing in this case is now scheduled for September 22, 1966.

4. On May 6, 1966, Barbourville petitioned the examiner to amend its application to specify the physical plant presently used by WBVL as the plant which it would use if its application were granted. In its petition to amend, Barbourville noted that Brown wishes to dismiss his application for renewal of license and to submit his license for cancellation; that Barbourville has arranged to purchase all of Brown's assets, including his home in Barbourville, for a total of $65,000; that none of this $65,000 is regarded as payment by Barbourville to Brown for Brown's expenses incurred in the prosecution of his renewal application; and that the details of the purchase sale agreement, which were attached to the petition to amend, were submitted only for the information of the Commission. The Broadcast Bureau opposed the granting of this amendment. It took the position that on its face the amendment plus the sale-purchase agreement constituted an agreement between Barbourville and Brown whereby for a price Brown would withdraw his application in order that Barbourville's might be granted. The Bureau argued that, viewed as a whole, it was clear that the sale of Brown's equipment to Barbourville for $65,000 was a condition precedent to dismissing his application and submitting his license for cancellation, and that therefore this must be regarded as an agreement subject to the provisions of section 311(c) of the Communications Act[3] and section 1.525 of the Commission's rules.[4] The Bureau further argued that, this being so, the examiner had no jurisdiction to pass upon the amendment, since under the Commission's rules authority to act upon such matters is delegated to the Review Board.[5] The hearing examiner heard argument on these matters and, without expressly articulating a ruling on the jurisdictional argument, granted the petition to amend by order FCC 66M–881, released June 21, 1966. It is from this order which the Broadcast Bureau has taken its partial appeal.

5. In its appeal the Bureau urges that the examiner erred on three basic grounds:

> (*a*) The examiner erred by asserting original jurisdiction over what is clearly a dismissal agreement;
>
> (*b*) Assuming jurisdiction lay with the examiner, he erred by not ruling or attempting to rule on the procedural contentions raised by the Bureau's opposition of May 16, 1966; and
>
> (*c*) Assuming jurisdiction lay with the examiner, the ruling lacks a proper factual foundation, i.e., no facts were submitted which would permit a holding that $65,000 is a justifiable price for Community to pay for Brown's physical assets.

On the jurisdictional point, the Bureau argues before the Board, as it did before the examiner, that the petition to amend, the amendment, and the purchase-sale agreement which was filed therewith must be viewed together, and that so viewed they constituted a dismissal agree-

[2] The application of Golden East Broadcasting Co., Inc., was dismissed for failure to prosecute on Jan. 25, 1966, formalized by hearing examiner's order, FCC 66M–300, released Mar. 1, 1966.

[3] 47 U.S.C. 311(c).

[4] 47 C.F.R. 1.525.

[5] 47 C.F.R. 0.365.

ment within the terms of section 311(c) of the Communications Act and section 1.525 of the Commission's rules and regulations, supra. With respect to its second point of appeal, the Bureau notes that the examiner was obliged as a matter of basic fairness to all of the parties involved to rule upon the question which it raised as to his jurisdiction, and that his failure to do so is prejudicial to the parties here involved. On the third point, the Bureau notes that neither Barbourville nor Brown submitted any basic facts as to the value of the physical assets being sold by Brown to Barbourville, and that, in the absence of some probative evidence as to the value of this property, it was impossible for the examiner to determine whether granting the amendment would serve the public interest. The Bureau then indicates that it would have no objection to having the Board consider this matter de novo as a dismissal agreement providing the parties make the showings required by section 1.525 of the Commission's rules.

6. In its opposition Barbourville reaffirms its belief that the amendment which it submitted does not come within the provisions of section 311(c) of the Communications Act but concedes that, for the purpose of resolving the matter, the documents before the Board might be regarded as a dismissal agreement. Moreover, Barbourville notes that the physical assets have been appraised by independent appraisers and that documents setting forth their value would be submitted by Dwight Brown in his supplement to Barbourville's opposition. Those affidavits filed by Brown state that Brown's residence in Barbourville is worth $20,000, and that the fair market value of the physical assets of radio station WBVL installed and operating according to good engineering practice is $53,192. The appraisal of the physical assets of WBVL included an inventory and valuation of the various component parts. Thus, the fair market value established by independent appraisals of the property proposed to be transferred by Brown to Barbourville is $73,192.

7. With respect to the question raised by the Bureau as to the examiner's authority to act in this matter, we note that, since all the parties have agreed that the Board may view the matter de novo as an agreement to dismiss, the examiner's failure to certify this matter is not decisive. However, we are constrained to agree with the Bureau that the documents before the examiner at the time he granted the agreement, when viewed in their entirety, did constitute a dismissal agreement, and that authority to consider such agreement is delegated by the Commission to the Review Board. The Board will therefore consider the entire matter as a dismissal agreement.

8. Viewing all of the pleadings, affidavits, and other documents before the Board in this matter, it is apparent that the factual data required by section 1.525 of the Commission's rules have been supplied. Moreover, the affidavits filed with Brown's supplement to Community's opposition to the Bureau's partial appeal make it abundantly clear that Brown is selling his physical assets in Barbourville for less than their fair market value (fair market value, $73,192; sale price, $65,000). Moreover, the Broadcast Bureau in its reply pleading now takes the position that Community has justified "paying $45,000 for used equipment as opposed to $32,710 for new equipment" presumably

106-509—66——3

because of the fact that it is being acquired on a turnkey basis, and also includes miscellaneous additional items. Under this circumstance, we agree that Brown is receiving no reimbursement for expenses incurred in prosecuting his renewal application.

9. The proposed transaction is not prohibited by section 311(c) of the Communications Act or the case precedents. The question before the Board may therefore be expressed as follows: Will the public interest be served by permitting Barbourville, an applicant which the Commission has found qualified in all respects to be the licensee of a broadcast station, to purchase the established plant of a licensee who has decided not to prosecute his application further? In considering this question we note that even should the outstanding character issues with respect to Brown be decided against him, Barbourville would become the licensee of the only AM station in Barbourville, Ky. Should this occur, it is unlikely that the Commission would object to Barbourville's acquisition of the physical plant used by Brown to provide the same service to Barbourville.[7] In view of these circumstances, it would serve no useful purpose to disapprove the agreement. On the other hand, by approving the agreement, we avoid the delay and expense of further hearing.

Accordingly, it is ordered, This 30th day of August 1966, that the Broadcast Bureau's partial appeal from presiding officer's adverse ruling, filed July 1, 1966, *Is granted;* and

It is further ordered, That, effective October 10, 1966, the petition for leave to amend its application submitted by Barbourville-Community Broadcasting Co., May 6, 1966, together with all the pleadings, affidavits, and other documents related thereto, be considered as a joint request to approve agreement: that the agreement *Is approved*, and the petition for leave to amend *Is granted;* that the application of Dwight L. Brown, tr/as Brown Radio & Television Co. (WBVL), *Is dismissed;* and that the application of Barbourville-Community Broadcasting Co. for a construction permit for a new AM broadcast station, 950 kc, 1 kw, day, class III, *Is granted.*

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

---

[6] By the earlier agreement Brown sought to transfer his license to Barbourville and the Commission denied, citing *Radio 13, Inc.*, FCC 65–47, 4 R.R. 2d 322 (1965), because of the unresolved character issues against Brown.

[7] See *Pike-Mo Broadcasting Co.*, 2 FCC 2d 207, 6 R.R. 2d 581 (1965); *Biscayne Television Corporation*, FCC 62–1260, released Dec. 7, 1962.

FCC 66R-333

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of ROYAL BROADCASTING CO., INC. (KHAI), HONOLULU, HAWAII For Renewal of License	Docket No. 16676 File No. BR-4120
RADIO KHAI, INC., HONOLULU, HAWAII For Construction Permit	Docket No. 16677 File No. BP-16294

MEMORANDUM OPINION AND ORDER

(Adopted August 30, 1966)

BY THE REVIEW BOARD:

1. The Review Board has before it for consideration a motion to enlarge issues, filed on June 27, 1966, by Royal Broadcasting Co., Inc. (KHAI) (hereinafter referred to as Royal).[1] Royal requests that issues be added concerning possible misrepresentations to the Commission by Lincoln Dellar, Radio KHAI's principal, and Radio KHAI's financial qualifications. Royal also requests that existing issue 3 [2] be clarified or that a separate issue be added to permit a determination of whether Radio KHAI abused the Commission's processes by misusing the publication requirements of rule 1.580. The Broadcast Bureau and Radio KHAI, Inc., oppose Royal's requests.

2. The above-captioned applications were consolidated for hearing by Commission memorandum opinion and order (FCC 66-499, released June 7, 1966) on the following questions: (1) The financial qualifications of Royal; (2) Royal's compliance with sections 1.613 and 1.615 of the rules with respect to the reporting of certain agreement or pledges relating to Royal's stock; (3) whether Royal and/or Radio KHAI had abused the Commission's processes with regard to a previous assignment of license application; [3] (4) a standard comparative issue; and (5) in light of the above, which, if either, of the applications should be granted.

[1] Other related pleadings before the Board are: An opposition filed July 12, 1966, by Radio KHAI, Inc.; comments, filed on July 22, 1966, by the Broadcast Bureau; a reply to Radio KHAI's opposition, filed July 25, 1966, by Royal; a reply to the Bureau's comments, filed Aug. 3, 1966, by Royal; and an affidavit, filed Aug. 3, 1966, by Royal. On Aug. 18, 1966, Radio KHAI, Inc., filed an additional reply to Royal's reply to its opposition; and a petition to accept this pleading. Royal, on Aug. 25, 1966, filed an opposition to petition to accept additional pleading. Radio KHAI contends that its pleading is responsive to "a fact raised for the first time in the Royal Broadcasting reply." This is not the case, however (see par. 7 of Royal's petition), and Radio KHAI's additional reply will not be accepted.

[2] Issue 3: "To determine, in light of all the facts and circumstances surrounding the assignment of license application (BAL-4912), whether Robert Sherman and Royal Broadcasting Co. or Lincoln Dellar and Radio KHAI, Inc., or both, abused the Commission's processes."

[3] On Sept. 23, 1963, Royal filed an application for consent to assignment of the license of station KHAI to Radio KHAI, Inc. (BAL-4912). This application was dismissed at the request of Royal on Feb. 28, 1964.

3. In relevant part, Royal, the present licensee of station KHAI, Honolulu, Hawaii, makes the following allegations with respect to the requested misrepresentation issue: Lincoln Dellar and his wife, the principals of Radio KHAI, acquired station KROY, Sacramento, Calif., by virtue of the Commission's grant of a transfer application (BTC–3539) on November 2, 1960, to Sacramento Broadcasters, a corporation wholly owned by the Dellars. The transfer application mentioned the possibility of a future stock assignment agreement between Sacramento Broadcasters and William H. Weaver, the proposed manager of station KROY. On October 31, 1960, an agreement with Weaver was entered into by Dellar and Sacramento Broadcasters, Inc., providing that Weaver would become general manager of station KROY for a period of 2 years, and that the agreement would be automatically renewable for successive 2-year periods unless 60 days' prior written notice was given by either party. Weaver was to receive a salary plus a percentage of the station's gross receipts. The agreement also provided a stock option to Weaver, exercisable prior to December 31, 1964, for 20 percent of the corporation's stock at a stated price payable over a 10-year period if certain conditions precedent were met. This agreement, Royal contends, is not on file with the Commission, although it is referenced in the station's ownership reports. On October 10, 1962, station KROY filed a modification of the October 31, 1960, agreement dated June 15, 1962; KROY's letter of transmittal stated that Weaver did not in fact sign the document until September 25, 1962. The modification provided for an increase in Weaver's percentage of the gross billings, an extension of Weaver's stock option for as long as he remained manager of station KROY, specifically extended Weaver's employment to July 1, 1964, and retained the renewal provisions of the October 31, 1960, agreement. On February 6, 1964, Royal alleges, Weaver exercised his stock option by written notice to the corporation; this notice was not filed with the Commission and, by letter dated April 5, 1965, Dellar notified the Commission that the agreement of June 15, 1962, had been terminated by Weaver on September 25, 1964. Royal states that Weaver did not terminate the agreement on September 25, 1964, and that Weaver has instituted a suit in the California courts demanding specific performance of the option agreement and compensation for his discharge as general manager.

4. Radio KHAI and the Bureau oppose Royal's request for the addition of a misrepresentation issue. Radio KHAI answers that the October 31, 1960, agreement between Sacramento Broadcasters, Inc. (Dellar), and Weaver, upon which Royal premises its request, was in fact filed with the Commission on December 1, 1960.[4] The agreement is also referenced in a KROY ownership report filed on December 5, 1960, and again in KROY's license renewal application filed on November 6, 1962. Radio KHAI further asserts that, as it explained to the Commission in its letter of October 10, 1962, Weaver did not sign the modification agreement until September 25, 1962. As to

[4] Although counsel for Radio KHAI asserts that the agreement in question was filed on Dec. 1, 1960, the Commission's staff has not been able to locate the item. Royal, in its reply to Radio KHAI, says with respect to the filing of the agreement: "Counsel's assertions are, of course, accepted."

KROY's failure to inform the Commission that Weaver had exercised his stock option and station KROY's error in informing the Commission that the agreement with Weaver had been terminated on September 25, 1964, Radio KHAI contends that Weaver "resigned and thereby terminated his option on September 26, 1964"; the matter is presently being litigated in the courts of the State of California; and if the court decides that the facts are other than as reported by KROY, the Commission will be fully advised. In reply Royal notes that Dellar has never informed the Commission that "Weaver exercised the option, in writing, of February 6, 1954 [sic], more than 7 months before the date of the alleged termination of the agreement and 14 months before the Commission was informed of this alleged termination." Royal also notes that Dellar had not reported Weaver's lawsuit to the Commission prior to the filing of Royal's motion to enlarge. Moreover, a letter written by Dellar's attorney and addressed to Weaver dated November 6, 1964, indicates that Weaver's resignation was made orally on September 26, 1964, and that Dellar knew of the dispute as to whether Weaver still had stock rights in the licensee of KROY 7 months prior to the April 1965 notification to the Commission.

5. Royal has not made sufficient allegations of fact to support its request for a misrepresentation issue.[5] The fact that Weaver has commenced a suit against the Dellars in a California court indicates no more than that there exists a bona fide, legal dispute involving a private contract between Weaver and the Dellars. The Dellars may ultimately be shown to have been mistaken as to the validity of Weaver's exercise of the option, but such an error in legal or factual judgment does not raise a question of deliberate misrepresentation to the Commission.

6. Notwithstanding the above, Dellar's failure to inform the Commission of the existence of the civil controversy raises a question whether Dellar has complied with his obligation to keep the Commission informed of significant events occurring after the filing of the application.[6] Although the application form (form 301) does not specifically ask whether an applicant or a principal of an applicant has any civil suits pending against him, it is established policy that an applicant report any substantial change which may be of decisional significance in a Commission proceeding involving the pending application. See *The Riverside Church in the City of New York*, FCC 62–968, 24 R.R. 195; *Tidewater Teleradio, Inc.*, FCC 62–1246, 24 R.R. 653. In view of the facts and circumstances presented, an issue to determine whether Dellar complied with his responsibility of informing the Commission of significant changes is warranted and the information developed thereunder may be weighed in evaluating the comparative qualifications of Radio KHAI.

---

[5] As to filing of the Oct. 31, 1960, agreement, the Board accepts counsel's assurance that it was in fact duly filed with the Commission on Dec. 1, 1960. Counsel's assurance is supported by the Dec. 5, 1960, ownership report filed by station KROY which references the Oct. 31, 1960, agreement. See also footnote 2, supra.

[6] On Nov. 13, 1964, the Commission amended part I of the rules to specifically require an applicant to keep his application up to date and to inform the Commission of "any substantial change as to any matter which may be of decisional significance * * *." (Sec. 1.65 of the rules.)

7. Royal's request for a financial qualifications issue against Radio KHAI is supported by a detailed list of "required minimum costs for the construction and operation of the proposed * * * [Radio KHAI] station." [7] This list was compiled by Robert Sherman, Royal's sole stockholder, based upon his personal knowledge of broadcasting and Hawaii. According to Sherman, Radio KHAI's minimum cost for construction and first year's operation would be $314,000, a figure far in excess of the $100,000 committed to Radio KHAI by the Dellars. Royal also asserts that the $120,000 which Radio KHAI estimates as its first year revenues is unsupported and therefore cannot be used to partially satisfy its financial requirements. Moreover, Royal contends, even if the $120,000 estimated revenues could be used, Radio KHAI's financial sources would still fall $94,000 below the minimum figure offered by Royal.

8. Radio KHAI opposes the addition of a financial issue and states that Royal, in representing Radio KHAI's own cost of construction and initial operating expenses as $154,000, has disregarded an amendment filed on July 20, 1964, increasing that figure $15,000–$20,000. Radio KHAI disputes the minimum figure offered by Royal on the theory that Royal's experience is not an indicant of what Radio KHAI will require and that Royal has provided no factual basis for concluding that Royal's estimate is more accurate than Radio KHAI's estimate of about $174,000. The Bureau opposes the addition of the issue as lacking in specificity. Further, the Bureau recognizes that Radio KHAI's estimated revenues cannot be relied upon in considering the financial qualifications of that applicant absent a showing as to the basis for them. However, the Bureau would not question Radio KHAI's financial qualifications due to the large personal net worth of the Dellars, Radio KHAI's principals.

9. Lincoln Dellar and his wife have subscribed to 5,000 shares ($50,000) of Radio KHAI stock; a further agreement between the Dellars and Radio KHAI provides for the Dellers to lend Radio KHAI "up to Fifty Thousand Dollars ($50,000) * * *." Thus, the applicant is assured of financing up to $100,000 to meet costs of construction and initial operation which it estimates will be about $174,000. Due to this $74,000 deficiency, Radio KHAI's proposal suggests that the applicant may have to rely upon operating revenues to finance its first year of operation. Although Radio KHAI lists its anticipated first year revenues as $120,000, there is no information presently in the record to support this estimate. Royal and the Bureau have correctly stated the Commission's policy as to the necessity of substantiation of estimated revenues before they can be considered in satisfying a question of financial qualifications. See *Ultravision Broadcasting Co.*, 1 FCC 2d 544, 5 R.R. 2d 243 (1965). Contrary to the Bureau's position, the Board cannot find Radio KHAI to be financially qualified on the basis of the large personal net worth re-

[7] The Commission designated a general financial issue against Royal, a renewal applicant, on the basis of the station's past financial difficulties, financial representations, and proposals for sale.

flected in the Dellars' balance sheet.[8] The Dellars have agreed to subscribe to Radio KHAI's stock in the amount of $50,000 and have agreed to lend the applicant up to $50,000. Absent some indication that they would increase their financial contribution, Radio KHAI is assured of a maximum of only $100,000, $74,000 less than its estimated needs. Lastly, the conflicting cost estimates of Royal and Radio KHAI require that this aspect of financial qualifications also be explored at a hearing. Therefore, Royal's request for a financial qualifications issue will be granted.[9]

10. The third issue which Royal requests is whether Lincoln Dellar and Radio KHAI have abused the publication requirements of the Commission's rules. Royal contends that Radio KHAI placed its public notice of filing in the only two newspapers of general circulation in the State of Hawaii on March 5, 6, 10, and 11, 1964; and that the wording, size of type, and positioning in the main news section of those newspapers were not in accordance with the usual "legal notice" practice. Royal argues that much of the information which Radio KHAI's notice contained was gratuitous and has injured Royal in the eyes of "its advertisers, creditors, lessors, and listening audience." In the alternative, Royal asks that present issue 3 (see footnote 2, supra) be clarified to permit a showing of the above matters.

11. Radio KHAI's opposition pleading states that: The appearance of its public notice in two papers was the result of an error made by the agency which handles advertising for both newspapers; the size of the type utilized in the notice was not large and was in fact smaller than that used by Royal in its public notice of hearing; the wording of the notice was accurate at that time and appropriate in view of the similarity between Radio KHAI's corporate name and the call letters of Royal's station (KHAI) and the prior, recent notice concerning the proposed transfer from Royal to Radio KHAI. The Bureau would deny Royal's request, viewing the matters raised as de minimis and issue 3 as limited to the dismissed assignment application which the applicants herein had previously filed with the Commission. See footnote 3, supra. In its reply pleading, Royal contends that Radio KHAI's opposition is not adequate and again requests the addition of an issue.

12. The Board agrees with the Bureau's characterization of the question raised by Royal as de minimis. Petitioner states that it can demonstrate that injury was caused to it by Radio KHAI's action, but has not done so in its petition. The Board can find no wrongdoing in Radio KHAI's actions regarding the public notice of filing. In section 1.580 of the rules, which deals with the method of publication, the Commission has set minimum standards for informing the public; applicants must make public at least the information called for in that section. This does not mean that an applicant cannot do more. We agree with petitioner that the notice requirement of rule 1.580 could

[8] *Springfield Television Broadcasting Corporation*, FCC 64R–243, 2 R.R. 2d 841, cited by the Bureau, is not dispositive; in that case the applicant's principal, who had a large net worth, and others indicated a willingness to increase the amount of funds available to the venture.

[9] However, since no question has been raised concerning the Dellars' ability to meet their commitment to Radio KHAI of up to $100,000, the showing under this issue should be limited to financial requirement in excess of $100,000.

be abused, but such has not been shown to be the case in this proceeding. Therefore, the requested issue will not be added and existing issue 3 will remain limited in the manner described by the Commission in its designation order.

Accordingly, it is ordered, This 30th day of August 1966, that the motion to enlarge issues, filed on June 27, 1966, by Royal Broadcasting Co., Inc. (KHAI), *Is granted* to the extent reflected herein and *Is denied* in all other respects; and that the issues in this proceeding *Are enlarged* by the addition of the following issues:

(*a*) To determine the basis of Radio KHAI, Inc.'s (1) estimated construction costs and (2) estimated operating expenses for the first year of operation; and

(*b*) In the event that the applicant will depend upon operating revenues during the first year of operation to meet fixed costs and operating expenses, to determine the basis of Radio KHAI, Inc.'s estimated revenues for the first year of operation; and

(*c*) To determine, in light of the evidence adduced, whether Radio KHAI, Inc., has demonstrated a reasonable likelihood of construction and continuing operation of its proposed station in the public interest;

(*d*) To determine whether Lincoln Dellar properly exercised his responsibilities and obligations as a Commission licensee to inform the Commission of the circumstances surrounding the lawsuit pending against him and Sacramento Broadcasters, Inc., brought by William H. Weaver, and, if so, the effect thereof on the comparative qualifications of Radio KHAI, Inc.; and

It is further ordered, That the petition to accept additional pleading filed by Radio KHAI, Inc., on August 18, 1966, *Is denied*.

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

FCC 66R-334

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
ROYAL BROADCASTING CO., INC. (KHAI), HONOLULU, HAWAII	Docket No. 16676 File No. BR-4120
RADIO KHAI, INC., HONOLULU, HAWAII For Construction Permit	Docket No. 16677 File No. BP-16294

MEMORANDUM OPINION AND ORDER

(Adopted August 30, 1966)

BY THE REVIEW BOARD:

1. The Review Board has before it for consideration a motion to enlarge, change, or delete issues filed June 27, 1966, by Radio KHAI, Inc.[1] By its motion Radio KHAI seeks clarification of the issues designated for hearing by Commission order, FCC 66-499, released June 7, 1966, to determine whether "the overall issue of character qualifications of" Robert Sherman, principal of Royal Broadcasting Co., Inc. (KHAI), should be tried in the hearing. Radio KHAI also requests that for purposes of issues 2 and 3,[2] the burden of proceeding with the introduction of evidence be placed upon the party with "knowledge of the facts" rather than upon the party making the charge. Radio KHAI further requests deletion of that portion of issue 3 which relates to the possible abuse of the Commission's processes by Lincoln Dellar and Radio KHAI.

2. In view of our disposition of that portion of Radio KHAI's motion which requests clarification of the scope of designated issues 2 and 3, it will not be necessary to describe at length the pleadings before us. Radio KHAI requests that the Board make clear that evidence as to alleged misrepresentations by Royal and evidence as to Robert Sherman's character qualifications would be permitted in the hearing. The Commission's rules (sec. 1.251(c)) specifically provide that the clarification of the scope of designated issues may be considered as part of the prehearing procedures by the hearing examiner. The Board's policy regarding such requests was set forth in *Star Broad-*

[1] Other related pleadings before the Board are: Motion to dismiss and opposition to motion to enlarge, filed July 12, 1966, by Royal Broadcasting Co., Inc. (KHAI); comments, filed July 22, 1966, by the Broadcast Bureau; and a reply, filed July 22, 1966, by Radio KHAI. Radio KHAI's motion, which was erroneously addressed to the Commission, will be considered by the Board as a motion for enlargement of issues and Royal's motion to dismiss for this error will be denied.

[2] "2. To determine whether during the period from Sept. 17, 1962, to date, Royal Broadcasting Co., Inc., or Robert Sherman had in effect certain agreements or pledges and whether they failed to file various reports with respect to these agreements or pledges as required by secs. 1.613 and 1.615 of the Commission's rules and regulations.

"3. To determine, in light of all the facts and circumstances surrounding the assignment of license application (BAL-4912), whether Robert Sherman and Royal Broadcasting Co., Inc., or Lincoln Dellar and Radio KHAI, Inc., or both, abused the Commission processes."

casting Corp. (*WFLS*), FCC 62R–54, 24 R.R. 297, wherein it held: "We are of a view that, except in the most unusual circumstances, a petition for clarification of issues should not be entertained by the Board prior to consideration by the hearing examiner at a prehearing conference." See also *Springfield Television Broadcasting Corp.*, FCC 64R–234, 2 R.R. 2d 841.

3. Radio KHAI's request that the burden of proceeding with the introduction of evidence be shifted to Royal as the party having "knowledge of the facts" instead of Radio KHAI as the party making the charges must also be denied. In designating issues 2 and 3 for hearing, the Commission in paragraph 28 of its designation order, supra, placed the burden of proof on the party making the charges. This resulted in Radio KHAI having the burden on issue 2, and Royal and Radio KHAI sharing the burden on the relevant portions of issue 3. Generally, the burden of proceeding with the introduction of evidence initially devolves upon the party with the burden of proof. Thus, Radio KHAI is in effect asking that the Board reconsider the Commission's designation order, supra. Radio KHAI has presented no facts which were not before the Commission at the time of designation, nor does it even claim that the Commission failed to consider the matter fully. In view of these circumstances, the Board is unable to grant Radio KHAI's request. See *Fidelity Radio, Inc.*, 1 FCC 2d 661 (1965); *Coastal Communications Corporation* (*KPLT*), FCC 65R–359, released September 28, 1965; and *Tri-State Television Translators, Inc.*, FCC 65R–428, released December 6, 1965.

4. The last request contained in Radio KHAI's motion is that the Board delete that portion of issue 3 which pertains to Lincoln Dellar and Radio KHAI. In requesting this deletion, movant is again asking the Board to reconsider the Commission's action in designating issue 3. In paragraph 23 of its designation order, supra, the Commission said: "In view of the conflicting charges regarding negotiations between Royal Broadcasting Co., Inc., and Radio KHAI, Inc., prior to dismissal of the assignment application, evidence should be adduced and a determination made as to whether there has been an abuse of the Commission's processes by Royal Broadcasting Co., Inc., or Radio KHAI, Inc., or both of them." Movant does not claim that the Commission's opinion was based upon incomplete or incorrect facts, but only that the Commission should have resolved the allegations as to Dellar and Radio KHAI on the basis of the pleadings. This contention does not justify the relief requested. See cases cited in paragraph 3, supra.

Accordingly, it is ordered, This 30th day of August 1966, that the motion to enlarge, change, or delete issues, filed June 27, 1966, by Radio KHAI, Inc., *Is denied;* and

It is further ordered, That the motion to dismiss filed by Royal Broadcasting Co., Inc. (KHAI), on July 12, 1966, *Is denied.*

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

FCC 66-776

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of JULIO MORALES ORTIZ AND CLEMENT L. LITTAUER (TRANSFERORS) AND RADIO SAN JUAN, INC. (TRANSFEREE) For Transfer of Control of TeleSanJuan, Inc., Permittee of Station WTSJ-TV, San Juan, P.R., and Satellites WMGZ-TV, Mayaguez, P.R., and WPSJ-TV, Bayamon, P.R.	File No. BTC-5100

ORDER

(Adopted August 24, 1966)

BY THE COMMISSION: COMMISSIONER WADSWORTH ABSENT.

At a session of the Federal Communications Commission held at its offices in Washington, D.C., on the 24th day of August 1966;

The Commission having under consideration the above-captioned and described application;

It appearing, That, except for the provisions of section 1.597 of the Commission's rules, no questions exist as to the qualifications of the above-named parties; and

It further appearing, That the permittee was granted initial operating authority on August 24, 1964, for station WTSJ-TV, and filed the above-described transfer of control application on May 9, 1966; and

It further appearing, That the above-described transfer of control application accordingly comes within the purview of section 1.597 of the Commission's rules, since the permittee has held the authorization for station WTSJ-TV et al. less than 3 years; and

It further appearing, That (*a*) the station has operated at a loss; (*b*) that the transferors have committed all their available capital to its operation; (*c*) that they are unable to obtain additional financing; and (*d*) this showing of unavailability of capital constitutes an exception to the hearing requirement of the rule as specifically provided by subpart (a) (3) thereof;

It is ordered, That the above-described application for transfer of control of the permittee of station WTSJ-TV et al. *Is granted.*

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

FCC 66-792

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF POWELL COUNTY BROADCASTING CO., LICENSEE OF RADIO STATION KDRG, DEER LODGE, MONT., FOR FORFEITURE

MEMORANDUM OPINION AND ORDER

(Adopted August 31, 1966)

BY THE COMMISSION: COMMISSIONERS BARTLEY, COX, AND WADSWORTH ABSENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has under consideration (1) its notice of apparent liability dated April 6, 1966,[1] addressed to the Powell County Broadcasting Co., licensee of radio station KDRG, Deer Lodge, Mont., and (2) the response to the notice of apparent liability filed April 22, 1966.

2. The notice of apparent liability in the amount of $150 was issued because of the licensee's failure to file annual financial reports for the years 1963 and 1964, in willful or repeated violation of section 1.611 of the Commission's rules.

3. In response to the notice of apparent liability the licensee alleged that its former president and general manager (who appears to have resigned at or about the time the notice was issued) kept incomplete bookkeeping records. No other reason was given for the failure to file the 1963 and 1964 reports and to date these reports have not been filed. However, the licensee submitted the 1965 annual financial report with its response. It alleged that the books are presently being properly maintained, promised future compliance with the reporting requirements, and claimed that because of the poor financial condition of the station a forfeiture at this time would "impose a further handicap."

4. We find that the licensee willfully and repeatedly failed to observe the provisions of section 1.611 of the Commission's rules as above stated. *In the Matter of Fay Neel Eggleson*, 1 FCC 2d 1006. Moreover, there is nothing in licensee's response which would warrant reduction of the amount of apparent liability set forth in the notice. Commission records show that the licensee ignored four written requests to file the 1963 and 1964 reports (May 19 and June 16, 1964, and June 25 and July 9, 1965). Licensees are expected to be familiar with Commission rules and to adhere thereto, and the licensee is responsible for the acts of its former president and general manager.

[1] The notice was issued under delegated authority to the Chief of the Broadcast Bureau in accordance with sec. 0.281(x) of the Commission's rules.

5. In view of the foregoing, *It is ordered*, This 31st day of August 1966, that Powell County Broadcasting Co., licensee of radio station KDRG, Deer Lodge, Mont., *Forfeit* to the United States the sum of $150 for willful and repeated failure to observe the provisions of section 1.611 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 Powell County Broadcasting Co.

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

FCC 66R-324

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of KEITH L. REISING, LOUISVILLE, KY.	Docket No. 16253 File No. BPH-4207
KENTUCKIANA TELEVISION, INC., LOUISVILLE, KY.	Docket No. 16423 File No. BPH-5120
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted August 25, 1966)

BY THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Keith L. Reising (Reising) and Kentuckiana Television, Inc. (Kentuckiana), each seeking a construction permit for a new FM broadcast station to operate on channel 295 in Louisville, Ky.[1] The outstanding issues involve Reising's financial qualifications; the effect on Kentuckiana's comparative qualifications of certain advertisements broadcast over station WLKY-TV, licensed to Kentuckiana; [2] and a comparison of the applicants. Presently before the Review Board is a joint request for approval of agreement whereby Kentuckiana's application would be dismissed, Reising's application would be granted, and Reising would reimburse Kentuckiana in the amount of $8,250 for expenses incurred in preparing and prosecuting its application.[3]

2. The Broadcast Bureau, in its comments, raises two specific objections to approval of the agreement. First, the Bureau points out that the agreement between the parties was reached on April 25, 1966, was signed by Reising and Kentuckiana on May 24, 1966, and May 31, 1966, respectively, but was not filed with the Commission until June 15, 1966. Since section 1.525(a) requires that a joint request for approval of agreement be filed within 5 days after entering into the agreement, and no effort to justify the delay has been made, the agreement, the Bureau urges, should be disapproved. In their joint reply to the Bureau's comments, petitioners state that although they "agreed to agree" by April 25, 1966, the terms of the agreement were not completely settled until May 12, 1966, and the agreement was not signed

[1] A third application, filed by Kentucky Central Broadcasting, Inc., for similar facilities was dismissed by order, FCC 66M-318, released Mar. 3, 1966. Reising and an official of Kentuckiana both filed affidavits stating that no consideration was promised or paid to Kentucky Central for dismissing its application.

[2] See *Keith L. Reising*, FCC 66R-212, 3 FCC 2d 904 (1966).

[3] Also before the Review Board are the following pleadings: (*a*) Addendum and supplemental exhibit, filed on June 23, 1966, by Reising; (*b*) supplemental exhibits, filed on July 6, 1966, by Reising; (*c*) comments, filed on July 7, 1966, by the Broadcast Bureau; and (*d*) joint reply, filed on July 19, 1966, by Reising and Kentuckiana.

by both parties until May 31, 1966. The delay in filing the agreement 8 days after the due date (June 7, 1966) was due, according to petitioners, to (*a*) a need for obtaining verification and affidavits as to Kentuckiana's expenses, requiring a search of the corporate records by an officer of the corporation; (*b*) other Commission matters requiring Reising's counsel to be away from his office; and (*c*) an effort to satisfy the remaining issue against Reising concerning his financial qualifications. While the Board does not condone petitioners' tardiness and believes the better practice would have been to attempt to obtain the necessary information prior to entering into the agreement, petitioners' explanation is adequate to justify the delay in this instance.

3. The second objection raised by the Bureau relates to portions of the $8,392 in expenses listed by Kentuckiana. In an affidavit itemizing the expenses, an official of Kentuckiana indicates that some of the $7,366.14 in legal expenses incurred were related to "[n]egotiations and preparation of papers re settlement of litigation concerning BPH–5120." This language apparently refers to services rendered with respect to the subject joint request and agreement, and, the Bureau argues, reimbursement for such expenses should not be allowed. The Bureau also urges that the Board should not allow reimbursement for $113.22 listed for "Miscellaneous telephone, photostating, postage, etc., expenses" without a further breakdown of this amount. Petitioners, in their joint reply, indicate that $200 of Kentuckiana's legal expenses were attributable to the settlement of litigation,[4] and contend nevertheless that reimbursement should be allowed for this expense. With regard to the miscellaneous expenses, petitioners have submitted a revised detailed breakdown showing $142.17 in such expenses. The Board agrees with the Bureau that expenses incurred in the preparation of an agreement looking toward the dismissal of an application are not incurred in "preparing, filing, and advocating the *granting* of [an] application" (emphasis added), as required by section 311(c)(3) of the Communications Act and are therefore not reimbursable. Since the remaining expenses for which reimbursement is sought are adequately verified, the Board will allow reimbursement in the sum of $8,220.95 (the original $8,392 of claimed expenses, minus the $200 in unallowable legal expenses, plus the increase of $28.95 in verified miscellaneous expenses).[5]

4. Except for the above-excused delay in the filing of the agreement, petitioners have complied with the requirements of section 1.525 of the rules. Approval of the agreement would be in the public interest, since it would enable the inauguration of a new FM service at an earlier date than would otherwise be the case. There remains the basic qualifications issue concerning Reising's financial qualifications. However, where favorable resolution of issues outstanding as to an applicant will permit an immediate grant of that application in conjunction with the approval of an agreement looking toward the dismissal of a competing applicant, the Board has followed a policy of considering the merits of the remaining issues. See, e.g., *Chapman & Television Co.*,

[4] An affidavit from Kentuckiana's counsel substantiates this amount.
[5] Petitioners, in their joint reply, indicate that this amount is acceptable to them, although they erroneously computed the figure to be $8,211.89.

2 FCC 2d 132, 6 R.R. 2d 872 (1965). Therefore, based upon the information submitted, the Board will consider the financial issue at this time.

5. An amendment to Reising's application, accepted by the examiner on June 1, 1966, indicates that Reising will require $47,200 to construct his proposed station, and $63,168 to operate for 1 year.[6] To these figures must be added the $8,220.95 which Reising has agreed to pay Kentuckiana. Thus, Reising will require a total of $118,588.95 in order to construct and operate for 1 year. To meet this requirement, Reising relies upon cash on hand (minus current liabilities) in the amount of $26,480;[7] two loans from financial institutions in the amount of $25,000 and $36,000, respectively;[8] and a note for $37,800 from Electrocast, Inc., due on March 7, 1967.[9] Thus, Reising will have available $125,286 to finance his proposal, and is therefore financially qualified to construct and operate his proposal for 1 year.[10]

6. The Bureau, in its comments, points out that the Board, in a memorandum opinion and order, 3 FCC 2d 364, released April 11, 1966, ordered that in the event of a grant to Reising, the construction permit shall contain a condition that Reising submit proof (prior to program test authority) that he has severed all interest in station WXVW (AM), Jeffersonville, Ind. (a suburb of Louisville), which is licensed to Electrocast; that the imposition of the condition was based on the theory that a lessening of competition might result between Reising's proposed station and the stations owned by Electrocast or its principals if Reising had an interest in Electrocast; and that Reising is relying, in part, on a note from Electrocast to establish his financial qualifications, and holds other notes (totaling $42,200) from Electrocast and its principals. The Bureau urges that Reising's creditor relationship with Electrocast and its principals is inconsistent with the *Macon* doctrine,[11] and that if Reising attempts to dispose of the notes in order to comply with the condition, a reexamination of Reising's financial qualifications would be essential to a grant of his application.

7. The only note relied upon by Reising to establish his financial qualifications is one with respect to which payment has already been arranged. See footnote 9, infra. In view of this fact, we do not believe that the existence of this note, by itself, will result in a lessening of competition between Reising's proposed station and the stations owned by Electrocast and its principals.[12] The condition to be imposed on a grant to Reising will therefore be appropriately modified so as to allow Reising to retain this note until March of 1967, when it falls due. Thus, Reising can comply with the condition without affecting his financial qualifications.

---

[6] All of these figures are supported by detailed breakdowns itemizing the costs involved.
[7] This figure is substantiated in a balance sheet for Reising, dated Mar. 21, 1966.
[8] These commitments are supported by letters from the financial institutions; and letters evidencing the availability of the necessary collateral.
[9] Payment of this note is assured by a bank letter in which this amount is committed to Electrocast for the purpose of paying off the note.
[10] The fact that $37,800 of this amount will not be available until March of 1967 does not require a contrary conclusion, since Reising has adequate funds to construct and operate until that time without reliance on this amount.
[11] *Macon Television Co.*, 8 R.R. 897 (1953).
[12] In the joint reply, Reising indicates that he will discount or dispose of the other notes in question prior to receiving test authorization.

Accordingly, it is ordered, This 25th day of August 1966, that the joint request for approval of agreement, filed June 15, 1966, by Keith L. Reising and Kentuckiana Television, Inc., *Is granted;* that the agreement *Is approved;* that the application of Kentuckiana Television, Inc. (BPH–5120), *Is dismissed* with prejudice; and that the application of Keith L. Reising (BPH–4207) for a new FM broadcast station to operate on channel 295 in Louisville, Ky., *Is granted;* and

It is further ordered, That program tests will not be authorized until permittee has submitted proof that, except as indicated above, he has severed all interest and connections with station WXVW, Jeffersonville, Ind.

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

FCC 66R–325

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
HENNEPIN BROADCASTING ASSOCIATES, INC., ST. PAUL, MINN.	Docket No. 16487 File No. BPH–4369
WMIN, INC., ST. PAUL, MINN.	Docket No. 16488
For Construction Permits	File No. BPH–4869

MEMORANDUM OPINION AND ORDER

(Adopted August 25, 1966)

BY THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Hennepin Broadcasting Associates, Inc. (Hennepin), and WMIN, Inc. (WMIN), for a new FM broadcast station to operate on channel 271, in St. Paul, Minn. Hennepin's application, filed on February 26, 1964, originally specified channel 271 in Minneapolis, Minn. However, WMIN requested that channel 271 be reallocated to St. Paul and, although Hennepin opposed this request, the Commission amended the FM Table of Assignments, effective March 12, 1965, to delete channel 271 from Minneapolis and allocate it to St. Paul. *FM Channel Assignments (Docket 15513)*, 30 FR 1851, 4 R.R. 2d 1509 (1965).[1] The Commission stated, however, that Hennepin would be given an opportunity to "submit whatever *amendments* are appropriate to specify a station assigned to St. Paul, Minn." (Emphasis added.) Thereafter, on March 23, 1965, Hennepin filed an amendment to its application, specifying increased power and increased tower height, and specifying St. Paul as its principal city. All other aspects of Hennepin's proposal, including the transmitter and studio site and programing,[2] remained unchanged by the amendment. Both the unamended and amended application proposed a 1-mv/m signal over both Minneapolis and St. Paul. WMIN filed its application for St. Paul on March 23, 1965. On June 29, 1966, the Review Board released a memorandum opinion and order, FCC 66R–252, 4 FCC 2d 279, granting a joint request for approval of agreement filed by the two applicants, dismissing the application of Hennepin, and granting the application of WMIN.

[1] In the same report and order, the Commission also reallocated channel 233 from Minneapolis to St. Paul. Hubbard Broadcasting, Inc., an applicant for channel 233 in Minneapolis, had previously tendered an amendment to its application to specify St. Paul, pending the outcome of the rulemaking, and requested the Commission, in the event the channel was reallocated, not to open up the hearing proceeding and permit competing applications to be filed for this channel. The Commission granted this request, based, in part, on "the contiguity of St. Paul and Minneapolis (with a considerable degree of overlapping interest of the two cities) * * *."

[2] In a subsequent amendment, filed 9 months after the Mar. 23, 1965, amendment, Hennepin made certain changes in its program schedule. However, the changes reduced only slightly (from 9 hours to 8) Hennepin's proposed policy of duplicating the programing of station KTCR, a Minneapolis standard broadcast station owned by Hennepin.

Presently under consideration is a petition for reconsideration of this action, filed by the Broadcast Bureau on July 13, 1966.[3]

2. The Bureau, in its petition, urges that it is requesting the Board to reconsider a "final action" and that the petition is submitted pursuant to section 405 of the Communications Act and section 1.106 of the rules, which allow 30 days for the filing of petitions for reconsideration of final actions.[4] The Bureau alleges as the reason for filing the subject petition that the Board misunderstood the Bureau's objections to the agreement filed by Hennepin and WMIN. The Board held that the Bureau objected to reimbursement for the expenses of the rulemaking proceeding and the March 23, 1965, amendment, whereas, in fact, the Bureau asserts, it did not object to the expenses of Hennepin's amendment.[5] The Bureau's disagreement with the Board, however, concerns the Board's allowance of reimbursement for the rulemaking expenses and any other expenses incurred prior to the amendment of March 23, 1966.[6] The basic thrust of the Bureau's present argument is that Hennepin actually filed two applications, one for Minneapolis and one for St. Paul; and that since the expenses incurred prior to the preparation of the Minneapolis application were not incurred in the preparation and filing of an application in conflict with WMIN's application, the expenses of the Minneapolis application are not recoverable under section 311(c) of the act.

3. Elaborating on this argument, the Bureau points out that both Hennepin and WMIN "drew a sharp distinction" between Hennepin's Minneapolis and St. Paul proposals in the rulemaking proceeding, and that the Commission rejected Hennepin's contention that Minneapolis and St. Paul should be treated as a single community. Thus, the Bureau contends, Hennepin's March 23 amendment involved a substantial change in facilities and was tantamount to a new application; this is further evidenced by the subsequent amendment to Hennepin's program proposal. The fact that Hennepin amended its application, rather than file a new application, is, the Bureau alleges, "a technical distinction which is irrelevant to a determination of whether the ex-

[3] Also before the Board are the following pleadings: (*a*) Opposition filed on July 26, 1966, by Hennepin; and (*b*) reply, filed on Aug. 3, 1966, by the Broadcast Bureau.

[4] Hennepin, in its opposition, contends that in cases where the Board has denied reimbursement, the Bureau has opposed requests for reconsideration, on the ground that the rules do not permit reconsideration of interlocutory rulings. However, the Board's previous action granted WMIN's application, dismissed Hennepin's application, and terminated the proceeding. Thus, it was a final action and the Bureau's petition is appropriate under the rules.

[5] Although the Bureau did not specifically object to reimbursement for the expenses of the amendment, par. 6 of the Bureau's opposition contained the statements that the "Chief Hearing Examiner has disallowed expenses incurred in connection with amendments to change frequency," and that in the *Midwest* case, *infra*, "the dismissing applicant improperly sought reimbursement for expenses incurred in filing an amendment *to specify a new frequency* * * *."

[6] A number of the cases cited by the Bureau were discussed at length in our previous opinion herein. They may be summarized as follows: In *Midwest Television, Inc.*, FCC 65R–69, 4 R.R. 2d 652, the Board indicated that it would not approve reimbursement for expenses incurred in an amendment by the dismissing applicant to a different frequency; since the consequent return of the application to the processing line would preclude a holding that the expenses were incurred with respect to the proposal presenting the hearing conflict. In both *Dirigo Broadcasting, Inc.*, FCC 65R–186, 5 R.R. 2d 735, and *WEPA–TV, Inc.*, FCC 65R–192, 5 R.R. 2d 756, the dismissing applicant sought reimbursement for rulemaking expenses incurred in its efforts to have assigned to its community the channel for which it subsequently applied. In *Morgan Broadcasting Co.*, FCC 65–308, 6 R.R. 2d 61 (the case most pertinent here), the Board allowed rulemaking expenses incurred by the dismissing applicant in opposing efforts to remove from the community the channel for which such applicant had already applied. (The Board's imperfect references to the *Midwest* and *WEPA–TV* cases in par. 2 of its previous opinion are hereby corrected.)

penses incurred" are recoverable; if this distinction is honored, reimbursement would be permitted for expenses for applications for entirely different facilities "so long as the applicant tied them together with a bridge of amendments." The touchstone for resolving this question, the Bureau submits, is "whether the expenses for which reimbursement is sought are those incurred in the prosecution of an application for substantially the same facility which was sought in the application as constituted at the time the dismissal is sought"; since only the "*current* application is in conflict with * * * other applications, section 311(c) of the act * * * would seem to limit reimbursement to expenses incurred * * *" in connection with that application. In support of its argument that Hennepin's amendment is tantamount to a new application, the Bureau cites *Florence Broadcasting, Inc.*, FCC 60M–637, 19 R.R. 1379; the case of *Sergio Martinez Caraballo*, FCC 65R–246, 5 R.R. 2d 905, in which the Board allowed reimbursement for expenses incurred prior to amendments changing frequencies and increasing power necessitated by changes in the Commission's Table of FM Assignments, is distinguished on the grounds that that case "did not involve any change of community."

4. Clearly, the Bureau's argument that a change in facilities tantamount to a new application can be inferred from Hennepin's programing amendment is unwarranted. Thus, the programing amendment was filed over 9 months after the amendment changing principal's cities was filed, and continued Hennepin's policy of duplicating its Minneapolis AM station. It is also clear that the Bureau's position cannot rest on the fact that the March 23 amendment increased the power and the tower height of Hennepin's proposal in view of the fact that an increase in power, in addition to a change in frequency, was also involved in the amendment in the *Caraballo* case, supra, with which the Bureau takes no quarrel.[7] Thus, the Bureau's position reduces to the fact that the March 23 amendment involved a change in principal cities from Minneapolis to St. Paul.[8]

5. The Board agrees with the Bureau that reimbursement under section 311(c) of the Communications Act can be obtained only for expenses incurred in prosecuting a pending application which is in conflict with another application.[9] We do not agree, however, that any amendment which involves a change in principal city location ipso facto proposes such a change in facilities sought as to constitute the amendment a new application. Certainly the Bureau would not contend that any amendment, regardless of how minor, changing the

[7] The Bureau's position in the *Caraballo* case was that even though the expenses "were incurred in the prosecution of an application for facilities other than those requested in the pending proposal," the Bureau would not object to reimbursement, because the "amendments were necessitated by reason of the Commission's actions." It appears that there has been a change in Bureau policy in this regard.

[8] *Florence Broadcasting, Inc.*, supra, relied upon by the Bureau in support of its position, involved changes in frequency, not a change of communities. Moreover, in that case an applicant for a standard broadcast facility had voluntarily changed frequencies on three separate occasions. The Chief Hearing Examiner held that allowing reimbursement for the applicant's present and previous proposals "could have the effect of thwarting the Commission's policy which is concerned with the discouragement of agreements and arrangements which might involve an abuse of process."

[9] An application is pending, according to sec. 311(c)(4) of the act, from the time such application is filed with the Commission until an order of the Commission granting or denying it is no longer subject to rehearing or review by any court.

nature of the facilities sought constitutes a new application.[10] Therefore, we believe that all of the circumstances of an amendment must be considered in order to determine whether that amendment creates such a substantial change in the facilities sought that it is tantamount to a new application. Here, Hennepin's amendment did not have any substantive effect on its proposal other than to change the principal city and increase coverage. Both the original and amended application specified the same transmitter and studio sites, proposed considerable duplication of Hennepin's AM station, proposed the use of the same channel, and proposed a 1-mv/m signal to both Minneapolis and St. Paul. Additionally, the communities of Minneapolis and St. Paul are, as stated by the Commission in its report and order, supra, contiguous and show "a considerable degree of economic, social, and cultural unity." Thus, we do not believe that Hennepin's amendment involved such a substantial change in facilities that it was tantamount to a new application, and we conclude that the expenses incurred by Hennepin prior to its March 23, 1965, amendment were incurred in the preparation or prosecution of a pending application in conflict with WMIN's application, and are therefore reimbursable under section 311 of the act.

Accordingly, it is ordered, This 25th day of August 1966, that the petition for reconsideration, filed on July 13, 1966, by the Broadcast Bureau, *Is denied.*

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

---

[10] Although sec. 1.57(j).(1) of the rules requires that a new file number be assigned to applications for standard broadcast facilities amended to change frequency, increase power or hours of operation, or change station location, no comparable rule exists for FM applications; and Hennepin's application was not assigned a new file number after the subject amendment.

FCC 66R-332

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of CITY INDEX CORP., JACKSON, MISS.	Docket No. 16584 File No. BPCT-3530
JOHN M. McLENDON, TR/AS TELE/MAC OF JACKSON, JACKSON, MISS. For Construction Permit for New Television Broadcast Station	Docket No. 16585 File No. BPCT-3647

ORDER

(Adopted August 30, 1966)

BY THE REVIEW BOARD:

The Review Board having under consideration a joint petition for approval of agreement, filed on July 20, 1966, by the above-captioned applicants, and the Broadcast Bureau's support of the joint petition, filed on August 1, 1966;

It appearing, That the parties have shown compliance with section 1.525 of the rules in all respects, that dismissal of the application of City Index Corp. would permit an immediate grant of the application of John M. McLendon, tr/as Tele/Mac of Jackson,[1] and that approval of the agreement would serve the public interest in that the institution of a new television service in Jackson, Miss., would be expedited;

It is ordered, This 30th day of August 1966, that the joint petition for approval of agreement, filed on July 20, 1966, by City Index Corp. and John M. McLendon, tr/as Tele/Mac of Jackson, *Is granted:* that the agreement *Is approved;* that the application (BPCT-3530) of City Index Corp. *Is dismissed* with prejudice; and that the application (BPCT-3647) of John McLendon, tr/as Tele/Mac of Jackson, for a construction permit for a new UHF television station to operate on channel 16 in Jackson, Miss., *Is granted*, subject to the following condition:

> Prior to licensing, permittee shall submit acceptable data for type-acceptance of its proposed transmitter in accordance with the requirements of section 73.640 of the Commission's rules.

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

---

[1] Dismissal of City Index's application moots all existing issues except an issue to determine whether the proposed McLendon tower would constitute a menace to air navigation. This issue is resolved by a letter of approval, dated Apr. 27, 1966, from the FAA (official notice taken).

FCC 66-779

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUEST OF LORAC SERVICE CORP. FOR SPECIAL TEMPORARY AUTHORITY (STA) TO OPERATE INDUSTRIAL RADIOLOCATION STATION KKH 706 AT A LOCATION OTHER THAN THAT SPECIFIED IN THE STATION'S LICENSE

ORDER

(Adopted August 30, 1966)

BY THE COMMISSION: COMMISSIONERS BARTLEY, COX, AND WADSWORTH ABSENT.

1. At a session of the Federal Communications Commission, held at its offices in Washington, D.C., on the 30th day of August 1966, the Commission considered the above-captioned matter.

2. Lorac Service Corp. (Lorac) has requested special temporary authority to operate Industrial Radiolocation station KKH 706 at a point other than that specified in the station's license. Lorac states that "* * * a canal is being dredged into the area on which the antenna for this station is located, which will render this site untenable before final action is taken by the Federal Communications Commission upon the modification application already submitted." The modification application referred to by Lorac was filed on May 16, 1966 (file No. 36522-IR-56). A petition to deny this and several other applications for renewal of several stations licensed to Lorac has been filed by Decca Survey Systems, Inc. The other stations are being operated by Lorac pursuant to section 1.62 of the Commission's rules pending action on the applications for renewal.

3. A 60-day special temporary authorization has been granted to Lorac under section 309(c)(2)(G) of the Communications Act of 1934, as amended, but Lorac has requested an extension. Since section 309(c)(2)(G) does not authorize the grant of special temporary authorization for longer than 60 days, Lorac's request must be considered under section 309(f) of the act. This section authorizes the Commission to issue a temporary authorization for the operation of a station subject to section 309(b) of the act if it finds that extraordinary circumstances exist requiring emergency operations in the public interest. (Lorac's basic application is subject to sec. 309(b).)

4. The station involved is part of a system operated by Lorac which is used to provide radiolocation service in the Gulf of Mexico. Failure to grant the requested extension will disrupt the radiolocation service provided by Lorac and will affect adversely, among other

things, oil exploration and other activities using Lorac's services in that area. Therefore, we find that the requirements of section 309(f) are met and that the public interest will be served by the grant of a temporary authority.

5. Accordingly, *It is ordered*, Pursuant to section 309(f) of the Communications Act of 1934, as amended, that Lorac Service Corp. *Is authorized* to operate radio station KKH 706 from a location at 29°-51'31" N. latitude, 92°01'46" W. longitude for a period of 90 days commencing August 30, 1966.

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

FCC 66R-331

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of JOHN W. COLLINS, JR., GLEN BURNIE, MD. Order To Show Cause Why the License for Radio Station KOI-0494 in the Citizens Radio Service Should Not Be Revoked [1]	Docket No. 16583

ORDER

(Adopted August 30, 1966)

BY THE REVIEW BOARD:

The Review Board, having under consideration the initial decision of Hearing Examiner Basil P. Cooper (FCC 66D-35, released July 1, 1966), proposing to revoke the above-captioned license;

It appearing, That no appeal has been taken from, or review ordered of, the above initial decision within the period allowed therefor;

It is ordered, This 30th day of August 1966, that, pursuant to section 1.276 of the Commission's rules, the initial decision became effective on August 22, 1966.

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

[1] The order to show cause shows the call letters as KKI-2785. However, the Commission on Feb. 7, 1966, had changed the call letters to KOI-0494 as indicated in the above caption. By an order dated June 2, 1966, released June 3, 1966, the examiner granted a motion to correct pleadings by substituting KOI-0494 for KKI-2785.

FCC 66D–35

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of JOHN W. COLLINS, JR., GLEN BURNIE, MD. Order To Show Cause Why the License for Radio Station KOI–0494 [1] in the Citizens Radio Service Should Not Be Revoked	Docket No. 16583

APPEARANCES

John W. Collins, Jr., respondent per se; *Francis J. Haynes* and *Frank B. Friedman*, on behalf of the Chief, Safety and Special Radio Services Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER BASIL P. COOPER

(Effective August 22, 1966, Pursuant to Sec. 1.276)

PRELIMINARY STATEMENT

1. By order to show cause dated April 13, 1966, released April 14, 1966, the Commission, by the Chief, Safety and Special Radio Services Bureau, acting under delegated authority, directed John W. Collins, Jr., the above-named respondent, to show cause why his license for KOI–0494 [1] in the Citizens Radio Service should not be revoked.

2. An evidentiary hearing was held in Baltimore, Md., on June 1, 1966, and the record closed the same day. Proposed findings of fact and conclusions of law were submitted by Collins and received in the offices of the Commission on June 20, 1966, and on behalf of the Chief, Safety and Special Radio Services Bureau, on June 23, 1966.

FINDINGS OF FACT

3. On the back of a license issued to Collins in the Citizens Radio Service is a warning that it is the responsibility of the licensee to see that the station is properly operated at all times; that the license may be revoked and/or monetary forfeitures may be imposed for failure to comply with the law and the Commission's rules; that the station should not be used to make unnecessary transmissions; and that, if the

[1] The order to show cause shows the call letters as KKI–2785. However, the Commission on Feb. 7, 1966, had changed the call letters to KOI–0494, as indicated in the above caption. By an order dated June 2, 1966, released June 3, 1966, the examiner granted a motion to correct pleadings by substituting KOI–0494 for KKI–2785.

licensee is using radiotelephone, he should not transmit unless there is a definite need in a situation which requires the use of radio communications to accomplish or expedite a definite objective.

4. On September 17, 1964, between the hours of 11:06–11:15 p.m., Collins used his station with the then call letters of KKI–2785 as a hobby in violation of section 95.81 (a) and (c) (now sec. 95.83(a)(1)) of the rules and carried on a continuous communication for 9 consecutive minutes without a 2-minute silent period as required by section 95.81(f) (now sec. 95.91(b)) of the rules. A notice of violation was mailed to Collins on October 6, 1964, advising him of the above violations. Attached thereto was a transcript of the communication referred to therein. By letter dated October 14, 1964, Collins admitted the above violations. He stated that he had reread part 95 of the Commission's rules and would try to be sure that the mentioned violations would not occur again.

5. On November 6, 1965, at or about 11:25 p.m., Collins (*a*) engaged in radio communication as a hobby or diversion in violation of section 95.83(a)(1) of the rules, (*b*) transmitted nonemergency communications or relay messages for a person other than the licensee or members of his immediate family in violation of section 95.83(a)(14) of the rules, (*c*) communicated or attempted to communicate with another station over a distance of more than 150 miles in violation of section 95.83(b) of the rules, and (*d*) failed to identify his station by its assigned call letters at the beginning and end of each transmission or series of transmissions in violation of section 95.95(c) of the Commission's rules. A notice of violation was mailed to Collins on November 18, 1965. Attached to said notice were excerpts from the conversation between the Missouri Fat Man and the Old Maryland Bald Eagle relating to a relayed message. By letter dated November 7, 1965, Collins replied to the Commission's notice of violation of November 18, 1965, stating, in part, that:

> It is obvious to me that either I have been accussed [sic] of the violations set forth mistakeably [sic] or someone has complained for some unknown reason to your office and used an excuse such as tagging a name such as indicated in this violation strickly [sic] to create trouble and attempt to have my license revoked.
>
> * * * * * * *
>
> Every indication proves to me that there has been some mistake or false accussation [sic] as mentioned in the first part of this letter.

By letter dated January 28, 1966, Collins admitted that the answers he had given to the notice of November 18, 1965, were not true. At the hearing on June 1, 1966, Collins indicated that the false statements had been encouraged or influenced by another, that he had been concerned over having made them, and was admitting the falsity thereof as he always tried to be an honest person.

6. On January 27, 1966, the Commission mailed a notice of violation to Collins, listing the following irregularities noted on January 25, 1966:

(*a*) Willful failure to identify your station by the assigned call sign at the beginning and conclusion of each transmission or series of transmissions in violation of section 95.95(c) of the rules.

(*b*) Your station has been observed on many occasions identified as "Bald Eagle," which is a false and deceptive call sign not assigned by proper authority in violation of section 95.115 of the rules.

(*c*) Communications were transmitted to many other units of other Citizens radio stations on 26.975 Mc/s (channel 2), a frequency reserved for communications between units of the same radio station, in violation of section 95.41(d)(2) of the rules.

(*d*) Engaging in radio communication as a hobby or diversion, i.e., operating the radio station as an activity in and of itself, as evidenced by communication of types similar to one or more of those exemplified under section 95.83(a)(1) and transmitting communications to other licensees relating to testing or adjustment of radio equipment, in violation of section 95.83(a)(1) and section 95.83(a)(13) of the rules.

(*e*) Your station has been observed operating on many occasions making contact with other stations over a distance of more than 150 miles in violation of section 95.83(b) of the rules.

(*f*) Communications on many occasions exceeded 5 consecutive minutes and failure to observe a 5-minute silent period in violation of section 95.91(b) of the rules.

(*g*) The station has been operated at a new permanent mailing address for a period in excess of 30 days and notification of such change was not given this office and there is no evidence that you applied for a modified license within the specified time, in violation of section 95.35(b) of the rules.

7. By letter dated January 28, 1966, Collins admitted that all of the charges were correct except as to the last, (g) above, under which the licensee is required to give changes in permanent mailing address.

8. At the evidentiary hearing on June 1, 1966, Collins, who has an honorable discharge from the United States Army, admitted that the several charges of improper operation of his station were true, that he regretted his prior false statements to the Commission (see par. 5, supra), that he had tried to rectify the situation since the receipt of the citation issued in 1966, and that he was trying to cooperate with the Federal Communications Commission. He conceded that the use of radio as a hobby could be pursued in the amateur band and should not be pursued on frequencies assigned to the Citizens Radio Service.

CONCLUSIONS

1. In this proceeding, John W. Collins, Jr., is ordered to show cause why the license for radio station KOI-0494 in the Citizens Radio Service should not be revoked. This order followed the third formal official notice of violation which had been issued to him within the last 3 years. In one or more of these notices, Collins was cited three times for using his Citizens Radio station as a hobby or diversion in violation of section 95.83(a)(1) of the rules, two times for using his radio station to communicate over a distance of more than 150 miles in violation of section 95.83(b) of the rules, two times for communi-

cating for a period exceeding 5 consecutive minutes in violation of section 95.91(b) of the rules, and two times for failing to identify the station in a manner prescribed in section 95.95(c) of the Commission's rules. In addition, on November 6, 1965, the station was used to transmit nonemergency communications for a person other than the licensee or members of his family in violation of section 95.83(a)(14) of the Commission's rules. Also on January 25, 1966, the station was used to communicate with other Citizens Radio stations on a frequency reserved for communications between units of the same radio station in violation of section 95.41(d)(2) of the rules, for transmitting communications to other licensees relating to the testing or adjustment of radio equipment in violation of section 95.83(a)(13) of the rules, and said station was identified as "Bald Eagle," which is a false and deceptive call sign not assigned by proper authority in violation of section 95.115 of the rules. Collins admits that he had operated his station in the manner charged in the three official notices of violations.

2. The record in this case, summarized in the foregoing paragraphs, establishes that John W. Collins, Jr., respondent herein, has repeatedly used the facilities of the station licensed to him in the Citizens Radio Service in a manner not authorized by that license; that he has violated sections 95.41(d)(2), 95.83(a)(1), 95.83(a)(13), 95.83(a)(14), 95.83(b), 95.91(b), 95.95(c), and 95.115 of the Commission's rules; and has made a false statement of fact in response to a communication sent by the Commission pursuant to section 308(b) of the Communications Act of 1934, as amended. Such violations made the respondent liable to the provisions of section 312 (a)(1)(2)(4) and (c) of the Communications Act of 1934, as amended, and would warrant the Commission in refusing to grant a license to Collins on an original application.

3. The several rules which Collins has violated are those which the Commission has established to assure that the frequencies assigned for use by stations operating in the Citizens Radio Service are used in such manner as will enable a licensee to use the facilities for essential personal or business short-distance radio communication, signaling, and radio control of remote objects or devices. Such a station is a valuable communications tool for many professional persons—such as doctors and engineers, the small businessman, and the plain citizen. When a station in the Citizens Radio Service is used as a hobby and to carry on "chitchat" for extended periods of time, such transmissions may interfere with or block completely the use of the frequency by other stations seeking to send and receive essential authorized communications.

4. To condone the manner in which Collins has operated his station even after the official notices of violations and his failure to abide by his promises to comply with the rules would be a disservice to other licensees in the Citizens Radio Service and would not be in the public interest.

It is ordered, This 30th day of June 1966, in accordance with section 312 (a) (1) (2) (4) and (c) of the Communications Act of 1934, as amended, that unless an appeal to the Commission from this initial decision is taken by any 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 license issued to John W. Collins, Jr., Glen Burnie, Md., for radio station KOI-0494 in the Citizens Radio service, *Is hereby revoked.*

FCC 66-805

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.606, TABLE OF ASSIGNMENTS, TELEVISION BROADCAST STATIONS (DICKINSON, N. DAK.)	Docket No. 16681 RM-912

REPORT AND ORDER

(Adopted September 7, 1966)

BY THE COMMISSION: COMMISSIONERS BARTLEY, WADSWORTH, AND JOHNSON ABSENT.

1. The Commission has before it for consideration the proposal to assign channel 7 to Dickinson, N. Dak., for the purpose of allowing translator station KØ7GV to increase power to 100 w under section 74.702(g) of the Commission's rules and regulations. See notice of proposed rulemaking, adopted June 2, 1966 (FCC 66-505).

2. Dickinson Radio Association, licensee of station KDIX-TV, channel 2, Dickinson, N. Dak., opposes the rulemaking. Briefly, station KDIX-TV contends: That it will be economically injured, that the proposal derogates from the mileage separation requirements of section 73.611(a)(4) as concerns channel 7 assignments at Sheridan, Wyo., and Jamestown, N. Dak., and that the proposal is inconsistent with the objectives and principles of docket No. 15858, which promulgated the high-power translator rules.

3. Meyer Broadcasting Co., Bismarck, the petitioner in this case, filed reply comments taking issue with the principal objections raised by KDIX-TV. With respect to the economic injury argument, Meyer questions whether this was not raised because of concern for the CATV system which KDIX is now constructing rather than the television station. With respect to cochannel separations, Meyer submits an engineering statement showing that all mileages meet the minimum specifications required by the Commission rules. Meyer also challenges the interpretation that KDIX-TV places on the interpretation of the new high-power translator rules.

4. We treat first the basic question of the interpretation of docket No. 15858, in which we promulgated the high-power translator rules. Dickinson Radio Association reads docket No. 15858 to mean that only VHF channels in the Television Table of Assignments which had remained unused for a number of years could be utilized for high-power translator use. Such an interpretation was not intended. There is no reason why a VHF channel cannot be added to a community for use as a high-powered translator, if such an assignment is technically feasible; i.e., in compliance with the mileage separations. The benefits intended by docket No. 15858 not only are equally

achieved in such circumstances, but the bringing of the additional service to a community in this manner may stimulate interest in a regular station.

5. KDIX–TV's allegations that the allocation of channel 7 to Dickinson would seriously restrict the location of transmitter sites for use of VHF channel 7 at Jamestown, N. Dak., and Sheridan, Wyo., is erroneous since it is sufficient that the site proposed meets all minimum requirements to the reference points in these cities.

6. We now turn to the economic injury argument. KDIX–TV argues "that the extension of coverage of petitioner's station KFYR–TV by means of the proposed translator on channel 7 would create an inequitable advantage resulting from its American Research Bureau (ARB) circulation figures, with satellite stations in Minot and Williston, N. Dak.; its established network rates; and its competition for regional, national spot, and network advertising." KDIX–TV thus avers that the competition offered would cause its station to lose its NBC–ABC Network program services. Meyer states that station KDIX–TV is part of the "KX Network," which has a common sales representative and sales manager for advertising over station KXJB–TV, Valley City, N. Dak.; KXMB–TV, Bismarck, N. Dak.; KXAB–TV, Aberdeen, S. Dak.; KXMC–TV, Minot, N. Dak., and KDIX. These stations are sold as a group for network and national sales, with a combined rate for all five television stations, and with a resulting combined ARB circulation figure which is over twice that of petitioner's television facilities.

7. In our view, the arguments and showings made by KDIX–TV in this connection are without substantial merit. It is well established that economic injury to an existing station is grounds for withholding action only where such economic injury would affect the public interest, as opposed to the private interests of the complaining station. *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940); *Carroll Broadcasting Co.* v. *FCC*, 258 F. 2d 440 (C.A.D.C. 1958). As the court of appeals remarked in the latter case, the burden of a party making this claim is a heavy one, and we do not find that an adequate basis for refusal has been shown. We should always be slow to act in a manner which would prevent the development of competition, and there is presented here no substantial reason why we should do so. KDIX's assertions are speculative, and we note its position as part of a combined sales arrangement, mentioned above.

8. It appears that the public interest, convenience, and necessity will be served by assigning channel 7 to Dickinson. Authority for the amendment adopted herein is contained in sections 4 (i) and (j), 303, and 307(b) of the Communications Act of 1934, as amended.

9. In view of the foregoing, *It is ordered*, That, effective October 17, 1966, the Television Table of Assignments (sec. 73.606(b) of the Commission's rules and regulations) *Is amended*, insofar as the city listed below is concerned, to read as follows:

City	*Channel No.*
Dickinson, N. Dak.	2+, *4, 7

10. *It is further ordered*, That this proceeding *Is terminated*.

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

FCC 66-787

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202, TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS (LAFAYETTE, GA.)	RM-1003

MEMORANDUM OPINION AND ORDER

(Adopted August 31, 1966)

BY THE COMMISSION: COMMISSIONERS BARTLEY, COX, AND WADSWORTH ABSENT.

1. The Commission has before it for consideration a petition requesting rulemaking to amend the FM Table of Assignments so as to assign channel 257A to LaFayette, Ga., filed by Radio Dixie, Inc., licensee of station WLFA (AM), LaFayette, Ga., on July 18, 1966. Since the proposed assignment does not conform to the minimum required spacings to all other assignments and stations, Radio Dixie also requests a waiver of section 73.207 of the rules.

2. LaFayette is a community of 5,588 persons (1960 U.S. census) and is located in the northwestern corner of Georgia about 23 miles south of Chattanooga, Tenn. Petitioner states that WLFA is a daytime-only station and so cannot render service at night to the area, that 62,277 people will be within the 1-mv/m contour of the proposed FM station, and that channel 257A would meet all the required separations with the exception of one. It submits that the distance between its site of WLFA and that of the adjacent channel station WAHR on channel 256 at Huntsville, Ala., is 87 miles, whereas the required spacing is 105 miles. In support of its request for a waiver of the spacing requirements in this case, Dixie Radio contends that the proposal will not result in harmful interference to WAHR, in view of a mountain barrier with elevations above 2,000 feet which is situated between the two locations at about 11 miles west of LaFayette.

3. Normally, the assignment of a class A FM channel to a community such as LaFayette would be warranted, in the event such an assignment could be made in conformance with the spacing and other rules. In this case there would result a rather severe shortage to a class C station. Petitioner submits that the shortage would be 18 miles, but our calculations reveal that the spacing between WLFA and WAHR is 75 miles (rather than 87 miles) and that the shortage would be 30 miles. While LaFayette does not have a local nighttime station, it does receive service from the three class C FM stations in Chattanooga. As for the contention that the shortage is justified on the basis that there is a mountain ridge between the two sites, our assignment plan is based solely on minimum mileages without regard

to terrain variations. And we have not deviated from this principle in making assignments throughout the country in the FM service. We do not believe that the petitioner has made a sufficient showing that the terrain involved is so exceptional, or that the signal would be so weak in the Huntsville area as not to cause any interference, as to warrant an exception in this case.

4. In the third report, memorandum opinion, and order of August 1963, docket No. 14185, 28 F.R. 8077, the Commission, in establishing the FM Table of Assignments and the minimum assignment and station separation table, was motivated by the proliferation of grants involving interference, both caused and received. We noted that an assignment plan is more efficient and would more nearly meet our long-term objectives than would a "protected contour" plan. For this and other reasons the old system of assigning frequencies on an ad hoc basis was abandoned in favor of a "go-no-go" method of assignments similar to that used for the television channels.

5. Therefore, we find that the aforementioned basic policy considerations underlying the new rules are of such paramount importance as to override the grounds presented in support of the LaFayette request, and that the petitioner has failed to show extraordinary circumstances or public interest considerations of sufficient weight to overcome the presumption in favor of strict enforcement of the mileage separation rules, which are the cornerstone of the entire FM assignment structure. Accordingly, the request for waiver is denied.

6. In view of the foregoing, *It is ordered*, That the petition of Radio Dixie, Inc., RM–1003, *Is denied*.

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

FCC 66–788

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.606, TABLE OF ASSIGNMENTS, RULES GOVERNING TELEVISION BROADCAST STATIONS (SAN ANGELO, TEX.)	RM–937

MEMORANDUM OPINION AND ORDER

(Adopted August 31, 1966)

BY THE COMMISSION: COMMISSIONERS BARTLEY, COX, AND WADSWORTH ABSENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has before it a petition filed by the Board of Education of the San Angelo Independent School District on March 11, 1966, requesting that channel 6 be reserved for educational use at San Angelo, Tex. SRC, Inc., filed an opposition to the petition on April 7, 1966.

2. San Angelo (1960 population, 58,815) is located in Tom Green County (1960 population, 64,630). Its present television assignments are channels 3, 6, 8, and *21. Abilene Radio & TV Co. (a satellite of KRBC–TV, Abilene) is operating KACB–TV on channel 3, and Westex Television Co. is operating KCTV on channel 8. SRC, Inc. (SRC), and the San Angelo Independent School District No. 226–903 (the School District) filed applications for channel 6 on April 5, 1966, and May 20, 1966, respectively. No application has been filed for channel 21, which is reserved for noncommercial educational use.

3. In its petition, the School District referred to its intention to file an application for an educational station on channel 6, which would serve 11 public school districts and 4 parochial schools in Tom Green County; 5 school districts within a 35-mile radius of San Angelo; the Angelo State College, a Texas State college in San Angelo; and would also provide educational programing for those outside the schools.

4. Although channel 21 is reserved for noncommercial educational use in San Angelo, the School District believes that channel 6 would better serve its purposes, since it could function more economically on that channel. KCTV, channel 8, has promised that it would make available to the educational station its studios and studio equipment, and would provide its staff for program production. Southwestern Bell Telephone Co. would rent its microwave tower to the School District for $1 per year, which tower is located on KCTV property, and KCTV would charge no additional rent for it. The School District is convinced that many of the economies available to it as a VHF station would not be attainable if it operated on a UHF channel

and that it would have more immediate acceptability among viewers in the San Angelo area as a VHF station, since all of the sets in the area are not yet equipped to receive UHF signals.

5. SRC, as an applicant for a commercial station on channel 6, opposes the request for reservation of the channel. It contends that the School District's petition indicates that its primary purpose will be to use channel 6 for in-school instruction and that, therefore, it should more appropriately utilize the Instructional Television Fixed Service (the 2500–2690-Mc/s band) for its purposes. SRC concludes that a reservation of channel 6 for educational use would be a manifestly wasteful utilization of the limited number of commercial VHF channels available.

6. SRC argues that the third VHF channel in San Angelo should not be reserved for educational purposes, since KACB–TV is carrying NBC programs, KCTV is a CBS affiliate, and a grant of SRC's application would bring to San Angelo an outlet for the third network, ABC, thus establishing a greater degree of competitive equality among the major networks than exists at present, which would inure to the community's benefit.

7. Under the circumstances we believe it preferable not to reserve channel 6 for educational use, which would preclude consideration of its possible use for commercial television. Channels not reserved for education are not reserved for commercial use either but are available for all qualified applicants, whether commercial or noncommercial educational. See *Fifth Report and Memorandum Opinion and Order* in docket 14229, 2 FCC 2d 527, paragraph 39. We note that the School District has filed an application for channel 6 (BPCT–3783), which is mutually exclusive with that filed by SRC (BPCT–3764). In similar circumstances where competing applications by educational and commercial applicants have been filed, we have left this matter for decision in a comparative hearing (*Channel Assignment to Wilmington, Del.*, 18 Pike & Fischer, R.R. 1653 (1959); *Channel Assignment to Eureka, Calif.*, 7 Pike & Fischer, R.R. 2d 1593 (1966). We believe that course should be followed here.

8. In view of the foregoing, *It is ordered*, That the petition of the Board of Education of the San Angelo Independent School District for rulemaking *Is denied*.

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

FCC 66-793

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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

MEMORANDUM OPINION AND ORDER

(Adopted August 31, 1966)

BY THE COMMISSION: COMMISSIONERS BARTLEY AND COX ABSENT; COMMISSIONER JOHNSON NOT PARTICIPATING.

1. On July 22, 1966, the Commission released its memorandum opinion and order in docket 15011 (FCC 66-675), in which the Commission did three things: (*a*) It deferred final decision in that docket and consolidated the proceedings therein with the above-captioned general investigation in docket 16258; (*b*) it ordered the cancellation of the basic Teletypewriter Exchange Service (TWX) rates that had been originally filed on November 16, 1964, by the American Telephone & Telegraph Co. (A.T. & T.) and which were scheduled to become effective August 1, 1966; and (*c*) it granted special permission to A.T. & T. to file on short notice certain substitute tariff schedules suggested by the Commission which, if filed, would establish basic TWX rates at a lower level than those proposed by A.T. & T. and would apply during the interim period pending final decision to be rendered later in docket 15011 in the light of the determinations to be made in docket 16258. The Commission stated that if A.T. & T. should file the interim rate schedules suggested by the Commission, the Commission would be disposed to lift the accounting requirements contained in its memorandum opinion and order of January 28, 1965 (FCC 65-53), which suspended the effectiveness of the TWX rates filed by A.T. & T. in November 1964.

2. On July 29, 1966, A.T. & T. filed tariff schedules effective August 1, 1966, effectively canceling the TWX rates which had been filed by it in November 1964, thereby complying with the Commission's memorandum opinion and order. On August 12, 1966, A.T. & T. filed tariff schedules to become effective September 1, 1966, establishing the interim basic TWX rate schedules suggested by the Commission pursuant to the special tariff permission granted by it. Concurrently,

A.T. & T. requested the lifting of the aforementioned accounting requirements.

3. The Commission now has before it a petition for reconsideration filed on August 22, 1966, by the Administrator of General Services (GSA) pursuant to section 1.106 of the Commission's rules in which GSA asks the Commission to reconsider and issue no order with respect to changes in the basic TWX rates presently in effect, or, in the alternative, to maintain the accounting requirements in force pending further determinations in docket 16258.

4. In support of its petition, GSA first asserts that the evidence of record does not support the conclusion in the memorandum opinion and order "that the earnings presently realized from TWX service should be adjusted upward by considerable amounts in order that the TWX service shall make a reasonable and adequate contribution to Respondents' revenue requirements during the interim period and not be a burden on other services" (par. 4).

5. We shall treat this argument first. The evidence of record shows that for the 60 speed, 15 KSR machine, the presently effective $10 a month fixed interstate charge is insufficient to cover the minimum revenue requirements of approximately $42 a month for such machine; and that for the 60 speed, 28 KSR machine, the presently effective $10 a month fixed interstate charge plus the $5 a month charge in most State tariffs are together insufficient to cover the minimum revenue requirements therefor of approximately $59 a month. The record further shows that these 60 speed machines were, at the time of the hearing, the most widely used machines in the TWX service. We are, therefore, of the opinion that the evidence of record amply supports the conclusion to which GSA objects.

6. The remaining allegations of GSA in support of its petition are based upon a misconception of what the Commission did. Thus, GSA alleges error in what it characterizes as the finding that the rates "prescribed" by the Commission will increase present TWX earnings; it alleges that the "prescription" of rates which the Commission cannot find to be just and reasonable is in violation of the act; it alleges that the "prescription of rate increases" by the Commission for the period necessary to decide their reasonableness in docket 16258 without an accounting order is in violation of the hearing requirements of the act and the Administrative Procedure Act; and it asserts that, because of the alleged "prescription" of rates, refunds cannot be ordered by the Commission in the absence of an accounting order and that the right of complaint has been denied.

7. The Commission did not prescribe rates in its memorandum opinion and order. It ordered canceled the rates which had been filed by A.T. & T. on November 16, 1964, for the reason that the Commission was unable to make the requisite findings on the evidence of record that such rates were just and reasonable, and it permitted A.T. & T. to file on short notice lower rate schedules deemed acceptable to the Commission for interim purposes. In granting this permission, however, the Commission stated specifically that the filing of such lower interim rate schedules by A.T. & T. was "without prejudice to such revisions as may be required or authorized in our final decision in the light

of the determinations to be made in docket No. 16258" (par. 4). Thus, the substitute rate schedules filed by A.T. & T. to become effective September 1, 1966, are carrier-made and not Commission-made rates and are subject to further investigation; their validity has not been determined by the Commission; and the rights of GSA and other users to challenge the validity of such rates or to seek reparations under the appropriate provisions of the act and the Commission's rules remain unimpaired. *California P.U.C.* v. *United States*, 356 F. 2d 236 (1966).

8. The aforementioned accounting requirements contained in our memorandum opinion and order of January 28, 1965 (FCC 65–53), read as follows:

> *It is further ordered*, That, in the event a decision as to the lawfulness of the tariff schedules herein suspended has not been made during the suspension period, and such tariff schedules go into effect, American Telephone & Telegraph Co. and its connecting and concurring carriers shall, in case of all increased charges and until further order of the Commission, keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid.

9. Under the above-quoted language, the accounting was to be performed only if the suspended tariff schedules should go into effect. The tariff schedules that were suspended were the objectionable basic TWX rates filed by A.T. & T. on November 16, 1964. However, as heretofore stated, A.T. & T. has now filed tariff schedules canceling such suspended tariff schedules and, in lieu thereof, A.T. & T. has filed the substantially lower interim rate schedules suggested by the Commission. Under these circumstances, we believe that the aforementioned accounting requirements should be deleted.

10. For all of the foregoing reasons we conclude that GSA's petition for reconsideration should be denied.

Accordingly, it is ordered, That the petition of the Administrator of General Services (GSA) for reconsideration of the Commission's memorandum opinion and order released July 22, 1966, in docket 15011 (FCC 66–675), *Is hereby denied;* and

It is further ordered, That the second ordering paragraph of the Commission's memorandum opinion and order released January 28, 1965, in docket 15011 (FCC 65–53), *Is hereby deleted.*

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

106-510—66——2

FCC 66D–37

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
PALMETTO BROADCASTING SYSTEM, INC. (WAGL), LANCASTER, S.C.	Docket No. 16266 File No. BP–16486
WPEG, INC. (WPEG), WINSTON-SALEM, N.C.	Docket No. 16267 File No. BP–16492
For Construction Permits	

APPEARANCES

On behalf of applicant Palmetto Broadcasting System, Inc. (WAGL), *William P. Bernton* (Mallyck & Bernton); on behalf of applicant WPEG, Inc. (WPEG), *Mark E. Fields;* on behalf of Interstate Broadcasting Co., Inc., respondent, *Harry Huge* (Arnold & Porter); and on behalf of the Broadcast Bureau, Federal Communications Commission, *Earl C. Walck.*

INITIAL DECISION OF HEARING EXAMINER WALTHER W. GUENTHER

(Effective August 31, 1966, Pursuant to Sec. 1.276)

PRELIMINARY STATEMENT

1. This proceeding involves (*a*) the application of Palmetto Broadcasting System, Inc. (WAGL) (hereinafter also Palmetto), for authority to improve the facilities of standard broadcast station WAGL, Lancaster, S.C., a class II station, by increasing the power of its present 1-kw daytime operation on the frequency of 1560 kc/s (500 w during critical hours) to 10 kw (500 w during critical hours) and by installing a new transmitter for the 10-kw operation, using the present transmitter for operation during critical hours; and (*b*) the application of WPEG, Inc. (WPEG), for authority to improve the facilities of standard broadcast station WPEG, Winston-Salem, N.C., a class II station, by increasing the power of its present 1-kw daytime (nondirectional) operation to 10 kw; by changing the present frequency of 1550 kc/s to 1560 kc/s; by changing its transmitter site to a location 3.5 miles southeast of the present site; and by employing a directional antenna system.

2. In view of the mutually exclusive nature of the proposals, the Commission, by order released November 1, 1965 (FCC 65–975), designated the subject applications for hearing on the following issues:

> 1. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operations of stations WAGL and WPEG and the availability of other primary service to such areas and populations.

2. To determine whether the directional antenna parameters proposed by WPEG accurately depict the radiation values indicated on the horizontal and vertical plane radiation patterns specified in the application.

3. To determine, in the light of evidence adduced pursuant to the foregoing issue, whether adequate daytime skywave protection would be afforded class I–B station WQXR, New York, N.Y., in accordance with section 73.187 of the Commission's rules.

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.

Interstate Broadcasting Co., Inc., licensee of station WQXR, New York, N.Y., was made a party to the proceeding. The order futhermore specified that in the event of a grant of either application, the construction permit shall contain the following condition:

> Pending a final decision in docket No. 14419 with respect to presunrise operation with daytime facilities, the present provisions of section 73.87 of the Commission rules are not extended to this authorization, and such operation is precluded.

3. Issue 2 as noted (see par. 2, supra) seeks to determine whether the parameters specified for the proposed directional antenna of WPEG, Inc., would produce the horizontal and vertical radiation patterns reflected in WPEG, Inc.'s application. A petition for leave to amend application filed by WPEG, Inc., on December 9, 1965, and supplemented on December 27, 1965, was granted by the hearing examiner and the amendment tendered therewith was accepted. (See memorandum opinion and order, released January 13, 1966 (FCC 66M–87).)

4. With regard to the pertinent provisions of section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules concerning notice of hearing, (*a*) grants of petitions for waiver filed by WPEG, Inc., and Palmetto because of lack of compliance with subsections (a) and (g) and subsections (a)(2), (b), and (g) of section 1.594, respectively, and (*b*) acceptance of proper certifications of broadcast and publications of notices (see memorandum opinion and orders of the hearing examiner released December 17, 1965, and January 13, 1966, respectively (FCC 65M–1611 and FCC 66M–84), eliminated statutory impediment to commencement of hearing. A prehearing conference was held on November 19, 1965, and hearings on January 24 and April 19, 1966, respectively. The record was closed on the latter date. Proposed findings of fact and conclusions of law were timely filed by the applicants and Bureau. No reply findings were submitted. Respondent Interstate Broadcasting Co., Inc.'s participation was limited in nature.

FINDINGS OF FACT

The Communities

5. Lancaster is located about 100 miles south-southeast of Winston-Salem and approximately 6 miles south of the common State boundary of South Carolina and North Carolina. Lancaster (population 7,999) is the principal city and the county seat of Lancaster County (popula-

tion 39,352). Lancaster has in addition to station WAGL one other standard broadcast station (WLCM) and an FM broadcast station (WLCM–FM). Winston-Salem (population 111,135) is the central city of the Winston-Salem urbanized area (population 128,176) and the county seat of Forsyth County (population 189,428). Winston-Salem has four FM broadcast stations (WAIR–FM, WSJS–FM, WYFS, and WFDD–FM (educational)), a television broadcast station (WSJS–TV), and, besides station WPEG, five other standard broadcast stations (WAIR, WSJS, WAAA, WTOB, and WKBX).

Coverage—Palmetto

6. The present and proposed service areas of Palmetto are roughly circular and centered on Lancaster.[1] Palmetto's present service area extends at its minimum a distance of 17 miles southeast of Lancaster and at its maximum to a distance of 21 miles west thereof. The new service area would extend 28 miles to the southeast to as much as 35 miles over the sector from southwest to northeast of Lancaster. This represents an expansion of from 11 to 14 miles beyond Palmetto's present service area. All areas now served by Palmetto will continue to receive service from its subject proposal.

7. Palmetto now serves 63,913 persons in South Carolina and 9,153 persons in North Carolina, for a total of 73,066 persons in an area of 1,181 square miles. Operating as proposed, Palmetto would serve 117,293 persons in South Carolina and 58,105 persons in North Carolina, for a combined population of 175,398 in an area of 3,290 square miles. Palmetto's proposal would provide a new primary service (*a*) to 53,380 persons in 1,480 square miles in South Carolina and (*b*) to 48,952 persons in 629 square miles in North Carolina, or in the aggregate 102,332 persons in 2,109 square miles. Distribution of this new primary service in South Carolina would be as follows:

	County population
Chesterfield	6,773
Kershaw	6,860
Fairfield	7,460
Chester	12,996
York	17,062
Lancaster	2,229

In North Carolina this service would extend to:

County	*Population*
Mecklenburg	24,976
Anson	1,105
Union	22,871

With the exception of Great Falls, S.C. (population 3,030), an urban place located 12.5 miles southwest of Lancaster, all of the service gain would occur in rural areas. Palmetto's coverage of Great Falls would be extended from its present service to 173 persons to all of Great

[1] No difference in coverage exists between the present and proposed operation of Palmetto during critical hours when station WAGL employs (and would employ) 500 w of power.

Falls.[2] The proposed power increase would permit Palmetto to expand its primary service in Lancaster County from 37,123 persons (94.3 percent) to all of the county.

8. All of the rural area in which Palmetto would provide new primary service is served with a signal of 0.5-mv/m or greater by 1 broadcast station; portions thereof are so served by 33 other broadcast stations. In the aggregate, these broadcast stations provide from 2 to 17 services in any one part of Palmetto's proposed gain area. In the rural gain area, Palmetto's proposal would provide a third primary service to 624 persons in 31.8 square miles and a fourth primary service to 3,205 persons in 112 square miles, all in South Carolina. Station WBT, Charlotte, N.C., provides primary service (2.0 mv/m or greater) to all of Great Falls.[3] Station WLCM in Lancaster serves 951 persons in Great Falls, including nearly all of the 173 persons now served by station WAGL in that community. Implementation of facilities would enable Palmetto to provide a second primary service to nearly 2,079 persons and a third such service to somewhat over 778 persons within Great Falls.[4]

Coverage—WPEG, Inc. (Directional Antenna Parameters—Radiation Limit)

9. WPEG, Inc.'s amendment (see par. 3, supra) corrected the horizontal and vertical radiation patterns to correspond with the parameters specified for its proposed directional antenna. The maximum expected operating values specified for this proposed directionalized operation will not exceed the maximum values of radiation permitted under section 73.187(b) of the Commission's rules toward any point on the 0.1-mv/m contour of cochannel class I–B station WQXR, New York, N.Y.

10. The present service area of station WPEG is essentially circular in shape and centered on Winston-Salem. From the center of Winston-Salem it reaches from 13 miles generally south to 15 miles north to northeast. The station's proposed service area would be pear shaped and would extend a minimum of 13 miles northeast and south, 29 miles southeast, and to a maximum of 31 miles northwest from the center of Winston-Salem. WPEG, Inc., would expand its service area 16 miles southeast and 15 miles northwest beyond station WPEG's present service area. To the southwest the station's present and proposed service areas would almost coincide. To the northeast the proposed service area would fail to extend as far as the present service area by about 2 miles. The present and proposed service areas are confined within North Carolina.

---

[2] This finding is based on field strength measurements made jointly on Feb. 7, 1966, by the engineering consultants representing the two applicants. The measurements were taken on station WAGL toward Great Falls and on WLCM (radial through Great Falls at a bearing of 220° as well as two stub radials). All population data reflect the 1960 U.S. census.

[3] Pertinent field strength contours were established on the basis of ground conductivities in the area as shown by fig. M–3 of the rules except where field strength measurements taken on station WLCM indicated otherwise. Antenna radiations were taken from the Commission's official notification list. In critical areas proof of performance data were used for directionally operated broadcast stations.

[4] Station WAGL now serves a very small segment of Great Falls not served by station WLCM. This difference will not significantly change the population to which Palmetto's proposal would provide a second and third primary service.

11. Station WPEG now serves 204,637 persons in 617 square miles. The proposed operation would serve 291,293 persons in 1,712 square miles. A new primary service would be provided to 86,915 persons in 1,106 square miles, while 259 persons in 11 square miles would no longer receive service from the proposed station. This results in a net gain of 86,656 persons and 1,095 square miles. Urban places that will receive primary service from the proposed operation include all of the 2,942 persons in Kennersville and 11,171 persons (slightly over 18 percent) of the 62,063 persons within High Point, N.C. Thus, the gain area consists of an urban population of 14,113 persons and rural population of 72,543 persons. The proposed coverage of Forsyth County would involve a minuscule increase from 189,182 persons to 189,283 persons. Under either mode of operation the station's coverage of Forsyth County (population 189,428) is virtually complete.

12. One broadcast station provides signals (0.5 mv/m or greater) to all rural portions of the gain area. Additionally, there are 33 other broadcast stations which serve portions of this area. In combination these 34 broadcast stations provide from 4 to 20 broadcast services in any one part of the proposed rural gain area. Other broadcast service is available in the proposed loss area from 11 stations and in part from 8 other stations. No less than 13 broadcast stations serve any one portion of the loss area and as many as 18 broadcast stations serve other portions. Kennersville receives primary service (2.0 mv/m or greater) from five broadcast stations and in part from another such station. High Point is served by eight broadcast stations and in part by a ninth broadcast station.[5]

CONCLUSIONS

13. On the basis of the findings (see par. 9, supra), it is initially concluded that WPEG, Inc., has satisfactorily resolved in its favor issues 2 and 3 relating to a correct specification of the horizontal and vertical radiation patterns and protection of station WQXR's (class I–B) 0.1-mv/m contour, respectively. The remaining crucial resolution to be made involves section 307(b) of the Communications Act of 1934, as amended (issue 4—fair, efficient, and equitable distribution of radio service).

14. Station WAGL is 1 of 2 AM broadcast stations in Lancaster, S.C. (population 7,999). Palmetto's proposal to increase the station's daytime power from 1 kw to 10 kw (except during critical hours) would bring a new primary service to 102,332 persons in 2,109 square miles without loss of service. From 2 to 17 broadcast services are available to any portion thereof. In rural areas a third primary broadcast service would be provided to 624 persons and a fourth such service to 3,205 persons. A second primary broadcast service would be rendered to 2,079 persons and a third such service to 778 persons within the urban community of Great Falls, S.C. (population 3,030). Cover-

[5] All field strength contours were determined on the basis of ground conductivities as set forth on fig. M–3 of the rules and antenna radiations as given in the Commission's official notification list except where directional operation is involved. Antenna radiation for the proposed operation was taken from the horizontal plane pattern. All population figures were based upon the 1960 U.S. census.

age of Lancaster County, of which Lancaster is the principal community and county seat, would be increased from 94.3 to 100 percent. There would be no change of broadcast service during critical hours.

15. Station WPEG is 1 of 6 AM broadcast stations authorized in Winston-Salem, N.C. (population 111,135 persons). The proposal of WPEG, Inc., to increase the station's daytime power from 1 to 10 kw would remove primary broadcast service from 259 persons but would provide a new such primary service to 86,915 persons, for a net gain of 86,656 persons. The gain area includes 2,942 persons who constitute the entire urban community of Kennersville, and 11,171 (slightly over 18 percent) of the 62,023 persons in High Point, N.C. No substantial improvement of broadcast service would result in Forsyth County, of which Winston-Salem is the principal community and county seat. All of the loss area receives primary broadcast service from no less than 13 stations and the rural gain area from at least 4 stations. Kennersville receives primary broadcast service from five to six stations, and eight to nine stations serve that portion of High Point which would be gained by the proposal of WPEG, Inc.

16. In view of the foregoing conclusions (pars. 14 and 15, supra), the requirements of section 307(b) of the Communications Act of 1934, as amended, put into focus the following considerations: The gain area of station WAGL would include 102,332 persons and that of station WPEG 86,656 persons; however, the slight difference weighing in favor of Palmetto is diminished by lack of improvement in its service during critical hours. The decisive factor weighing in favor of Palmetto's proposal is that it would provide the following additional primary broadcast services: A second primary broadcast service to 2,079 persons,[6] and a third such service to 778 persons in urban areas, as opposed to WPEG, Inc.'s proposal providing but a sixth service to urban areas. In rural areas Palmetto's proposal would provide a third primary broadcast service to 624 persons and a fourth such service to 3,205 persons, compared to a fifth broadcast service provided by WPEG's proposal to a part of its gain area. Thus, Palmetto's proposal would better meet the mandate of section 307(b) of the Communications Act of 1934, as amended, and, therefore, would better serve the public interest than would the proposal of WPEG, Inc. See *In re WNOW, Inc. (WNOW)*, 37 FCC 916, 3 R.R. 2d 875; reconsideration denied, 38 FCC 471, 4 R.R. 2d 857.

17. In its proposed conclusions, WPEG, Inc., characterizes the present operation of station WPEG as "inefficient in that it brings 2-mv/m service to only 40 percent of" Forsyth County. Since its subject proposal would, as WPEG, Inc., sees it, provide a 2-mv/m signal to 81 percent of said county, it considers its subject proposal as "an example of the need for stations located in large cities to obtain authorized power commensurate with the size of the metropolitan area which they are licensed to serve." In support of this argument WPEG, Inc., adds that the "poor coverage which [station] WPEG now has of its county with its 2-mv/m signal indicates the inadequacy

[6] According to Palmetto, it is this factor which brings its application "within one of the recognized priorities for the allocation of AM radio service, against which WPEG shows no countervailing need * * *." (See par. 9 of its findings.)

of the present facilities." As to Palmetto's subject proposal WPEG, Inc., emphasizes the rural nature of Lancaster County and that, in view thereof, "the 0.5-mv/m contour is the pertinent one for consideration in determining coverage." Adjudging Palmetto's subject proposal on this basis WPEG, Inc., points out that approximately 98 percent of the persons who would gain service from Palmetto's proposal reside in counties other than Lancaster, with 48 percent of the persons gaining service residing in North Carolina. In adjudging the comparative efficiency of the subject two proposals, WPEG, Inc., further points to the fact that the 53,380 persons living in South Carolina who would gain broadcast service from Palmetto's proposal "live in counties which already have 1 or more stations of their own." [7] It argues that since these other broadcast stations (in counties to which Palmetto's proposal would bring new service) are mostly located within Palmetto's proposed 0.5-mv/m contour, Palmetto's proposal would "represent an inefficient method of bringing new service to these counties." In the opinion of WPEG, Inc., Palmetto's proposal is lacking in efficiency "in terms of bringing new service to any large underserved areas." In this context it further points out that the rural area to be gained by Palmetto's proposal which now receives only 2 broadcast services not only has a population of 624 but lies at a distance of some 23 miles from Lancaster, and that 2,079 people reside in the portion of the town of Great Falls to which Palmetto's proposal would bring a second broadcast service.

18. The hearing examiner does not share the ultimate conclusion urged by WPEG, Inc., that, on balance, the more equitable distribution of radio facilities would be furthered by a grant of its application. He rejects the arguments in support thereof set forth in paragraph 17, supra. As stated in paragraph 16, supra, the factors therein enumerated require a preference in favor of Palmetto under section 307(b).

19. In view of all of the foregoing, it is ultimately concluded that the application of Palmetto Broadcasting System, Inc. (WAGL), should be granted as being in the public interest, and that of WPEG, Inc. (WPEG), should be denied. The grant to Palmetto Broadcasting System, Inc. (WAGL), must be conditioned as specified in the Commission's order:

> **Pending a final decision in docket No. 14419 with respect to presunrise operation with daytime facilities, the present provisions of section 73.87 of the Commission rules are not extended to this authorization, and such operation is precluded.**

Accordingly, *It is ordered*, This 12th day of July 1966, that, unless an appeal from this initial decision is taken by a party or the Commission reviews the initial decision on its own motion in accordance with rule 1.276, the application of WPEG, Inc. (WPEG), for a construction permit for a standard broadcast station to operate on the

[7] WPEG, Inc.'s findings recite in this respect that 30,058 (or 56 percent of the 53,380 persons) live in the counties of Chester and York: that station WGCD is licensed to the city of Chester: that station WYCL is licensed to York: that stations WTYC and WRHI are licensed to Rock Hill, also located in York County: that station WCKM is licensed to Winnsboro, located in Fairfield County: that station WCRE is licensed to Cheraw, located in Chesterfield County, and station WKSC is licensed to Kershaw.

frequency 1560 kc/s (class II) with 10-kw power, DA–D, at Winston-Salem, N.C., is hereby *Denied*, and that the application of Palmetto Broadcasting System, Inc. (WAGL), for a construction permit for a standard broadcast station to operate at Lancaster, S.C., on the frequency 1560 kc/s (class II), with 10-kw power (500 w during critical hours), daytime only, is hereby *Granted*, subject to the following condition:

Pending a final decision in docket No. 14419 with respect to presunrise operation with daytime facilities, the present provisions of section 73.87 of the Commission rules are not extended to this authorization, and such operation is precluded.

106–510—66——3

FCC 66D–38

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of B&K BROADCASTING CO., SELINSGROVE, PA. For Construction Permit	Docket No. 16367 File No. BP–16183

APPEARANCES

On behalf of the applicant, *Jason L. Shrinsky* (Grove, Jaskiewicz, Gilliam, & Putbrese); on behalf of PAL Broadcasters, Inc., respondent, *Gene A. Bechtel* (Arent, Fox, Kintner, Plotkin, & Kahn); and on behalf of the Broadcast Bureau, Federal Communications Commission, *Joseph Chachkin.*

INITIAL DECISION OF HEARING EXAMINER WALTHER W. GUENTHER

(Effective September 2, 1966, Pursuant to Sec. 1.276)

PRELIMINARY STATEMENT

1. The subject application of B&K Broadcasting Co. (hereinafter also B&K) was filed on May 19, 1964. It seeks authority to construct a standard broadcast station (class IV) at Selinsgrove, Pa. Operation thereof is proposed on the frequency of 1240 kc/s, with power of 250 w, unlimited time. Although such operation would involve prohibited overlap of contours with cochannel station WBAX, Wilkes-Barre, Pa.[1] (0.025 and 0.5 mv/m, respectively), as defined by section 73.37(a) of the Commission's rules, to permit acceptance of the subject application, the Commission (over the opposition of PAL Broadcasters, Inc. (hereinafter also PAL, licensee of station WBAX), waived the provisions of sections 73.24(b) (1) and 73.37 of its rules (see memorandum opinion and order released April 7, 1965, FCC 65–263). PAL thereafter petitioned for denial because of the overlap resulting in the event of grant. Since, in the Commission's view, this petition "raised a substantial and material question of fact concerning the potential modification of" the license of PAL, by memorandum opinion and order released December 20, 1965 (FCC 65–1122), hearing was ordered on the following issues:

> 1. To determine the areas and populations which would receive primary service from the proposed operation and the availability of other primary service to such areas and populations.
> 2. To determine whether the proposed operation would cause objectionable interference to station WBAX, Wilkes-Barre, Pa., and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.

[1] This results from the Commission's adoption of an amendment of pt. 73 of its rules by report and order released July 7, 1964 (docket No. 15084), 2 R.R. 2d, 1658.

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.

Except as indicated by these issues the Commission found B&K legally, technically, financially, and otherwise qualified to construct and operate as proposed. It further determined that the interference standards contained in section 73.182(v) of its rules should be applied in resolving the interference problems affecting existing broadcast stations (see also par. 2, infra). PAL, as licensee of station WBAX, was made a party to the proceeding. The Commission further ordered that, in the event of a grant of the 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 1,000 w.

2. By memorandum opinion and order released February 24, 1966, the hearing examiner granted applicant's petition to accept notice of appearance and accepted for filing applicant's notice of appearance filed February 17, 1966 (see FCC 66M–274). By order released April 5, 1966 (FCC 66R–132), the Review Board (as a result of a motion to clarify or enlarge issues filed by PAL) modified issue 2 as hereinabove set forth by including station WHUM, Reading, Pa., for the purpose of determining possible interference to it by B&K's proposed operation.

3. Prehearing conferences were held on January 20 and April 7, 1966, and the hearing on June 7, 1966. The record was closed on the latter date. By letter dated May 17, 1966, counsel for PAL had advised the hearing examiner and the parties that PAL "has determined not to participate further" in the proceeding. Proposed findings of fact and conclusions of law were timely filed (July 5, 1966) by Bureau counsel. By petition filed July 6, 1966, counsel for the applicant requested acceptance of its proposed findings of fact and conclusions of law filed on that date. The request is herewith granted as the 1-day late filing is adjudged to be of no inconvenience to anyone.

FINDINGS OF FACT [2]

4. As noted (see par. 1, supra), B&K requests authority to construct a new class IV standard broadcast station to operate unlimited time on 1240 kc/s, with power of 250 w, at Selinsgrove, Pa. Selinsgrove is located near the center of Pennsylvania and borders on the center of the eastern boundary of Snyder County, defined by the Susquehanna River. Selinsgrove has a population of 3,948 and Snyder County a population of 25,922.[3] Selinsgrove is not a county seat; neither is it part of any urbanized area. No AM, FM, or TV broadcast station is authorized to operate either in Selinsgrove or Snyder County.

5. The daytime interference-free contour of the proposed broadcast station encompasses a circular area with a radius of about 10 miles, centered about 3 miles northwest of Selinsgrove and approximately 2 miles northwest of the specified transmitter site. Operating as proposed, the new broadcast station would provide primary service to

[2] The findings herein are substantially those submitted by Bureau; those proposed by the applicant are similar in material respects.
[3] All population data herein are based on the 1960 U.S. census.

46,300 persons in 270 square miles.[4] The population to be served in urban areas would include the 3,948 persons in Selinsgrove, 4,156 persons in Northumberland, and 13,687 persons in Sunbury, all in Pennsylvania, a total of 21,791 persons. The 24,509 persons in the balance of the service area reside in rural areas.

6. During daytime hours all rural portions of the proposed service area receive primary broadcast service (0.5 mv/m or greater) from each of three stations—WKOK, Sunbury, Pa.; WHLM, Bloomsburg, Pa., and WHP, Harrisburg, Pa., and, in part, from eight others. In the aggregate these broadcast stations make available from 3 to 10 services in any one part of this area. Selinsgrove receives primary broadcast service (2.0 mv/m or greater) daytime only from WKOK at Sunbury, Pa. Sunbury is located on the other side of the Susquehanna River and about 5 miles northeast of Selinsgrove. B&K's proposed new station would provide a fifth service in Northumberland, 7 miles to the northeast, and a fourth such service to Sunbury.

7. At night the proposed station's service area is limited to the 17.9-mv/m contour. Within this contour, which extends about 2.2 miles in all directions from the transmitter site, the proposed broadcast station would provide a primary service to 6,150 persons in 15 square miles, including all of Selinsgrove. At the present time there is no primary broadcast service available in any part of this area to be served at night.

8. Operation as proposed by B&K gives rise to a question of objectionable interference daytime to cochannel class IV stations WBAX, Wilkes-Barre, Pa. (1240 kc/s, 250 w, 1 kw-LS, U), and WHUM, Reading, Pa. (1240 kc/s, 250 w, 1 kw-LS, U). The extent of the daytime 0.5-mv/m contours of stations WBAX and WHUM was established from field strength measurement data and use of ground conductivities set forth in figure M–3 of the rules for those areas for which measurement data were not available. In each instance portions of the area within the respective 0.5-mv/m contours of stations WBAX and WHUM suffer interference from the operation of existing stations. The interfering cochannel 0.025-mv/m contour of the proposed station would penetrate the 0.5-mv/m contours of stations WBAX and WHUM. However, the areas in which interference would be calculated fall in areas already under existing interference.

CONCLUSIONS

9. As noted (see par. 1, supra), B&K Broadcasting Co. seeks a construction permit for a new class IV standard broadcast station to operate unlimited time on 1240 kc/s with a power of 250 w at Selinsgrove, Pa. Except for the engineering matters presented by the issues (see pars. 1 and 2, supra), B&K was found legally, technically, financially, and otherwise qualified to operate the proposed station. The only matter requiring resolution is the question of interference to cochannel class IV broadcast stations WBAX in Wilkes-Barre and

[4] Of 65,900 persons in 580 square miles that might otherwise be served within the proposed station's daytime 0.5-mv/m contour, interference from stations WBAX, WHUM, and WRTA, Altoona, Pa., would preclude service therein to 19,600 persons in 310 square miles.

WHUM in Reading, Pa. In its designation order the Commission (*a*) took note of the fact that it had previously waived sections 73.24(b)(1) and 73.37 of the rules to permit acceptance of B&K's application; and (*b*) determined that under the circumstances of this case the interference standards contained in section 73.182(v) of its rules should be applied in resolving the interference problems affecting existing broadcast stations (see par. 1, supra). The evidence in this proceeding establishes that interference from the proposed station to stations WBAX and WHUM would lie in areas already under existing interference and that no area in which these broadcast stations now provide a primary service would be deprived of such service due to B&K's proposal at Selinsgrove. Thus, the interference issue is resolved in favor of B&K and the application for a new broadcast station at Selinsgrove may be granted as in the public interest, subject to the conditions specified in the Commission's order of designation.

10. Selinsgrove does not have an AM broadcast station. A grant of B&K's application would thus provide that community with its first local outlet and would make available at night primary broadcast service for the first time to 6,150 persons in a 15-square-mile area, including 3,948 persons in Selinsgrove. During daytime hours of operation primary service would be furnished 46,300 persons in 270 square miles. Of the population to be served, 24,509 persons reside in rural areas and 21,791 persons in urban areas. At least three broadcast services are received in any one part of the proposed daytime rural service area. The new broadcast station represents a second broadcast service to Selinsgrove, a fifth such service to Northumberland (population 4,156), and a fourth such service to Sunbury, Pa.

Accordingly, *It is ordered*, This 14th day of July 1966, that, unless an appeal from this initial decision is taken by a party or the Commission reviews the initial decision on its own motion in accordance with rule 1.276, the application of B&K Broadcasting Co. for a construction permit for a new class IV standard broadcast station to operate unlimited time on 1240 kc/s with a power of 250 w at Selinsgrove, Pa., *Is granted* subject to 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 1,000 w.

FCC 66R-337

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of FITZGERALD C. SMITH, TR/AS SOUTHINGTON BROADCASTERS, SOUTHINGTON, CONN. For Construction Permit	Docket No. 15871 File No. BP-16405

ORDER

(Adopted September 6, 1966)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

The Review Board having under consideration the petition for procedural relief filed on August 26, 1966, by Southington Broadcasters, requesting the Review Board to defer the date for filing any exceptions in this proceeding until 30 days after a definitive initial decision is released by the examiner;

It appearing, That by erratum released August 5, 1966 (mimeo No. 87757), the hearing examiner herein noted that the initial decision released in this proceeding on August 1, 1966 (FCC 66D-44), had overlooked the issues going to Southington's program and technical proposals;

It is ordered, This 6th day of September 1966, that the initial decision released in this proceeding on August 1, 1966 (FCC 66D-44), *Is remanded* to the examiner, and that the petition for procedural relief, filed on August 26, 1966, by Southington Broadcasters, *Is dismissed* as moot.

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

FCC 66R-338

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of FITZGERALD C. SMITH, TR/AS SOUTHINGTON BROADCASTERS, SOUTHINGTON, CONN. For Construction Permit	Docket No. 15871 File No. BP-16405
In re Applications of ARTHUR K. GREINER, GLENN W. WINTER, WILLIAM W. RAKOW, ROBERT M. LESHER, D.B.A. LEBANON VALLEY RADIO, LEBANON, PA.	Docket No. 15835 File No. BP-16098
JOHN E. HEWITT, THOMAS A. EHRGOOD, CLIFFORD A. MINNICH, AND FITZGERALD C. SMITH, D.B.A. CEDAR BROADCASTERS, LEBANON, PA.	Docket No. 15836 File No. BP-16103
CATONSVILLE BROADCASTING CO., CATONSVILLE, MD.	Docket No. 15838 File No. BP-16105
RADIO CATONSVILLE, INC., CATONSVILLE, MD. For Construction Permits	Docket No. 15839 File No. BP-16106
In re Application of EASTERN LONG ISLAND BROADCASTERS, INC., SAG HARBOR, N.Y. For Construction Permit	Docket No. 16033 File No. BPH-4321

MEMORANDUM OPINION AND ORDER

(Adopted September 6, 1966)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. Lebanon Valley Radio (Valley) and Cedar Broadcasters (Cedar) are applicants for a new standard broadcast station at Lebanon, Pa. Their applications were originally designated for hearing by memorandum opinion and order, FCC 65-102, released February 15, 1965.[1] On November 3, 1965,[2] the Commission consolidated the Lebanon proceeding with two other proceedings [3] for the limited purpose of taking evidence relating to the character qualifications of Fitzgerald C. Smith, a party in all three proceedings. Presently

[1] The Commission's order designated for hearing an application for Baltimore, Md. (Radio Americana, Inc. (since dismissed)); the two present Lebanon, Pa., applications; a third Lebanon application (Lebanon Valley Broadcasting Co. (since dismissed)); and three applications for Catonsville, Md. (Catonsville Broadcasting Co.; Radio Catonsville, Inc.; and Commercial Radio Institute, Inc. (since dismissed)).

[2] *Southington Broadcasters*, 1 FCC 2d 1121, 6 R.R. 2d 467, partial reconsideration denied, 1 FCC 2d 1590, 6 R.R. 2d 470.

[3] The other proceedings involve an application for a new standard broadcast station at Southington, Conn. (Fitzgerald C. Smith), and an application for a new FM broadcast station at Sag Harbor, N.Y. (Eastern Long Island Broadcasters, Inc.).

before the Board for consideration is a petition to enlarge issues and reopen the record, filed by Valley on March 18, 1966.[4]

2. An assessment of Valley's claim that there is good cause for the late filing [5] of its petition requires some exploration of the procedural history of Cedar's application. On August 4, 1965 (FCC 65R–90), the Review Board enlarged the issues in the Southington, Conn., proceeding to include character qualifications issues concerning Smith. On September 15, 1965, the Board released an order (FCC 65R–340) in the Lebanon proceeding which related the Southington issues to the outcome of the Lebanon case. On October 25, 1965, Cedar filed a petition for leave to amend its application to delete Smith from the joint venture. The examiner allowed the amendment (FCC 65M–1497, released November 12, 1965) and, thereupon, the Chief of the Office of Opinions and Review, by delegated authority, vacated the consolidation order of the Commission and severed the Lebanon proceeding from the consolidated proceeding (FCC 65M–1618, released December 17, 1965). The Review Board reversed the examiner's ruling and disallowed the amendment (2 FCC 2d 287, 6 R.R. 2d 767, Rev. Bd. 1966; review denied FCC 66–144, released February 17, 1966). Valley participated in the hearing in the consolidated proceeding on January 11, 1966; that hearing record was closed on January 13, 1966. On February 17, 1966, the Commission released a memorandum opinion and order, 2 FCC 2d 582, vacating the severance order and reconsolidating the Lebanon proceeding with the Southington and Sag Harbor proceedings.

3. Valley contends that good cause for its late filing exists because it was not authorized to participate in the consolidated proceeding until February 17, 1966. This contention ignores the facts that Valley could have requested issues bearing on Smith's qualification in the Lebanon proceeding (as opposed to the consolidated proceeding) at any time; that it had ample time while a party to the consolidated proceeding prior to the severance order (i.e., November 3, 1965, to December 17, 1965) to request enlargement; and that it did in fact participate in the hearing in the consolidated proceeding on January 11, 1966. The facts underlying Valley's request relate to events which occurred long before release of the December 17, 1965, order severing the Lebanon proceeding from the consolidated proceeding. Under the circumstances, Valley has failed to show good cause for the untimely filing of its petition. This conclusion is reinforced by the fact that favorable action on Valley's petition would require a reopening of the

[4] Before the Board are: (*a*) Petition of Lebanon Valley Radio to enlarge issues and reopen record, filed on Mar. 18, 1966; (*b*) the Broadcast Bureau's statement supporting Lebanon Valley Radio's petition to enlarge issues and reopen record, filed on Apr. 22, 1966; (*c*) the Broadcast Bureau's erratum to its statement supporting Lebanon Valley Radio's petition to enlarge issues and reopen record, filed Apr. 25, 1966; (*d*) motion to strike and request for alternate relief, filed by Cedar Broadcasters on May 19, 1966; (*e*) reply of Lebanon Valley Radio to motion to strike and request for alternate relief, filed on June 1, 1966; (*f*) statement on behalf of Eastern Long Island Broadcasters, Inc., filed on June 1, 1966; (*g*) comments, filed by Southington Broadcasters on June 1, 1966 (addressed to the hearing examiners); (*h*) the Broadcast Bureau's opposition to Cedar Broadcasters' request for alternate relief, filed June 2, 1966; and (*i*) reply, filed by Cedar Broadcasters on June 24, 1966.

[5] Rule 1.229 requires filing of petitions to enlarge issues within 15 days of publication of the designation order in the Federal Register. The designation order herein was published on Feb. 18, 1965 (30 F.R. 2223) and the consolidation order was published on Nov. 9, 1965 (30 F.R. 14119).

record.[6] Such an action will not be taken when the facts upon which the petition is based could with due diligence have been discovered or known at the time of hearing. *Kern Radio Dispatch*, 29 FCC 1079, 20 R.R. 967 (1960); cf. *La Fiesta Broadcasting Co.*, 2 FCC 2d 255, 6 R.R. 2d 884 (Rev. Bd. 1965).

4. In addition to the fact that Valley has failed to make a showing of good cause to justify the tardy filing of its petition, the Board concludes that no merit of a substantive nature has been established.[7] Valley requests issues relating to (*a*) the surrender of the license of station WBZY, Torrington, Conn., after WBZY's renewal application was designated for hearing with Smith's Southington application; and (*b*) the true ownership and control of station WLNG, Sag Harbor, N.Y.

The WBZY Matter

5. In support of its request for issues to determine whether Smith induced the licensee of station WBZY to refrain from surrendering its license until after its renewal application was designated for hearing with Smith's application for Southington and whether Smith promised the licensee of WBZY any consideration for dismissal of WBZY's renewal application, Valley alleges that: Station WBZY (formerly WLCR), Torrington, Conn., was last licensed to Pioneer States Broadcasters. In January 1960, control of Pioneer States passed from Albert L. Capstaff to Bernard J. Zucker. This transfer was occasioned by the fact that Capstaff had become an officer of the National Broadcasting Co. However, Capstaff remained secondarily liable for the payment of certain promissory notes for which Pioneer States was primarily liable. Pioneer States filed an application for renewal of license of station WBZY in January 1963. In September 1963, Capstaff died. In January 1964, Zucker informed the Commission that WBZY had gone off the air and requested that its license be canceled. In February 1964, Capstaff's estate urged the Commission not to cancel WBZY's license. Capstaff's estate also filed a civil suit against Pioneer States for $27,000 damages and to enjoin it from surrendering the license.[8] On October 19, 1964, while the WBZY renewal application was pending, Smith filed his application for Southington, requesting the same frequency (990 kc) as WBZY. On March 10, 1965, the Southington and Torrington applications were designated for hearing, and on March 19, 1965, Zucker requested the Commission to dismiss the WBZY renewal application. This sequence of events, coupled with the facts that Smith and Capstaff had

[6] As indicated above, Valley's petition was filed on Mar. 18, 1966, about 2 months after the record was closed on Jan. 13, 1966. There is now issued (FCC 66D-43, released July 28, 1966) a joint initial decision in the consolidated proceeding.

[7] A second procedural question—one of standing—is asserted by Cedar. Cedar claims that Valley has forfeited the right to further participation in the consolidated proceeding because it failed to file proposed findings and conclusions. However, the Commission merely stated that Valley should be afforded an opportunity to review the transcript and submit findings of fact and conclusions of law and replies thereto together with the other Lebanon, Pa.-Catonsville, Md., applicants. This does not bring the case within rule 1.263(c), which states that "In the absence of a showing of good cause therefor, the failure to file proposed findings of fact, conclusions, briefs, or memoranda of law, when *directed* to do so, may be deemed a waiver of the right to participate further in the proceeding." (Emphasis added.)

[8] No hearing was ever held in the civil action, although one was scheduled for Feb. 27, 1964. Apparently, the civil suit was settled.

earlier connections (see par. 9, infra); that WLNG, controlled by Smith, paid Capstaff's estate more than $16,000; and that Smith has not filed an affidavit concerning consideration in the Southington-Torrington proceeding, led, according to Valley, to the conclusion that Smith conspired with Zucker and/or Capstaff's estate to carry out a procedure to prevent 990 kc from becoming available to the public generally for application looking possibly toward allocation to other communities.

6. The Broadcast Bureau supports addition of issues as requested by Valley and points to additional facts concerning WBZY: Capstaff acquired his interest in 1958. Shortly thereafter, Capstaff ordered an engineering study preliminary to processing an application to change the station location of WBZY from Torrington to a larger market, West Hartford, Conn. After the transfer of control from Capstaff to Zucker, Pioneer States filed an application to move WBZY to West Hartford. This application was denied; [9] WBZY then ceased broadcasting; and Zucker informed the Commission in a letter dated January 23, 1964, that "we may in the future request the same frequency (990 kc) in another community * * *." Also, Zucker made several requests for permission for WBZY to remain silent after the Capstaff estate commenced its action. Thus, the Bureau reasons, since Pioneer States did not inform the Commission of the pending civil suit and since Smith's proposal for Southington would accomplish use of 990 kc in the larger market of Waterbury,[10] Smith and Zucker and/or Capstaff (or his estate) may have been involved in an undisclosed arrangement or agreement to move the frequency to a larger market.

7. In opposition [11] to Valley's petition, Cedar supplies the affidavits of Smith and of E. Gaynor Brennan, Jr., an executor of Capstaff's estate. Smith states that he never discussed WBZY, 990 kc, or Southington with the executors of Capstaff's estate; that he has never even met Zucker; and that he paid or promised no consideration to WBZY for dismissal of its renewal application. Brennan states that the estate urged the Commission not to cancel WBZY's license because there were potential buyers who would have been willing to run the station in Torrington; that the estate did not prosecute its suit against Pioneer States because the notes for which Capstaff was secondarily liable were canceled; and that Smith never suggested that the estate abandon its action against Pioneer States.

8. Valley's request for issues concerning Smith's role in the filing and ultimate dismissal of the WBZY renewal application is bottomed on what amounts to a combination of speculation and factual error.

---

[9] *Pioneer States Broadcasters, Inc.*, 34 FCC 625, 25 R.R. 221 (Rev. Bd. 1963), review denied, FCC 63-627, released Sept. 19, 1963.

[10] Whether Smith's proposal for Southington is realistically a proposal for Waterbury has been made a hearing issue. *Southington Broadcasters*, 2 FCC 2d 936, 7 R.R. 2d 213 (Rev. Bd. 1966).

[11] Although Cedar entitles its pleading "motion to strike and request for alternate relief," it is in substance a response to Valley's petition. The affirmative relief requested by Cedar is (*a*) to "strike" Valley's petition as improper, untimely, unverified, and "bottomed upon sham"; and (*b*) to add an issue against Valley to determine whether it has acted in good faith, made accurate representations, and made full disclosure in its pleadings. Cedar's charge that Valley's petition is a sham is based on its characterization of the petition as "misstatements, omissions, and misleading comparisons." The Board does not so construe Valley's petition, and Cedar's motion to strike and request for issues will be denied.

Valley's suggestion that Smith and WBZY (whether it be Zucker or Capstaff (or his estate) or both is of no moment) conspired to prevent any other application for 990 kc ignores (*a*) that at the time WBZY filed its renewal of license application, the frequency became available for any application for its use, in Torrington or elsewhere (see public notice, FCC 64–837, September 10, 1964); (*b*) that Smith himself filed for use of the frequency and presumably a third applicant could have; and (*c*) that in fact a third applicant did apply for 990 kc in Torrington (Litchfield County Broadcasting Co.). Valley makes much of Smith's refusal to file an affidavit concerning consideration for the WBZY dropout: Smith filed such an affidavit, attesting to the absence of any consideration, on April 19, 1966. That Capstaff's estate did not continue to prosecute its action against Pioneer States is explained by the cancellation of notes for which Capstaff was liable. In response to Valley's conjectural allegations, Smith unequivocally and under oath denies that any undisclosed arrangement was made concerning the WBZY renewal application. Under these circumstances, there is no basis for addition of the issues requested by Valley.

Station WLNG

9. Valley requests addition of an issue to determine whether there was an undisclosed agreement between Smith and Capstaff concerning the management or control of station WLNG, Sag Harbor, N.Y. Valley points to the following facts: The original application for WLNG, dated October 15, 1959, specified as the site of the station property which was formerly acquired by Capstaff in February 1960. Smith, originally sole owner of WLNG, at the time of hearing on the Southington application, owned 55.4 percent of the stock of Eastern Long Island Broadcasters, Inc., licensee of WLNG. In his testimony, Smith valued his interest at approximately $100,000. On June 21, 1963, Smith had filed an application to assign 51 percent of his interest to Capstaff "without cost" (BAP–643). The reasons given were: (*a*) The public interest would benefit from Capstaff's ability and experience; and (*b*) Smith had suffered financial reverses and Capstaff could assist in financing the station. Smith's May 21, 1963, balance sheet showed current assets at $27,700 and a net worth of $45,000. The probate records of the Capstaff estate show that Capstaff owned personal property worth $2,800 in Sag Harbor and that this property was purchased by WLNG; and that Capstaff's estate received $14,000 labeled "Rent—WLNG" and spent $400 for heating equipment in Sag Harbor. Adding the above facts to its analysis of the fluctuations in the value of Smith's real property between 1959 and 1965, Valley concludes that Capstaff had an undisclosed ownership interest in WLNG "rather than an arm's-length business relationship." The Broadcast Bureau agrees with Valley that its allegations, standing alone, are sufficient to justify inclusion of the requested issue.

10. In its response to Valley's allegations concerning Capstaff's relationship to WLNG, Cedar states that the reasons for the proposal to assign 51 percent of Eastern Long Island Broadcasters, Inc., to Capstaff without cost were as stated in the assignment application,

which was withdrawn on Capstaff's death; that the partnership agreement would have required Capstaff to provide over $20,000 in cash to the venture and to become personally liable for its debts; that it is unfair to compare the value of WLNG as an operating station with its value before it was built; that Smith lost about $18,000 in the 1962 stock market decline; and that although Smith had the funds to construct WLNG, he was nevertheless desirous of obtaining Capstaff's financial backing. Cedar submits the affidavit of Smith, substantiated by affidavits of the executors of Capstaff's estate, stating that Capstaff purchased the waterfront property on which WLNG is located for the purpose of building a marina for small boats and then rented the property to WLNG (without a written lease) on the condition that WLNG's use would not interfere with the marina. Smith also explains in his affidavit the bases for the various fluctuations in the value of his real estate holding. One of the executors swears that the sale of personal property to WLNG for $2,800 was an "arm's-length" transaction. Capstaff's plans to build a marina at Sag Harbor are verified by the affidavit of an acquaintance. The manager of WLNG submits an affidavit that, while Capstaff owned the property upon which the station was located, he did not hire any employees or otherwise control the station directly or indirectly.

11. Cedar's explanations of the reasons for the proposed transfer of a 51-percent interest in WLNG to Capstaff; Smith's explanation, corroborated by others, of the circumstances of Capstaff's ownership of the property on which WLNG is located; and the explanation for the payments made to Capstaff's estate all appear reasonable, are uncontradicted, and are all substantiated by affidavits. These support Smith's unequivocal denial that Capstaff had any undisclosed management or control interest in WLNG and override the bare inferences relied upon by Valley in its petition.

Accordingly, it is ordered, This 6th day of September 1966, that the petition to enlarge issues and reopen the record, filed on March 18, 1966, by Lebanon Valley Radio, and the motion to strike and request for alternate relief, filed on May 19, 1966, by Cedar Broadcasters, *Are denied.*

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

FCC 66-807

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF GEORGE G. T. HERNREICH, PERMITTEE OF TELEVISION STATION KAIT-TV, JONESBORO, ARK.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted September 7, 1966)

BY THE COMMISSION: COMMISSIONERS BARTLEY, WADSWORTH, AND JOHNSON ABSENT.

1. The Commission has under consideration (1) its notice of apparent liability dated June 2, 1966, addressed to George T. Hernreich, permittee of television station KAIT-TV, Jonesboro, Ark., and (2) the response to the notice of apparent liability filed by the permittee on July 25, 1966.

2. The notice of apparent liability was issued for willful or repeated failure to observe the provisions of section 325(a) of the Communications Act of 1934, as amended, and sections 73.652, 73.655, 73.669, and 73.670 of the Commission's rules. The notice provided that pursuant to section 503(b)(1)(B) of the Communications Act the permittee was subject to a forfeiture of $1,000.

3. The material facts leading to issuance of the notice of apparent liability are as follows: During the course of a Commission inquiry into the operations of station KAIT-TV, Jonesboro, Ark., it was learned that certain special news events, such as the Los Angeles riots between August 12-17, 1965, and the Gemini V launch attempt of August 19, 1965, were rebroadcast by KAIT-TV without obtaining authorization from the originating stations or forwarding such authorizations to the Commission. Moreover, on several occasions excerpts from the Huntley-Brinkley program (but not the pictures of Huntley or Brinkley or any sound track of the program) were broadcast without authorization as a part of KAIT-TV newscasts. By letter dated November 1, 1965, in response to Commission inquiry, the permittee acknowledged that KAIT-TV rebroadcast the above-named programs without authorization, in apparent violation of section 325(a) of the

Communications Act of 1934, as amended, and section 73.655 of the Commission's rules.[1]

4. Examination of the KAIT–TV program logs revealed other unauthorized rebroadcasts, including the Gemini flight and splashdown on June 3 and 7, 1965, respectively. On March 9, 1966, the permittee stated in reply to Commission inquiry concerning these rebroadcasts that "Express authority for rebroadcast was not received. Commission not notified."

5. In addition to the above matters, an examination of the KAIT–TV program logs for the first 7 days of each of the 5 months from May 1 to September 7, 1965, inclusive, revealed that frequently during each of the 1-week periods examined the logs were not signed by the persons maintaining them when starting and going off duty, in violation of section 73.669(a) of the Commission's rules. Also, for portions of many days during these periods the program logs consisted of mere pretyped program schedules without any notation or initials by the persons maintaining the logs, in violation of sections 73.669 (a) and (b) of the rules. In numerous instances during the periods examined no entries were made in the program logs showing a broadcast of station identification at the required times, in violation of section 73.652 or 73.670 of the rules. In many instances insertions or corrections on the program logs were not initialed or dated by the person originating the entry, in violation of section 73.669(c) of the rules. Of the logs examined, those for the first 5 days of August 1965 were selected as typical of daily logkeeping practices in effect at KAIT–TV. The discrepancies found in those logs are specifically identified in the attached appendix to this memorandum opinion and order.

6. In his reply to the notice of apparent liability, the permittee does not deny the violations set forth in the notice of apparent liability but requests that the amount of the forfeiture be reduced from the $1,000 apparent liability to $500. In support of his plea for a reduction, the permittee alleges that the amount of apparent liability is "disproportionately excessive" in view of the nature of the violations, which, he asserts, were due to "negligence or failure of my employees at KAIT–TV to follow instructions from the station manager"; that a $1,000 fine would be an economic hardship in view of KAIT–TV's financial condition and location in "one of the smallest TV markets in the United States" and, finally, that "ample precautions" have been taken to prevent future violations of the same nature.

7. We have carefully considered the permittee's reply and all the circumstances in this case but we are not persuaded to reduce the forfeiture as requested. The violations in this case were serious and

[1] Sec. 325(a) of the act states: "No person within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signal of distress, or communication relating thereto, nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station." Sec. 73.655(b) of the Commission's rules states: "The licensee of a television broadcast station may, without further authority of the Commission, rebroadcast the program of a United States television broadcast station, provided the Commission is notified of the call letters of each station rebroadcast and the licensee certifies that express authority has been received from the licensee of the station originating the program."

extensive and cannot be excused merely because the permittee himself allegedly was unaware of them and never gave his personal permission for them. A broadcast licensee or permittee is fully responsible for the acts of its employees. *Eleven Ten Broadcasting Corporation*, 32 FCC 706. Moreover, the numerous violations of our logging requirements which the permittee apparently allowed to continue over a period of several months indicate a laxness in operation which in itself militates against reduction of the forfeiture. As to permittee's plea of economic hardship, it should be noted that KAIT–TV's financial condition was taken into account, together with various other factors, when the amount of the apparent liability was determined. In conclusion, we find the violations to be willful and repeated. *In the Matter of Fay Neel Eggleston*, 1 FCC 2d 1006.

8. In view of the foregoing, *It is ordered*, This 7th day of September 1966, that George T. Hernreich, permittee of television station KAIT–TV, Jonesboro, Ark., *Forfeit* to the United States the sum of $1,000 for willful and repeated failure to observe section 325(a) of the Communications Act of 1934, as amended, and sections 73.652, 73.655, 73.669, and 73.670 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 the forfeiture may be filed within 30 days of the date of receipt of this memorandum opinion and order.

9. *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 George T. Hernreich, permittee of television station KAIT–TV, Jonesboro, Ark.

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

APPENDIX

Of the logs examined, those for the first 5 days of August 1965 were selected as typical of daily logkeeping practices in effect at KAIT–TV. Discrepancies found therein are listed below:

(1) Program log entries of station identification announcements not made at the following required times (failure to make the required log entries indicates either that the permittee violated sec. 73.670(a)(1) of the rules if the announcements were made, or that he violated sec. 73.562(a) of the rules if no announcements or improper announcements were made): Sunday, August 1, 1965, 10 p.m.; Monday, August 2, 1965, 2, 3, and 11 p.m.; Tuesday, August 3, 1965, 2 and 3 p.m.; Wednesday, August 4, 1965, 1, 2, 3, and 11 p.m.; Thursday, August 5, 1965, 2, 3, 7, and 11 p.m.

(2) Logs not signed by logkeeper when starting duty and/or again when going off duty (violations of sec. 73.669 (a) and (b) of the Commission's rules): Sunday, August 1, 1965, W. O. Vernon did not sign the log when going off duty at 1:29:30. Following logkeeper (apparently Jack E. Smith) did not sign log when going on duty or off duty. Monday, August 2, 1965, Jack E. Smith did not sign the log when going off duty at 6:30 p.m. Wednesday, August 4, 1965, Jack E. Smith did not sign the log when going off duty sometime subsequent to 12:26 p.m. Log not maintained from 12:26 to 3 p.m. (No initials during that time and only two entries made showing time announcements were broadcast.) Signa-

ture of Gary W. Jones on page 1 indicates he did not start on duty until 6:30 p.m., but entries on pages 3–5 indicated he was on duty from 3 to 6:30 p.m. prior to signing on. Thursday, August 5, 1965, Jack E. Smith did not sign log when going off duty at 7:30 p.m.

(3) Program log corrections (all p.m.) not dated or initialed (violations of sec. 73.669(c) of the FCC rules): Sunday, August 1, 1965, 4:56:15, 8:28, and 8:56:40.

FCC 66R-336

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
WTCN TELEVISION, INC. (WTCN-TV), MINNEAPOLIS, MINN.	Docket No. 15841 File No. BPCT-2850
MIDWEST RADIO-TELEVISION, INC. (WCCO-TV), MINNEAPOLIS, MINN.	Docket No. 15842 File No. BPCT-3292
UNITED TELEVISION, INC. (KMSP-TV), MINNEAPOLIS, MINN.	Docket No. 15843 File No. BPCT-3293
TWIN CITY AREA EDUCATIONAL TELEVISION CORP. (KTCA-TV), ST. PAUL, MINN.	Docket No. 16782 File No. BPET-249
TWIN CITY AREA EDUCATIONAL TELEVISION CORP. (KTCI-TV), ST. PAUL, MINN.	Docket No. 16783 File No. BPET-250
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted September 6, 1966)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. Before the Review Board for its consideration is a petition for review filed July 27, 1966, by Twin City Area Educational Television Corp. (Twin City) and Midwest Radio-Television, Inc. (WCCO-TV), requesting the Board to reverse the hearing examiner's order [1] denying reconsideration of his earlier order [2] refusing to direct the Broadcast Bureau to exchange its rebuttal exhibits by a date certain prior to hearing.[3] The facts leading up to the filing of the instant petition are essentially as set forth below.

2. Each of the above-captioned applicants seeks authority to move its transmitter site to an antenna farm located northeast of Minneapolis, Minn. Because of an air hazard issue common to each of their proposals, the applications were designated for consolidated hearing.[4] On March 29, 1965, a prehearing conference was held for the purpose of establishing procedural ground rules to govern the conduct of the hearing. Petitioners maintain that at this meeting all of the parties (with the exception of Twin City which was not then a party) agreed to exchange their direct and rebuttal exhibits

[1] FCC 66M-997, released July 20, 1966.
[2] FCC 66M-820, released June 9, 1966.
[3] Other pleadings before the Board are: (*a*) Broadcast Bureau's opposition, filed Aug. 8, 1966, and (*b*) reply to opposition, filed Aug. 18, 1966, by Twin City and WCCO-TV.
[4] The applications of WTCN Television, Inc. (WTCN-TV), WCCO-TV, and United Television, Inc., were designated for hearing by memorandum opinion and order, FCC 65-103, released Feb. 15, 1965. On June 16, 1965, the examiner granted Twin City's petition to intervene (FCC 65M-782, released June 16, 1965). Subsequently, the applications of Twin City, as licensee of educational television broadcast stations KTCA-TV and KTCI-TV, were designated for hearing and consolidated into this proceeding (FCC 66-668, released July 26, 1966).

by May 3, 1965, and June 1, 1965, respectively.[5] According to the petitioners, all parties represented at the conference have complied with this agreement save the Broadcast Bureau, which to date has not submitted its rebuttal exhibits. On May 19, 1966, Twin City and WCCO–TV petitioned the examiner to direct the Bureau to make its exchange by June 7, 1966. The examiner denied the petition on the ground that petitioners had not demonstrated "good cause" for the requested action. Thereafter the examiner confirmed his ruling by denying a petition for reconsideration filed July 5, 1966. The subject petition for review was filed within 5 days of this latter ruling.

3. Taken together, the pleadings raise three principal questions. First, as a procedural matter, was the petition for review timely filed: second, did the Broadcast Bureau commit itself to the exchange agreement as alleged by petitioners; and third, even if the Bureau did not specifically agree to the exchange dates, should it nevertheless be directed to exchange its rebuttal exhibits within a reasonable time prior to hearing?

4. We turn our attention first to the procedural question.[6] The Bureau argues that petitioners should not be permitted to use the petition for reconsideration, which they filed on July 5, 1966, as a means of circumventing the provisions of rule 1.301, which require that an appeal from an adverse ruling of a presiding officer be filed within 5 days. According to the Bureau, the petition for review is directed to the examiner's order of June 9, 1966, and should have been filed within 5 days after that ruling.

5. The Bureau's position is not without appeal but it is unsupported by the Commission's rules. Unlike interlocutory rulings of the Commission, Review Board, and Chief Hearing Examiner, which are not subject to reconsideration,[7] rule 1.303 specifically authorizes any party to file a petition requesting the presiding officer to reconsider an oral ruling or written order. This procedure was followed by the petitioners, and their appeal to the Board was properly filed within 5 days after release of the order denying reconsideration.

6. We have carefully reviewed the transcript of the March 29, 1965, prehearing conference to determine what, if any, commitment was given by the Bureau. From this record it appears that the suggestion for an early exchange of exhibits by the applicants originated with counsel for one of the applicants. When asked for the Bureau's reaction to this suggestion counsel for the Bureau stated he had no objection to such a procedure (Tr. 6). While it is arguable that the Bureau's statement was intended only as its approval of the procedure to be followed by the other parties to the proceeding, the transcript reflects some confusion on the matter. For example, the record indicates that while at one point the examiner considered the Bureau as

[5] Several continuances of the exchange dates were granted. By order, FCC 66M–680, released May 13, 1966, the examiner extended the time for exchange of Twin City's exhibits from May 23 to June 7, 1966.

[6] We are cognizant of the note to rule 1.301 which provides that unless the ruling complained of is fundamental and affects the conduct of the entire case, appeals should be deferred and raised as exceptions. Because of the nature of the ruling appealed from, our deferment of the matter until after release of the initial decision would be tantamount to a denial of the action requested by petitioners.

[7] Rules 1.102(b) and 1.106(a).

having agreed to such an exchange,[8] subsequently, in making his ultimate ruling (Tr. 16), he addressed himself only to the applicants and to respondents, Association of Maximum Service Telecasters, Inc., and Department of Aeronautics, State of Minnesota, omitting any mention of the Bureau. Because of this ambiguity we are unable to conclude that the Bureau was legally and technically bound to the exchange dates set at the March 29, 1965, prehearing conference. See *KTAG Associates*, 19 R.R. 389 (1959).

7. The only remaining question warranting consideration is whether the Bureau should be directed to exchange its rebuttal exhibits prior to hearing even though it was not bound by the agreement. The examiner resolved this question in a manner adverse to petitioners when he overruled their oral motion to compel the Bureau to make its exchange by June 29, 1966 (Tr. 70), and again when he denied their petition for reconsideration requesting that August 30, 1966, be set as the exchange date.[9] Although we might have reached a different result had we made the initial determination, we recognize that authority to make such a ruling lies within the sound discretion of the examiner, and we are not persuaded that his action was arbitrary or constituted an abuse of that discretion. *Tinker, Inc.*, 4 FCC 2d 372.

Accordingly, it is ordered, This 6th day of September 1966, that the petition for review, filed July 27, 1966, by Twin City Area Educational Television Corp. and Midwest Radio-Television, Inc., *Is denied.*

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

---

[8] "Mr. GAGUINE. That is correct, sir. On the other hand I think *since we now have this agreement*, we will be able to schedule a time for perhaps our presentation of what might be called the direct case.
"PRESIDING EXAMINER. Yes.
"Mr. GAGUINE. Then a reply, or whatever they might want to denominate that particular document.
"PRESIDING EXAMINER. Certainly.
"* * * * * * *
"PRESIDING EXAMINER. Yes, I think it would be appropriate to determine the exchange date on the direct case, first, and then give the two intervenors *and the Bureau* any time that it might want, or a reasonable amount of time, to submit anything that they want to submit, or to present direct oral evidence as intervenors or respondents" (Tr. 7–8) (*emphasis supplied*).

[9] Petitioners recognized that such relief would have constituted a modification of the relief requested in their original petition but argued that passage of time mooted the relief originally requested.

FCC 66R-339

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of TREND RADIO, INC., JAMESTOWN, N.Y.	Docket No. 16712 File No. BPCT-3665
JAMES BROADCASTING CO., INC., JAMESTOWN, N.Y.	Docket No. 16713 File No. BPCT-3694
For Construction Permits for New Television Broadcast Station	

MEMORANDUM OPINION AND ORDER

(Adopted September 6, 1966)

BY THE REVIEW BOARD:

1. The applications of Trend Radio, Inc., and James Broadcasting Co., Inc., who are competing for a UHF television authorization in Jamestown, N.Y., were designated for hearing June 15, 1966 (FCC 66-536). Except for an air hazard issue as to James, both were found fully qualified.[1] James has now petitioned for addition of the following issues against Trend:[2]

> (*a*) To determine the basis of Trend Radio, Inc.'s (1) proposal for the availability and source of funds with which to construct the proposed UHF television station, (2) estimated construction costs, (3) estimated operating expenses for the construction period and the first year of operation, and (4) to determine amount of funds necessary and available for long-term debt repayment for the period encompassing this hearing, construction, and the first year of station operation.
>
> (*b*) In the event Trend Radio, Inc., will depend upon operating revenues deriving the first year of operation to meet fixed costs and operating expenses, to determine the basis of its estimated revenues for the first year of operation; and
>
> (*c*) To determine, in light of the evidence adduced, whether Trend Radio, Inc., is overall financially qualified to construct and operate its proposed station.
>
> (*d*) To determine whether the staffing proposal of Trend Radio, Inc., is adequate to meet the overall operational needs of a UHF television station utilizing the applicant's weekly broadcast proposal.

Financial Issue

2. James bases its request for financial issues against Trend on the latter's financial showing at the time the applications were designated for hearing. After the petition to enlarge was filed, Trend

[1] Commissioner Bartley concurred with this action except that he would have added an issue to determine whether Trend "meets the financial qualification standards of *Ultravision*, 5 R.R. 2d 343."

[2] The pleadings before the Board are: Petition to enlarge issues filed by James, July 11, 1966; opposition to petition to enlarge issues filed by Trend July 25, 1966; reply to opposition to petition to enlarge issues filed by James, Aug. 1, 1966.

petitioned the hearing examiner for leave to amend its application, and this petition was granted on August 3, 1966 (FCC 66M–1063). The amendment dealt mainly with those aspects of Trend's financial proposal attacked by James. The amendment having been granted, it is in terms of the showing made therein that James' request for financial issues must be tested.

3. Trend relies for its financing upon existing capital ($5,846), loans from the Bank of Jamestown ($560,000),[3] profits from existing operations ($21,067), and deferred equipment payments ($221,064), for a total of $807,977. The terms of payment and security for the bank loan are specified, the security being the pledge of Eastman Kodak common stock having a market value of at least $540,000. The mortgage loan is to be secured by a mortgage on the new building and on the building now housing Trend's radio stations. With these sums available, Trend would have an excess of $101,867 over the increased expenses provided for in the amendment, without reliance on estimated revenues.

4. James contends that provision had not been made for cash down-payments to General Electric for equipment. Trend points out that these are included in the construction and installation costs. Petitioner's assertions that the bank loan agreements were deficient because silent as to terms of repayment, interest rate, and security are satisfied by the new agreements in which these conditions are detailed. The amendment also makes clear that the bank's commitment would not be affected by existence of other loans previously granted by the bank to Trend in connection with its AM and FM stations. Any questions which may have existed as to security for the loans have also been answered, as has been indicated in the previous paragraph. James argues in its reply pleading that the absence of a balance sheet and other financial documents evidencing the ability of the president's mother to secure the loan leaves the financial showing as deficient as before. However, here the bank has expressly stated that it has satisfied itself of her financial ability to meet her pledge of securities and she has stated her agreement to make available for hypothecation shares of Eastman Kodak common stock having a market value of $450,000. The showing is sufficient. Questions concerning payment for the building to house the station have also been satisfied by the bank mortgage agreement and the security arrangements stated therein. Trend now plans to charge all the cost of this building to the television station, so that ambiguities as to the true cost of the building have been eliminated. In the amendment, substantial increases in the sums set aside for hearing expenses and other contingencies[4] have been made, and the showing amply answers the questions raised by James concerning these costs.

5. Prior to amendment, Trend specified first year operating costs of $190,000,[5] a figure which remains unchanged in the amendment.

[3] A bank loan of $470,000 for construction and initial operation of the station and a mortgage loan of $90,000 for construction of a building.

[4] Over $50,000, of which $25,000 is set aside for legal, engineering, and contingency expenses.

[5] This does not include first year equipment payments, interest on bank loan and building mortgage, etc., for which separate provision was made.

James contends this estimate is too low because it does not take into account Trend's amendment to delete network programing, increase live programing to almost one-half of total air time, and extend the broadcast week by over 9 hours. Petitioner asserts that costs must increase substantially because it is clear that the cost to the station of live television programing is substantially higher than the cost it would incur in the telecast of network programs. Trend answers that James' assertions concerning program costs are unsupported and unverified, and denies that the cost of broadcasting independent programing will be greater than the cost for network programing. Further, it asserts that savings on wire charges of more than $24,000 a year will enable Trend to operate within the $190,000 figure for the first year, considering that a substantial part of the talent for the live programing proposed will be without cost. James does not address itself further to this point in its reply. The Bureau points out that the change in Trend's financial proposal providing a sum in excess of $100,000 over estimated requirements will be sufficient for any added programing costs. The Bureau also states that the question of Trend's operating costs was before the Commission, that the Commission raised no questions, and that no new facts have been offered to warrant a different treatment now.

6. To the Board it appears likely that Trend will have greater costs than it projects for nonnetwork operation with substantial live programing. Even so, the cushion between available funds and stated expenses is, as the Bureau says, sufficient, with anticipated savings in wireline charges, to provide for these larger costs without endangering Trend's financial position for the first year.

Staffing Issue

7. As noted, Trend originally proposed a network operation. About 73 percent of its programing was to come from network sources. Before designation for hearing, the network proposal was eliminated and live programing was increased from about 24 percent to about 42 percent. At this time, broadcast hours were also slightly increased. However, no changes in staffing were proposed. Thus, Trend still plans to operate with 16 full-time employees, including 5 supervisors who also devote time to operation of the AM and FM stations, and 3 part-time employees. As before, the applicant states that as needs indicate additional employees will be hired.

8. James attacks the staffing proposal, arguing that at the best (giving credit to supervisors who also must devote time to the AM and FM operations) Trend would have only 5.2 individuals for each shift, which is inadequate to operate a television station, particularly since no changes were made to handle the expanded schedule following deletion of network programing. In opposition, Trend argues that the staff is adequate because existing employees of the radio stations, other than the supervisors already mentioned, will be used for the television operation when required. It points out that funds are available to hire additional employees if needed. Trend also argues that its staffing proposal is virtually the same as James'. The Bureau

comments that since Trend says it will add to its staff as necessary and since funds are available, the issue should not be added, especially since the same facts were before the Commission at time of designation.

9. Trend's proposal is now nonnetwork while James' proposes a network affiliation. Thus, the conclusion Trend tries to draw from the similarity of the staffing proposals is not justified. Examination of Trend's staffing plan shows that in both its original network proposal and its present nonnetwork plan only three full-time employees are assigned to the programing department and that five full-time and two part-time employees are assigned to the technical department. If this number was sufficient under the original proposal, its adequacy where approximately 51 hours each week of live programing are proposed is not apparent. Trend, rather vaguely, proposes to augment from its radio staff and hire additional employees if necessary. This showing is inadequate, and a staffing issue will be added. Cf. *Spanish International Television, Inc.*, 64R–239, 2 R.R. 2d 853.

10. In view of the foregoing, *It is ordered*, This 6th day of September 1966, that the petition to enlarge issues filed July 11, 1966, by James Broadcasting Co., Inc., *Is granted* to the extent of adding the issue hereinafter specified and *Denied* in all other respects.

To determine whether the staff proposed by Trend Radio, Inc., is adequate to effectuate its television broadcast proposal.

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

FCC 66D–39

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of HADDOX ENTERPRISES, INC., COLUMBIA, MISS. For Construction Permit	Docket No. 16636 File No. BPH–4532

APPEARANCES

Maurice R. Barnes, Esq., on behalf of Haddox Enterprises, Inc.; and *Leo I. George, Esq.*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER ISADORE A. HONIG

(Effective September 2, 1966, Pursuant to Sec. 1.276)

PRELIMINARY STATEMENT

1. This proceeding concerns the application of Haddox Enterprises, Inc., for a new FM station in Columbia, Miss., to operate on channel No. 244 (96.7 Mc) with power of 3 kw and antenna height of 100 feet above average terrain. Originally, the Haddox application and an application of WCJU, Incorporated (WCJU, Inc.), for use of the same frequency at Columbia were designated for hearing in a consolidated proceeding by order of the Commission (FCC 66M–840), released May 13, 1966. Except for a question as to the financial qualification of WCJU, Inc., the Commission found that both applicants were qualified to construct and operate their stations as proposed. Accordingly, the specified hearing issues were designed to inquire into the financial capability of WCJU, Inc., to effectuate its proposal, and the comparative merits of the two applications.

2. On May 31, 1966, WCJU, Inc., filed a pleading entitled "notice of withdrawal," in which this applicant requested the dismissal of its application from the comparative hearing. The hearing examiner then issued an order (FCC 66M–778) on June 1, 1966, directing WCJU, Inc., to submit an affidavit, as required by sections 1.525 (c) and (d) of the rules, stating whether or not the payment or promise of any consideration was connected with the proposed dismissal. The requisite affidavit reflecting that no consideration was involved in the dismissal was furnished on behalf of WCJU, Inc. Counsel for the other parties thereafter notified the examiner that they did not object to grant of the dismissal request, and by an order (FCC 66M–840)

released by the examiner on June 14, 1966, the application of WCJU, Inc., was dismissed with prejudice.

3. The dismissal of the WCJU application mooted the hearing issues and left the Haddox application unopposed but still in hearing status. A prehearing conference on the remaining application was held on June 17, 1966, at which time it was determined that Haddox complied with the requirements of section 311(a)(2) of the Communications Act and section 1.594 of the rules as to publication of notice of designation for hearing of its application.[1] The hearing on the Haddox application was held on July 13, 1966, and applicant submitted for the record the affidavit of its president, Lester Haddox, showing that no consideration was promised or paid for the dismissal of the WCJU, Inc., application. Official notice was taken of the previously submitted affidavit of the president of WCJU, Inc., to the same effect. Counsel for the parties waived their rights to file proposed findings of fact and conclusions and to submit corrections to the transcript. The record was closed on the hearing date—July 13, 1966.

FINDINGS OF FACT

4. The dismissal of the formerly competing application of WCJU, Incorporated, has rendered moot all of the issues specified in the order of designation. Haddox Enterprises, Inc., the remaining applicant for the FM channel in question, has been found by the Commission to have the requisite statutory qualifications to construct and operate the FM facilities proposed in its instant application.

5. The affidavits of officers of Haddox and WCJU, Incorporated, respectively, establish that no consideration was paid or promised for the dismissal of the latter's application, and no other public interest question has been raised in this proceeding either with respect to the withdrawal of the WCJU application or the qualifications of Haddox to become a licensee.

CONCLUSIONS

1. Haddox Enterprises, Inc., the only applicant now requesting an authorization for FM channel No. 244 at Columbia, Miss., is legally, technically, financially, and otherwise qualified to construct and operate the FM facilities proposed by it, and no bar to a grant of its application has been found to exist in connection with the dismissal of the mutually exclusive application of WCJU, Incorporated, or otherwise. Therefore, it is concluded that the public interest, convenience, and necessity would be served by a grant of the above-captioned application of Haddox.

2. Accordingly, *It is ordered*, This 14th day of July 1966, that, unless an appeal to the Commission from this initial decision is taken

[1] By counsel's letter of June 17, 1966, the Commission was notified of the publications, as required by sec. 1.594(g) of the rules.

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 application of Haddox Enterprises, Inc., for a construction permit for a new FM station at Columbia, Miss., to operate on channel No. 244 *Is granted.*

FCC 66–772

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.606(b) OF THE COMMISSION RULES AND REGULATIONS TO ADD A UHF TELEVISION BROADCAST CHANNEL ASSIGNMENT AT BEND, OREG.	Docket No. 16673 RM–946

REPORT AND ORDER

(Adopted August 24, 1966)

BY THE COMMISSION: COMMISSIONER WADSWORTH ABSENT.

1. On June 3, 1966, the Commission issued a notice of rulemaking (FCC 66–493) proposing to add channel 21 to Bend, Oreg., upon request of Liberty Television, Inc. (Liberty), licensee of KEZI–TV, operating on channel 9 at Eugene, Oreg.

2. In support of its petition, Liberty indicated it wished to provide television service in the Bend area, but that the only channel presently assigned to that community is channel 15, which is reserved for noncommercial, educational use. Bend is located in central Oregon, and its 1960 population was 11,936. The nearest commercial TV stations are KEZI–TV (channel 9) and KVAL–TV (channel 13) at Eugene, approximately 90 miles west of Bend. Three 1-w VHF television translators are operated at Bend by Video Utility Corp., bringing in the signals of KOIN–TV (channel 6), KGW–TV (channel 8), and KPTV (channel 12) from Portland, Oreg. According to the 1966 edition of the "TV Factbook," Bend Cable TV Co. operates a CATV system at Bend and brings in the signals of the Portland stations plus KOAP–TV, an educational station (channel 10), from Portland, and KEZI–TV (channel 9) from Eugene.

3. Upon review of the petition, we determined by use of the electronic computer that channel 21 would be the most efficient assignment at Bend and proposed the addition of that channel in our notice of rulemaking. Comments in support of the petition were filed by Liberty, which again asserted its intention to apply for channel 21 if it is assigned to Bend.

4. We stated in paragraph 7 of our fifth report that our conclusion at that time not to make an assignment to a particular community meant only that we were postponing such a decision until we could be reasonably certain that such an assignment represented an actual need and would serve the public interest. Under the above circumstances, we are of the view that the assignment of channel 21 to Bend, Oreg., would serve the public interest. However, this has been done on the basis of representations that petitioner is prepared to file promptly an

application for authority to construct and operate a new UHF television broadcast station and, if awarded an authorization, will proceed diligently with such construction and operation. Failure to do so may result in the removal of the assignment to restore flexibility to the Table.

5. Authority for the amendment adopted herein is contained in sections 4(i), 303, and 307(b) of the Communications Act of 1934, as amended.

6. In view of the foregoing, *It is ordered*, That, effective October 3, 1966, section 73.606(b) of the Commission's rules and regulations is amended, insofar as the city listed below is concerned, to read as follows:

City	*Channel No.*
Bend, Oreg	*15, 21

7. *It is further ordered*, That this proceeding *Is terminated*.

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

FCC 66-798

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of ITT WORLD COMMUNICATIONS, INC. Proposed Revisions to Its Tariff FCC No. 7 Establishing Rules and Regulations for Timetran Service	Docket No. 16366

ORDER

(Adopted September 7, 1966)

BY THE COMMISSION: COMMISSIONERS BARTLEY, WADSWORTH, AND JOHNSON ABSENT.

At a session of the Federal Communications Commission held at its offices in Washington, D.C., on the 7th day of September 1966;

The Commission having before it a petition to withdraw the tariff revisions at issue, and to terminate the proceeding herein, filed by ITT World Communications, Inc., on June 29, 1966, and an application filed by that carrier on July 1, 1966, for special permission to cancel such revisions on short notice;

It appearing, That ITT World Communications, Inc., believes that the "imminence of fully automated telex service will result in the deferment at this time of the effectuation of the Timetran type of supplementary telex service," and it, therefore, requests permission to withdraw the revisions under investigation "without prejudice to the filing of a new tariff in some revised form should it develop that the Timetran type of service is desirable to supplement the telex service."

It further appearing, That none of the other parties to this proceeding object to a grant of the relief requested by ITT World Communications, Inc.;

It further appearing, That, in view of ITT World Communications, Inc.'s desire to cancel the tariff revisions at issue herein, no useful purpose would be served by requiring this matter to proceed to a decision;

It is ordered, That ITT World Communications, Inc.'s petition and application for special permission are *Granted;* and that this proceeding shall be *Terminated* upon the filing by ITT World Communications, Inc., within 5 days after the release of this order, of tariff pages

canceling the revisions of its tariff F.C.C. No. 7 under investigation herein, e.g.,

286th revised page 1	6th revised page 73
112th revised page 1A	6th revised page 74
13th revised page 3	7th revised page 77
6th revised page 7	8th revised page 80
6th revised page 11D	7th revised page 82
10th revised page 17	15th revised page 86
7th revised page 18	13th revised page 88
7th revised page 25	5th revised page 89
8th revised page 50	4th revised page 94B
6th revised page 69B	4th revised page 94C

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

FCC 66-797

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Application of COMMUNICATIONS SATELLITE CORP. For Authority To Use and Operate a Communications Satellite Earth Station at Andover, Maine, in Conjunction With a Synchronous Communications Satellite To Provide Commercial Communications Services, and for Approval of the Technical Characteristics Thereof	File No. 1-CSG-L-65

ORDER AND AUTHORIZATION

(Adopted September 7, 1966)

BY THE COMMISSION: COMMISSIONERS BARTLEY, WADSWORTH, AND JOHNSON ABSENT.

At a session of the Federal Communications Commission held at its offices in Washington, D.C., on this 7th day of September 1966.

The Commission having under consideration a request by the Communications Satellite Corp. (Comsat) to amend the above-entitled order and authorization to include authority to make available one additional unit of satellite utilization to the Canadian Overseas Telecommunications Corp. (COTC) via the Andover earth station for public telephone message service between Montreal, Canada, and Rome, Italy;

It appearing, That the order, as amended December 1, 1965 (file No. 1A-CSG-L-65), authorizes Comsat to provide COTC with the services of the Andover earth station to enable it to use nine units of satellite utilization;

That the instant request has been made pursuant to the terms and conditions set forth in the order and that the provision of the services of the Andover station to meet the COTC request will not interfere with the services presently being provided to United States communications carriers;

It is ordered, That the order and authorization, issued June 22, 1965, 38 FCC 1298, as amended by the order and authorization issued December 1, 1965, file No. 1A-CSG-L-65, *Be and hereby is amended* so as to include authority for the Communications Satellite Corp. to make available to the Canadian Overseas Telecommunication Corp. (COTC) the services of the Andover earth station in order that COTC may obtain the use of one additional unit of satellite utilization for public message voice service between Montreal, Canada, and Rome, Italy.

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

FCC 66-804

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of CLAY BROADCASTERS, INC., LIBERTY, MO. Requests: 1140 kc, 500 w, Day, Class II For Construction Permit	File No. BP-16811

MEMORANDUM OPINION AND ORDER

(Adopted September 7, 1966)

BY THE COMMISSION: COMMISSIONERS BARTLEY, WADSWORTH, AND JOHNSON ABSENT.

1. The Commission has before it the above-captioned application of Clay Broadcasters, Inc., for a construction permit for a new standard broadcast facility in Liberty, Mo.

2. The applicant's proposed 5-mv/m contour would encompass a substantial portion of Kansas City, Mo. Since the population of Kansas City exceeds 50,000 and is more than twice that of Liberty (475,539 and 8,909, respectively, according to the 1960 census), a rebuttable presumption 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, adopted December 22, 1965.[1] In an amendment filed April 27, 1966, and supplemented on May 27, 1966, the applicant submitted data for the purpose of rebutting the presumption that it was proposing to serve Kansas City.

3. After examination of the material submitted, the Commission finds that, notwithstanding the proposed 5-mv/m penetration of Kansas City, the applicant has effectively demonstrated its intention to furnish a broadcast service for the city of Liberty and for Clay County, Mo., rather than Kansas City. The applicant's proposed power of 500 w appears reasonable in the light of its desire to furnish adequate service throughout Clay County, and that relatively low power together with the proposed omnidirectional radiation pattern tends to rebut the inference that the applicant's real goal is to serve the larger community. Further, the applicant's proposed antenna location is not placed to the south of Liberty, where it would be closest to Kansas City, but to the southeast of Liberty, where county coverage would be maximized. Clay Broadcasters, Inc., has demonstrated a need for a first local broadcast outlet for Liberty and Clay County, and has shown the

[1] It is noted that, although the 5-mv/m contour would also cover the city of Independence (1960 population, 62,328), the aforementioned policy statement specifies that the presumption will apply as to the larger of 2 or more cities penetrated by the applicant's 5-mv/m contour. In any event, the applicant's showing is sufficient to rebut any presumption of intent to serve Independence.

existence of considerable local interest. Programing proposals submitted by the applicant indicate that its goal is to furnish a service directed to the interests of the people of Liberty and Clay County. Advertising commitments submitted by the applicant show that the bulk of its revenue will come from Liberty. Stockholders in Clay Broadcasters, Inc., are themselves closely identified with Liberty. Of the seven stockholders, six are business and professional men from that city. The seventh is a military officer from a nearby base.

4. In view of the foregoing, the Commission finds that the applicant's showing is sufficient to overcome the presumption that the proposed facility is realistically intended to provide service to Kansas City. The Commission further finds that the proposed operation of Clay Broadcasters, Inc., will serve the public interest, convenience, and necessity, and that the applicant is fully qualified to construct and operate a station in Liberty, Mo., as proposed.

Accordingly, *It is ordered*, This 7th day of September 1966, that the application of Clay Broadcasters, Inc., *Is granted*, subject to the terms and conditions contained in the construction permit.

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

FCC 66R-344

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of WEST CENTRAL OHIO BROADCASTERS, INC., XENIA, OHIO For Construction Permit	Docket No. 16124 File No. BP-15468

MEMORANDUM OPINION AND ORDER

(Adopted September 7, 1966)

BY THE REVIEW BOARD.

1. This proceeding involves the application of West Central Ohio Broadcasters, Inc. (West Central), for a new standard broadcast station at Xenia, Ohio. The application was filed on April 9, 1962, and designated for hearing by memorandum opinion and order, FCC 65-683, released July 27, 1965. On December 9, 1965, the record was closed, and, on April 28, 1966, the examiner released an initial decision, FCC 66D-21, recommending a grant of West Central's application. Presently under consideration is a petition to enlarge issues, filed by the Greene Information Center (Greene), a respondent in this proceeding, on May 24, 1966.[1]

2. Greene, the licensee of station WGIC, Xenia, Ohio, bases its request for enlargement on the contention that it has newly discovered evidence that Harry B. Miller, who is a 40-percent stockholder and president of West Central, "has made misrepresentations under oath to the Commission as to past services performed by one Neil Tussing, d.b.a. the Ohio Tower Co., for Miller and/or the applicant corporation." The testimony disputed by Greene is Miller's statement, at the December 7, 1965, hearing, that Tussing had, in the past, put up the towers for two stations (WERM and WHBM) with which Miller is associated.[2] Greene's newly discovered evidence consists of four attachments to its petition which include: (*a*) An affidavit sworn to by Eldon Junior Heinz, Greene's chief engineer, on April 19, 1966; (*b*) an affidavit sworn to by one H. E. Ruble, on April 20, 1966; (*c*) a copy of pages 4 and 4a of Miller's 1961 application; and (*d*) a copy of the jurat to West Central's pleading herein of September 7, 1965. It is

[1] Comments were filed by the Broadcast Bureau on June 8, 1966. West Central filed an opposition on June 8, 1966, an errata to the opposition on June 10, 1966, and a supplement to the opposition on June 14, 1966. West Central has shown good cause for acceptance of the supplement, and its request for acceptance is unopposed; accordingly, the request is hereby granted. Greene filed a reply to the other parties' pleadings on June 24, 1966.

[2] This testimony was elicited by West Central's counsel in response to financial issues, which were added by the Board in a memorandum opinion and order, 1 FCC 2d 1178, 6 R.R. 2d 486. However, since the qualifications and experience of Tussing, who is to construct West Central's proposed tower, were not in issue, this testimony was essentially irrelevant.

Heinz's affidavit, however, and further affidavits from Heinz submitted with Greene's reply pleading that are principally relied upon.

3. The Commission has consistently held that a petition requesting reopening of the record [3] must be supported by showings of newly discovered evidence; that the petitioner could not, through the exercise of due diligence, have discovered the facts relied upon at an earlier date; that the new evidence, if true, would affect the disposition of the proceeding; and that absent such a showing or other unusual and compelling circumstances, the petition should be denied. See, e.g., *Kern Radio Dispatch*, 29 FCC 1079, 20 R.R. 967 (1960).

4. In its petition, Greene does no more than state that its petition is based on newly discovered evidence. Both West Central (in its opposition) and the Broadcast Bureau (in its comments) point out Greene's untimeliness and the absence of a showing of good cause for such untimeliness. Notwithstanding these challenges, Greene's only explanation in its reply is that it did not learn of Tussing's proposed involvement "until December 7, 1965," and that "factual representations must be carefully checked before affidavits which raise the allegations made by Greene's petition can be made."

5. Greene's bare assertions that its evidence is newly discovered fall far short of what the Commission expects of parties and practitioners involved in the Commission's hearing processes.[4] Even assuming the accuracy of Greene's contention that the information upon which its petition is based could not have been discovered until December 7, 1965, we find no justification for the delay of over 5½ months after December 7, 1965, before Greene filed the subject petition. This is particularly true in view of the facts that attachments (c) and (d) to Greene's petition were on file with the Commission, and the affidavits chiefly relied upon were provided by an individual, employed by Greene, whose knowledge was presumably available to Greene during the entire period. Moreover, even if there were some basis for finding that Greene could not have procured the affidavits submitted with its petition until mid-April 1966, when they were executed, its withholding of what it terms "evidence of fundamental importance" for more than a month thereafter, and until an adverse initial decision was released, is totally unexplained and therefore inexcusable.[5]

6. As indicated by our discussion, the petition is grossly deficient from a procedural standpoint, having been filed many months after the closing of the record and the issuance of an initial decision, and without any showing that the alleged evidence of misrepresentation is newly discovered. For this reason, the public interest benefits in

[3] Although Greene has not labeled its petition a petition to reopen, a request for such relief—in light of the closing of the record and the subsequent issuance of an initial decision—is inherent in its request for enlargement.

[4] *WMOZ* v. *FCC*, 120 U.S. App. D.C. 103, 344 F. 2d 197, 4 R.R. 2d 2004 (1965), cited by Greene in its reply, is inapposite here. There, it could be held that the evidence relied upon by the petitioner was newly discovered, and the evidence went to points of infinitely greater substance than those involved here. See *WMOZ, Inc.*, 36 FCC 1467, 1473, 2 R.R. 2d 1057, 1063.

[5] A party to a proceeding cannot sit back with his newly discovered evidence in hopes of a favorable initial decision, and expect sympathetic regard for a petition filed only because the initial decision has gone the other way. See *WNOW, Inc.*, 38 FCC 471, 4 R.R. 2d 857 (1965); cf. *North American Airlines* v. *CAB*, 100 U.S. App. D.C. 5, 7, 240 F. 2d 867, 874 (1956).

the orderly and fair administration of the Commission's business require a denial of the extraordinary relief sought by petitioner. As to the merits of the petition, it is sufficient to state that petitioner has not established by its pleadings so substantial a likelihood of proving the alleged misrepresentations, outweighing, on balance, these public interest benefits. Petitioner's burden on the merits is an extremely heavy one in view of the procedural deficiencies, and requires a more convincing showing of prevailing on the merits than petitioner has presented in its pleadings here.

Accordingly, it is ordered, This 7th day of September 1966, that the petition to enlarge issues, filed May 24, 1966, by the Greene Information Center, Inc., *Is denied.*

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

FCC 66R-345

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 September 9, 1966)

BY THE REVIEW BOARD.

1. This proceeding involves the application of Norristown Broadcasting Co., Inc. (WNAR), Norristown, Pa. (1110 kc, 500 w, day), for a construction permit to install a directional antenna, change transmitter site, and increase power. WNAR's application was originally designated for hearing (FCC 63-112, released February 8, 1963), on issues involving the multiple ownership rules. The basis for inclusion of these issues was that certain individuals connected with WNAR might have had common ownership interests in or control of station WKAP, Allentown, Pa., and/or station WEEZ, Chester, Pa., and that therefore there was a possibility of prohibited overlap and/or concentration of control.[1]

2. In an initial decision (FCC 64D-56, released September 25, 1964), Hearing Examiner Millard F. French proposed a grant of WNAR's application. Exceptions and a supporting brief were filed by the Broadcast Bureau. WNAR filed a reply brief and requested oral argument. On January 7, 1966, the Broadcast Bureau filed a petition to enlarge issues and for reopening of the record and remand pursuant to the Commission's December 22, 1965, *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities* (FCC 65-1153, 2 FCC 2d 190, 6 R.R. 2d 1901, reconsideration denied FCC 66-229, 2 FCC 2d 866, 6 R.R. 2d 1908). By order (FCC 66R-75, 2 FCC 2d 685, released March 2, 1966), the Review Board denied the Broadcast Bureau's petition to enlarge issues because resolution of the qualifications issues against WNAR would render moot the issues requested by the Bureau. Accordingly, the Board rescheduled the oral argument in the proceeding for March 29, 1966.

3. On March 15, 1966, WNAR requested a further postponement of oral argument on the basis of approval by the Commission of an assignment of license of station WEEZ, which obviated the multiple

[1] The designation order provided that should WNAR's application not be denied, final action should be withheld until dispositive action had been taken with respect to the application of WTSP-TV, Inc., docket No. 12449, file No. BPCT-2437. By order of Oct. 14, 1965, 6 R.R. 2d 2001, the Court of Appeals for the District of Columbia Circuit affirmed the Commission's action granting the application of WTSP-TV, Inc.

ownership problem raised by the Commission in designating this proceeding for hearing. WNAR also requested that the Board not remand on section 307(b), despite the mooting of the qualifications issues, because it proposed to amend its application to comply with the new policy. In pleadings filed on March 22, 1966, the Bureau supported WNAR's request for cancellation of the oral argument on the ground that the issues had been rendered moot; suggested that the Board retain jurisdiction over the proceeding to examine the proposed amendment; and requested enlargement of issues to inquire into the background of WNAR's proposed amendment. On the basis of these pleadings, the Board continued the oral argument without date (FCC 66R–111, released March 24, 1966).

4. The Board now has before it for consideration a petition for leave to amend and return to processing line, filed by WNAR on June 3, 1966.[2] In its petition WNAR points out that all of the existing issues in this proceeding have become moot; that it has decided to withdraw its original 50-kw proposal and instead proposes to increase the present 500-w power of WNAR to 5 kw; that it has further decided to withdraw its proposal to change transmitter site and to operate with a three-tower directional array rather than the nine-tower array originally proposed in its application; and that therefore the public interest would be served by permitting it to amend its application and return it to the processing line.[3] Anticipating that a question might be raised concerning its compliance with the section 307(b) policy statement, WNAR asserts that it is "not proposing to become a substandard Philadelphia station," but that it is not appropriate to argue the merits of the question at this time since there is no issue presently in the proceeding regarding the policy statement, and the presumption arising from WNAR's increased 5-mv/m penetration of Philadelphia can be rebutted at the processing level.

5. In opposing WNAR's petition for leave to amend, the Bureau argues that amendment under rule 1.522(c) is not available to WNAR because the proposed amendment "does not resolve important public interest considerations as to WNAR's proposal," and that further hearing would be required. The Bureau specifically argues that "absolutely no purpose would be served by returning WNAR's application to the processing line, for it is a certainty that a hearing on the 307(b) issue will be required."[4]

---

[2] Before the Board are: "Petition for Leave To Amend and Return to Processing Line, Pursuant to Section 71.522(c) [sic]," filed by Norristown Broadcasting Co., Inc. (WNAR), on June 3, 1966, and amendment filed therewith; the opposition of the Broadcast Bureau, filed on July 1, 1966; and further amendments filed by WNAR on June 10, June 20, July 1, and July 20, 1966. On July 15, 1966, WNAR filed a request for authority to file a reply to the Bureau's opposition, accompanied by a reply; on July 22, 1966, the Bureau filed an opposition to this pleading. WNAR has failed to justify the submission of additional pleadings and its request will be denied. Also before the Board are: Petition to enlarge issues, filed on Mar. 22, 1966, by the Broadcast Bureau; opposition, filed on Apr. 6, 1966, by WNAR, and reply, filed on Apr. 18 1966 by the Broadcast Bureau.

[3] WNAR states that its amendment does not require the assignment of a new file number to its application. This question is not properly before the Board but is a matter to be determined when the application is returned to the processing line.

[4] The Bureau makes no reference in its opposition to its earlier filed petition to enlarge issues (Mar. 22, 1966) to inquire, among other things, into the question whether WNAR had decided to abandon its 50-kw proposal at a date earlier than that reported to the Board. While the Board recognizes that WNAR has not prosecuted its application in a most diligent manner (see FCC 66R–207, released June 2, 1966), it now appears that WNAR will prosecute its 5-kw application and the matter raised by the Bureau is therefore not sufficient to warrant further inquiry.

6. The Bureau's opposition to WNAR's petition for leave to amend and return to the processing line is based on a faulty premise. As WNAR points out, it is not inevitable that 307(b) suburban policy considerations will require ultimate resolution in a hearing. It is possible that WNAR can successfully rebut the presumption raised by the policy statement on the processing line. See, e.g., *KEZY Radio, Inc.*, FCC 66–300, 3 FCC 2d 407. Therefore, there is no impediment to a grant of WNAR's petition for leave to amend and return to the processing line.

Accordingly, it is ordered, This 9th day of September 1966, that the request for authority to file reply to the opposition of the Broadcast Bureau, filed on July 15, 1966, by Norristown Broadcasting Co., Inc. (WNAR), *Is denied;* that the petition for leave to amend and return to the processing line, filed on June 3, 1966, by Norristown Broadcasting Co., Inc. (WNAR), *Is granted;* that the amendments to the application (BP–12902) of Norristown Broadcasting Co., Inc. (WNAR), filed on June 3, June 10, June 20, July 1, and July 20, 1966, *Are accepted;* and that the application of Norristown Broadcasting Co., Inc. (WNAR), as amended, *Is returned* to the processing line; and

It is further ordered, That the petition to enlarge issues and for associated relief, filed on March 22, 1966, by the Broadcast Bureau, *Is denied;* and

It is further ordered, That this proceeding *Is terminated.*

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

FCC 66R-351

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
ABACOA RADIO CORP. (WRAI), RIO PIEDRAS (SAN JUAN), P.R.	Docket No. 14977 File No. BP-14070
MID-OCEAN BROADCASTING CORP., SAN JUAN, P.R.	Docket No. 14978 File No. BP-14994
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted September 13, 1966)

BY THE REVIEW BOARD.

1. The Review Board has before it for consideration a joint petition for approval of agreement filed by Mid-Ocean Broadcasting Corp. (Mid-Ocean) and Abacoa Radio Corp. (WRAI) (Abacoa) on July 13, 1966.[1] By this petition the parties seek approval of an agreement whereby Abacoa would either dismiss its application for authority to operate on 1190 kc, or amend to 1520 kc and Mid-Ocean's application for 1190 kc would be granted.

2. The above-captioned standard broadcast applications are mutually exclusive and were designated for consolidated hearing by Commission order, FCC 63-174, released February 26, 1963. An initial decision (FCC 64D-37, released June 2, 1964) favored a grant of Mid-Ocean's application. The Review Board on June 2, 1965,[2] remanded the proceeding for further hearing on the possibility of a waiver of section 73.188 of the rules and on the standard comparative issue; the Board noted that the section 307(b) issue may not be decisive. It is in this posture that the agreement is offered.

3. The agreement between Mid-Ocean and Abacoa provides that Abacoa, in consideration of $16,750 as partial reimbursement[3] for its legitimate and prudent expenses incurred in connection with the preparation, filing, and advocating the grant of its application, will seek either to amend its application to specify 1520 kc or, if such amendment is not permitted, to withdraw its application. To support the legitimacy of the $16,750 consideration and the agreement the parties have submitted affidavits signed by the treasurer of Abacoa, the treasurer of

[1] On July 13, 1966, Mid-Ocean and Abacoa also filed a petition for waiver of 5-day requirement of rule 1.525(a) and a petition for certification to Review Board; both pleadings are related to the joint petition mentioned above. Good cause has been shown for waiver of the 5-day requirement. In addition, Abacoa filed a petition for leave to amend on July 13, 1966. This request will be considered in paragraph 6, infra. The Broadcast Bureau filed comments on joint petition for approval of agreement and related pleadings on July 19, 1966.

[2] FCC 65R-204, 5 R.R. 2d 774, review dismissed FCC 65-648, 5 R.R. 2d 776, released July 22, 1965.

[3] The parties have indicated in their joint petition that during the negotiations Abacoa informed Mid-Ocean that its expenses totaled "somewhere between $26,000 and $30,000."

Mid-Ocean, Abacoa's consulting engineer, and Mid-Ocean's consulting engineer, and a letter signed by Abacoa's legal counsel. The affidavits of the two treasurers state that the petition and the attached agreement recite all relevant facts surrounding the agreement and the total amount of consideration. Engineering and legal expenses incurred by Abacoa in connection with its application for the use of 1190 kc are shown to have been substantially in excess of the amount of reimbursement. Abacoa's legal counsel states that the itemized legal expense does not include any expenses incurred in settlement of this proceeding or the proposed amendment of Abacoa's application to specify operation at increased power on 1520 kc. Mid-Ocean's engineer states that from September 1965 to March 1966 Mid-Ocean incurred expenses of $1,225.06 for engineering work done in connection with the exploration of the possibility of WRAI (Abacoa's present station) operating at increased power on 1520 kc (its present frequency). The parties assert that this latter expenditure does not constitute consideration within the meaning of section 1.525(a)(1) of the rules but, even if it is so considered, the expenses established by Abacoa are considerably in excess of the amount of reimbursement proposed.

4. In their petition the parties recite the history of the negotiations between them, which started on or about September 7, 1965, and culminated in the agreement executed on June 7, 1966.[4] The parties assert that due to various legal and technical questions this proceeding has been in the trial stage for over 3 years, and that approval of the agreement would be in the public interest and would avoid further expense and delay. The parties contend that approval will permit the early establishment of a new standard broadcast service and that, if Abacoa's amendment is also approved, a substantial improvement of an existing facility, station WRAI, will result. The Broadcast Bureau supports the approval of the agreement and the grant of Mid-Ocean's application but would not permit Abacoa's amendment "at this stage of the proceeding."

5. Except for the delay in the filing of the agreement, petitioners have complied with all the requirements of section 1.525 of the rules. Approval of the agreement is in the public interest and would not unduly impede achievement of a fair, efficient, and equitable distribution of radio service to the public; since no basic qualifications issues are outstanding, it will permit the early inauguration of a new standard broadcast service at a date earlier than would otherwise be possible. See *Keith L. Reising*, FCC 66R–324, released August 26, 1966. The reimbursement to Abacoa, totaling $16,750, is legitimate and prudent under the circumstances, and is properly supported by affidavits. The expenses listed by Abacoa's consulting engineer and its legal counsel are considerably in excess of the total consideration agreed upon; therefore, it is unnecessary to determine whether the engineering ex-

[4] The agreement was not filed with the Commission until July 13, 1966. Section 1.525(a) of the rules requires that such agreements must be filed within 5 days after their execution. By separate petition filed on July 13, 1966, the parties have requested a waiver of this requirement because of the difficulties encountered due to geographical separation. The Broadcast Bureau states that the Commission has been kept fully informed by the parties at all times and supports the waiver of the 5-day rule. Accordingly, the Board will waive the 5-day filing requirement and consider the merits of the agreement.

pense ($1,225.06) incurred by Mid-Ocean in studying the feasibility of WRAI's (Abacoa's) operation on 1520 kc at increased power constitutes additional consideration.

6. The amendment offered by Abacoa[5] to specify operation on 1520 kc at 10-kw power, unlimited hours, directionalized operation, will also be accepted under the provisions of section 1.522(c) of the rules. However, since Abacoa's amendment includes a new engineering proposal, its application must be removed from hearing status and returned to the processing line. See sections 1.564(b) and 1.571(i) of the rules.

Accordingly, it is ordered, This 13th day of September 1966, that the petition for waiver of 5-day requirement of rule 1.525(a), filed July 13, 1966, by Abacoa Radio Corp. (WRAI) and Mid-Ocean Broadcasting Corp., *Is granted;* that the petition for certification to Review Board, filed on July 13, 1966, by Abacoa Radio Corp. (WRAI) and Mid-Ocean Broadcasting Corp., *Is granted;* that the joint petition for approval of agreement, filed July 13, 1966, by Abacoa Radio Corp. (WRAI) and Mid-Ocean Broadcasting Corp., *Is granted;* and that the agreement *Is approved;* and

It is further ordered, That the application of Mid-Ocean Broadcasting Corp. for a new standard broadcast station at San Juan, P.R., *Is granted*, subject to the following condition:

> Pending a final decision in docket No. 14419 with respect to presunrise operation with daytime facilities, the present provisions of section 73.87 of the Commission rules are not extended to this authorization, and such operation is precluded; and

It is further ordered, That the petition for leave to amend the application of Abacoa Radio Corp. (WRAI), filed on July 13, 1966, by Abacoa Radio Corp. (WRAI), *Is granted;* that the amendment tendered by Abacoa Radio Corp. (WRAI on June 17, 1966, *Is accepted;* and that the application of Abacoa Radio Corp. (WRAI) as amended *Is removed* from hearing status and returned to the processing line; and

It is further ordered, That this proceeding *Is terminated.*

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

---

[5] Abacoa tendered its amendment on June 17, 1966, but did not petition for its acceptance until July 13, 1966, the day the joint petition was filed.

FCC 66R-355

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of ATLANTIC BROADCASTING CO. (WUST), BETHESDA, MD. For Construction Permit	Docket No. 16706 File No. BP-14357
ATLANTIC BROADCASTING CO. (WUST), BETHESDA, MD. For Renewal of License	Docket No. 16707 File No. BR-1513
BETHESDA-CHEVY CHASE BROADCASTERS, INC., BETHESDA, MD. For Construction Permit	Docket No. 16708 File No. BP-16319

MEMORANDUM OPINION AND ORDER

(Adopted September 14, 1966)

BY THE REVIEW BOARD: BOARD MEMBERS NELSON AND KESSLER NOT PARTICIPATING.

1. The above-captioned applications were designated for hearing by Commission order FCC 66-526, released June 16, 1966. These applications include an application for renewal of station license filed by Atlantic Broadcasting Co. (WUST), an application filed by Atlantic Broadcasting Co. (WUST) to increase its power from 250 w to 5 kw with 1 kw during critical hours, and an application filed by Bethesda-Chevy Chase Broadcasters, Inc., for a new station at Bethesda, Md., with power and frequency identical to Atlantic's existing operation. Issues 4 and 5 seek to determine whether the proposed operation of station WUST with increased power will realistically provide a local transmission facility for its specified station location (Bethesda, Md.) or for another larger community (Washington, D.C.) and to determine, in the event it is concluded that the WUST proposal will not realistically provide a local transmission facility for its specified station location, whether it meets the technical requirements set forth in sections 73.30, 73.31, and 73.188(b) (1) and (2) as to coverage of the community for which it will provide a local transmission service. There was no specific section 307(b) issue included in the designation order.

2. Bethesda-Chevy Chase Broadcasters, Inc., seeks to modify the issues in this proceeding by: Broadening the inquiry pursuant to issues 4 and 5 to include the WUST renewal application and the Bethesda-Chevy Chase application; adding a contingent 307(b) issue as between Washington, D.C., and Bethesda, Md., in the event one or more applications are found to be realistically for Washington, D.C.; and to determine in the event it is found that any of these proposals will realistically provide a local service to a community

106-511—66——2

other than Bethesda, Md., whether such proposal or proposals comply with section 73.25(a)(5)(ii) of the Commission's rules.[1]

3. Bethesda-Chevy Chase has alleged no new facts or circumstances to support its request to modify the issues. Rather, it has relied upon its interpretation of various Commission policies and rules. Noting that issues 4 and 5, which apply to Atlantic's application to increase power, were included pursuant to the Commission's *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, released December 27, 1965, 2 FCC 2d 190, 6 R.R. 2d 1901, Bethesda-Chevy Chase observes that the criteria set forth in the policy statement which warrant the application of such issues to Atlantic's application for increase in power are equally applicable to Atlantic's application for renewal of license and to the Bethesda-Chevy Chase application for a new station.[2]

4. This argument does not warrant the action here requested. The Board acts on petitions to modify or enlarge issues pursuant to delegated authority contained in section 0.365 of the Commission's rules. That delegation carries with it authority to make such changes in the designated issues as might be justified by newly discovered factual allegations adequately supported by affidavit or official notice as required by section 1.229 of the Commission's rules. Also, in situations where it is shown that some matters have been overlooked by the body designating the matter for hearing, the Board may modify the issues as required. However, that is not the case in the matter before us. It is obvious on the face of the designation order herein that the Commission was cognizant of its *Policy Statement on Section 307(b) Considerations*, supra. Moreover, the Commission was fully cognizant of

---

[1] The Review Board now has before it the following pleadings: Petition to enlarge issues filed by Bethesda-Chevy Chase Broadcasters, Inc., July 7, 1966; Broadcast Bureau's comments on petition to enlarge issues filed August 5, 1966; statement on petition to enlarge issues filed by Atlantic Broadcasting Co., August 5, 1966; and a reply filed by Bethesda-Chevy Chase Broadcasters, Inc., August 24, 1966.

[2] In its policy statement on sec. 307(b) considerations for standard broadcast facilities involving suburban communities, the Commission noted a problem arising out of a growing propensity for applicants to specify a suburban community as their station location because of 307(b) and other technical advantages which flowed from such a designation, while in fact the applicant intended to serve the large city to which it was adjacent and the surrounding urbanized area. To curtail this practice the Commission stated as follows: "For these reasons, it will be our policy in the future under sec. 307(b) to examine every application for new or improved standard broadcast facilities to determine: (1) 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. When such a condition is found to occur, a presumption will arise that the applicant realistically proposes to serve that larger community rather than his specified community. If that presumption cannot be rebutted on the basis of the material included within the application, an evidentiary hearing will be held to determine whether the application should be treated as a proposal for the applicant's specified community or for some larger community."

The Commission further noted: "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. However, 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 secs. 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. However, he will be accorded only the 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. The application of an applicant who fails to rebut the presumption and fails to meet all of the technical requirements for that larger community will be denied."

the fact that WUST presently places a 5-mv/m signal over a substantial portion of northwest Washington, D.C., and that the station proposed by Bethesda-Chevy Chase would also place a 5-mv/m signal over a like area of Washington, D.C. Furthermore the Commission was fully cognizant of section 73.25(a)(ii) of its rules and, in paragraph 2 of its designation order, specifically waived the requirements of that section as to Atlantic's application to increase power. In view of these circumstances, to modify the issues as requested here would require reconsideration and modification of an action taken by the Commission with full cognizance of all the pertinent facts. This the Board is not authorized to do. *Fidelity Radio, Inc.*, 1 FCC 2d 601, 6 R.R. 2d 140 (1965). The petition to enlarge issues will therefore be denied.

Accordingly, it is ordered, This 14th day of September 1966, that the petition to enlarge issues in the above-captioned matter by Bethesda-Chevy Chase Broadcasters, Inc., *Is denied*.

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

FCC 66-812

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of VOICE OF THE CAVERNS, INC. (ASSIGNOR) AND JOHN B. WALTON, JR. (ASSIGNEE) For Assignment of License and Construction Permit of KAVE-TV, Carlsbad, N. Mex.	File No. BAPLCT-76

MEMORANDUM OPINION AND ORDER

(Adopted September 7, 1966)

BY THE COMMISSION: COMMISSIONERS BARTLEY, WADSWORTH, AND JOHNSON, ABSENT.

1. The Commission has before it for consideration the above-captioned assignment application of Voice of the Caverns, Inc., licensee of television station KAVE-TV, channel 6, Carlsbad, N. Mex., and various pleadings filed in connection therewith.[1] Voice of the Caverns (Assignor) proposes to assign the license, and a modified construction permit, of KAVE-TV to John B. Walton, Jr. (Assignee). Assignor also proposes to assign the license of KAVE-AM to a different assignee. However, the application covering that assignment is not in issue here, since the pleadings referred to below go only to BAPLCT-76.

2. The proposed assignment of KAVE-TV is otherwise unobjectionable, except that among the broadcast properties owned by Assignee is KVKM-TV, channel 9, Monahans, Tex. Monahans is roughly 120 miles from Carlsbad, N. Mex. The Assignee concedes that the grade B contours of KAVE-TV and KVKM-TV overlap, but contends that a grant would not be contrary to section 73.636(a)(1) of the rules—which prohibits overlap of grade B contours of commonly owned stations—because he intends to operate KAVE-TV as a satellite of his Monahans station, KVKM-TV. Under Walton's proposal, the Carlsbad station, KAVE-TV, would originate no local programs, but would carry instead KVKM-TV's full program schedule.

3. The central question posed by this application is whether the grade B overlap here is justified under note 4 to section 73.636(a)(1), which states that the revised duopoly rules "* * * will not be applied to

[1] Those pleadings are (*a*) petition to deny the proposed assignment of KAVE-TV (BAPLCT-76), filed July 5, 1966, by Taylor Broadcasting Co., licensee of KBIM-TV, channel 10, Roswell, N. Mex.; (*b*) opposition, filed July 5, 1966, to (*a*) above; and (*c*) reply, filed July 11, 1966, by petitioner, to (*b*), above.

television stations which are primarily 'satelite' operations."[2] The applicants to BAPLCT–76 contend that only a satellite operation is feasible for Carlsbad and Monahans. Taylor Broadcasting Co., the licensee of a Roswell, N. Mex., station which competes for advertising revenues and viewers in Carlsbad, denies this, arguing that operation of KAVE–TV as a satellite service would downgrade the Carlsbad station and subject petitioner to unfair competition.[3]

4. An analysis of the engineering data contained in the application shows that the overlap of KAVE–TV's and KVKM–TV's grade B contours is as follows:

	Population	Area
(1) KVKM–TV total grade B	276,960	14,310
(2) KAVE–TV total grade B	149,547	16,420
(3) Population in overlap area	38,139	2,965
(4) Combined grade B	388,369	27,765
(5) Overlap related to (4) percent	9.8	10.7
(6) KAVE–TV grade B not overlapped by KVKM–TV	111,408	13,455
(7) Portion of (6) served by KAVE–TV only	405	1,013
(8) Portion of (6) served by KAVE–TV and 1 other station	19,116	2,440
(9) Portion of (6) served by KAVE–TV and 2 other stations	91,887	10,002

5. The essence of applicant's showing to justify operating KAVE–TV as a satellite of KVKM–TV is that neither Carlsbad nor Monahans has a sufficient economic base to support a local television station. To substantiate this claim, the applicants have set out the economic histories of both stations.

6. Assignor avers that the history of KAVE–TV since it first went on the air has been one of uninterrupted and continuous losses. The station has lost money under three successive owners, with a cumulative net operating loss of $207,000. Since Assignor, Voice of the Caverns, acquired KAVE–TV and KAVE–AM in 1963, it has suffered a net operating loss of approximately $76,000. Assignor's principal stockholder, John Deme, has now exhausted his resources and credit at local banks and is unable to obtain further loans. In an affidavit attached to Assignor's opposition to the petition to deny, Deme further alleges that Assignor is in arrears in interest payments on outstanding loans; that $25,500 in notes will soon fall due and Assignor cannot meet even the interest payments; that the costs of constructing a new tower under a modified construction permit have exceeded expectations and Assignor still owes more than $12,000 on such costs; that legal actions have been filed against Assignor by several creditors, with suits by other creditors threatened; that Assignor's funds are insufficient to meet current payroll costs, and that if the assignment be not approved, KAVE–TV is in danger of going dark. The balance sheet filed with the application shows Assignor's current liabilities exceed current assets by approximately $40,000.

7. Further in support of the claim that Carlsbad cannot support a local television station, the applicants refer to the competition which

[2] The exemption of satellite operations from the duopoly rule is not absolute. *Eugene Television Inc.*, 2 FCC 2d 706, 708. As recognized by note 4, the degree to which grade B overlap of commonly owned stations is justified and in the public interest must be resolved on an ad hoc basis.

[3] Taylor Broadcasting Co. has standing to petition to deny the application. *Eugene Television, Inc.*, supra.

KAVE–TV (the only station in Carlsbad) must face from outside areas. Two Roswell, N. Mex., stations—KSWS–TV and KBIM–TV (the latter station being licensed to petitioner)—provide direct television service to Carlsbad.[4] In addition, Carlsbad Cablevision, Inc., brings in three VHF stations from Albuquerque. Assignor's competitive position has been further weakened by the recent loss of its CBS Network affiliation to petitioner's station, KIBM–TV. Applicants further contend that Carlsbad, with a 1960 population of 25,541, has shown virtually no growth since 1950, and that, even with modified facilities, the prospects for local advertiser support "remain ominous."

8. Finally, Assignor points out that it has made several efforts to sell the station to persons whose other broadcast interests would not give rise to problems of overlap. In January 1965, an assignment application (BAL–5348) was filed with the Commission, but fell through when the proposed assignee exercised his right to terminate the contract. Subsequently, Assignor put the stations in the hands of a station broker. The broker found a prospective buyer for the radio station but, after inspection, the buyer lost interest. No prospects were found for KAVE–TV. Further offers of the stations (singly or as a package) were made to four other persons, but nothing came of these offers.

9. As to Walton's Monahans station, despite Walton's continuing efforts to put the station on a profitable basis, KVKM–TV continues to operate at a loss. The station has sustained an average annual operating loss of $141,703.40. In the 8 years since the station has been on the air, this loss has mounted to a total of $1,141,627.21. Assignee's efforts to make an economically viable enterprise of his Monahans stations have included a change in transmitter site, establishing microwave facilities at his own expense (which facilities proved ineffective), purchasing private microwave service, and obtaining Commission authority to identify KVKM–TV as an Odessa, Tex., station. Despite all this, the network with which KVKM–TV is affiliated is not satisfied that the station satisfactorily covers certain areas. Accordingly, KVKM–TV's hourly rate is approximately half that of neighboring stations in the Midland-Odessa area.

10. Assignee's principal reason for his proposal to acquire KAVE–TV and operate it as a satellite of KVKM is to increase his total audience. Indications are that by adding the viewers obtained by operating KAVE–TV as a satellite, KVKM–TV's total audience may be increased sufficiently to enable KVKM to obtain the national business it needs for survival. Thus, through the proposed satellite operation, Walton hopes to make KVKM–TV an economically viable enterprise.

11. The petitioner, Taylor Broadcasting Co., does not controvert Assignor's financial condition.[5] Nor does petitioner dispute the extent

[4] In a letter attached to the petition to deny, Taylor Broadcasting Co. claims that KBIM–TV puts a "city grade" signal past Carlsbad.

[5] The applications for assignment of KAVE–TV and the associated AM station were filed shortly before expiration of the 3-year holding period. Considering Assignor's financial condition, there is meritorious basis for granting an exception to the 3-year rule under sec. 1.597(a)(3) of the rules. 47 C.F.R. 1.597(a)(3). The same considerations apply to the assignment of KAVE–AM (BAPL–346), which is not in issue here.

of the continuing losses (totaling in excess of $1 million) which Walton has sustained in his operation of KVKM–TV, although petitioner does claim that Walton's personal financial standing and other broadcast interests negate the "theme of continuing financial hardship." Similarly, while petitioner disputes Assignor's contention that 405 families depend on KAVE–TV alone for television service (and thus would lose their only service if KAVE–TV went dark), petitioner has not furnished any engineering data tending to refute the existence of this alleged white area. As much as there is in petitioner's pleadings on this point an unsupported, argumentative assertion that KAVE–TV is "patently in error" in claiming that 405 persons depend on it alone for service, and that this "just cannot be so." Beyond this, there is no factual data in petitioner's pleadings to refute Assignor's engineering claims that if KAVE–TV goes dark, more than 19,000 people would be left with only 1 service, and approximately 92,000 persons would be reduced to 2 services. Here, petitioner contents itself with the argument that service to the Carlsbad area afforded by petitioner's station (KBIM–TV) and another Roswell, N. Mex., station (KSWS–TV) refutes any possible claim "* * * that any Carlsbad home can be considered 'underserved.'" In short, petitioner's pleadings amount to a general (and factually unsupported) denial that applicants have made a sufficient showing to justify the proposed satellite operation.

12. The degree to which overlap of grade B contours of commonly owned stations is consistent with the public interest is a matter to be determined on an ad hoc basis. (Note 4 to sec. 73.636(a)(1) of the rules.) In a memorandum opinion and order disposing of certain petitions for reconsideration in docket 14711—which led to the revised duopoly rules—the Commission noted (par. 17) that on

> * * * further consideration of this matter, we believe that some discussion and elaboration of the satellite concept is in order.
>
> 18. A satellite station is one operating on a channel specified in the Television Table of Assignments and meeting all of the technical requirements of our rules, but one which usually originates no local programing and which may, and often does, involve overlap with a commonly owned parent station to a degree which would not be consistent with the duopoly rules. It rebroadcasts the programing of the parent station, usually a station under the same ownership in the same region. Such stations have been authorized, since 1954, on the basis of relaxation of our policies concerning local program origination and, if necessary, waiver of section 73.636 as to overlap. The purpose has been to bring television service to small communities and sparsely settled areas where there is insufficient basis for a full-scale television operation. It has been our hope—fulfilled in many instances—that satellite stations would develop with time into more nearly full-scale operation, with local studios and local program origination.
>
> 19. We have no doubt that it is in the public interest to authorize satellite television stations. Nor do we doubt the wisdom of exempting them from the duopoly rule as we have done, in the interest of promoting service to the kind of areas they are intended to accommodate. In addition, we are of the opinion that satellites which ultimately achieve a financial base that permits them to originate local programing should be permitted to do so. Otherwise, local programing would be kept off the air contrary to the public interest * * *.
>
> 20. As mentioned, satellites involve a deviation from general Commission policy with respect to local programing, as well as to overlap. We shall require all applicants proposing such operations to make a showing as to why a satellite form of operation is necessary for the community for which

they are applying. Our decision will depend on the facts of each case; but in general satellite grants will be made only in communities having no local television station. We have deviated from this principle in some past situations, but it does not appear equitable or in the public interest to relax our policies and rules for one station when its competitor in the same town is held to a higher standard and when the community appears able to support a full-scale operation. Any extension of this principle (for example, when there is an existing regular station in a nearby community) will be determined in individual situations * * *. (Docket 14711, 29 F.R. 13896, 3 R.R. 2d 1554, 1562–1563.)

13. Applying these principles to the application before us, we cannot agree with petitioner that the applicants have failed to make a sufficient showing to justify the proposed satellite operation. Certainly, there is ample basis for concluding, in light of the economic histories of KAVE–TV and KVKM–TV, that neither the Carlsbad nor Monahans area, standing alone, has a sufficient economic base to support a viable local television operation. KAVE–TV's history in Carlsbad has been one of uninterrupted losses ever since it went on the air, both under Assignor and two prior owners. Walton's cumulative losses in connection with his Monahans station are even more drastic—net operating losses in excess of $1 million. Unquestionably, these losses are attributable in large measure to the inadequate population base of the communities involved, and competing television service from neighboring communities. Carlsbad, for instance, has a 1960 population of 25,541; Monahans, a 1960 population of 8,567. While KAVE–TV is the only local station in Carlsbad, additional television service is available from petitioner's Roswell station (KBIM–TV), from another network-affiliated Roswell station (KSWS–TV), and from a CATV system which brings in the signals of three Albuquerque VHF stations. KVKM–TV, the Monahans station, is in competition with television stations in Midland and Odessa, Tex. Taken together, these factors reasonably suggest that Carlsbad and Monahans are unable to support local television operations, "so that the only means of providing television service to a significant number of persons would be through the relatively inexpensive means of 'satellite' stations." *Eugene Television, Inc.*, 2 FCC 2d 706, 708.

14. This conclusion is further buttressed by the relatively small degree of overlap which will result under the proposal, and the very distinct possibility that KAVE–TV will go dark if it is not placed in the hands of a financially qualified operator. Turning first to the overlap figures, approximately 75 percent of the population and 82 percent of the area within KAVE–TV's grade B contour are not overlapped by KVKM–TV's grade B contour. The population in this area (roughly 111,000 persons) presently receives service from only 3 stations, including KAVE–TV. If KAVE–TV were to go dark, 405 persons would lose their only service, some 19,000 would be left with only 1 service, and some 91,000 would receive only 2 services. Considering the admitted public interest in affording multiple competitive television service to the public, the overlap here is not sufficient to require a denial of the application.

15. As to Assignor's financial condition, the plain fact is that KAVE–TV does not have current funds to continue its operations [6]

[6] License renewals for KAVE–TV and AM have been deferred since Oct. 1, 1965, because of Assignor's lack of financial qualification.

and no alternative for keeping the Carlsbad station on the air, short of the proposed satellite operation, has been presented to the Commission. And while petitioner argues (reply, par. 7) that "* * * downgrading KAVE–TV to a satellite is not the only means of providing television service to a significant number of persons," it is silent as to what the alternatives are, beyond arguing that petitioner and its sister Roswell stations can adequately serve Carlsbad. Admittedly, for KAVE–TV to become a satellite of KVKM–TV and to carry the Monahans station's full program schedule does involve a degree of downgrading. A local community television outlet is always to be preferred over a satellite operation. Nevertheless, television markets being what they are, this is not always possible and, where a community cannot support a local television operation, deviations from the general policies regarding local program origination and overlap are provided for through satellite operations. Thus, the less-than-local service which might result from operating KAVE–TV as a satellite of the Monahans stations is inseparable from the economics of the Carlsbad market.[7] And even satellite service is preferable to permitting Carlsbad's only television station to go totally dark.

16. Petitioner argues also—both in its petition to deny and its reply—that a satellite operation would subject KBIM–TV to unfair competition, citing here the proposition quoted above that it "does not appear equitable or in the public interest to relax our policies and rules for one station when its competitor in the same town is held to a higher standard and when the community appears able to support a full-scale operation." (3 R.R. 2d 1563.) Petitioner's reliance on this proposition is misplaced for several reasons. First of all, petitioner has misconceived its position as a "competitor in the same town" for which satellite operations are authorized. Concededly, petitioner competes for viewers and advertising revenues in the Carlsbad area. But this does not make it a Carlsbad station, or KAVE–TV's "competitor in the same town." Secondly, the self-imposed restrictions on authorizing satellite operations is to apply only "* * * when the community appears able to support a full-scale operation," which we have found not to be the case here. And, finally, in arguing that competition from a satellite is unfair, petitioner has missed the whole point of the satellite concept. As is abundantly clear from the memorandum opinion and order in docket 14711, supra, satellite operations generally involve overlap and lack of local program origination. But deviations from the general policies in these areas is justified when the economics of a particular television market are such that a local television operation is unsupportable.

17. One further matter needs attention. In its reply, petitioner sets out a letter to the Commission wherein it is claimed Assignor's president, John Deme, called on petitioner's president, W. C. Taylor. In the presence of Taylor and G. F. Roberts, petitioner's executive vice president, Deme is said to have urged petitioner to withdraw its petition; that, at best, the petition would merely delay the transfer;

[7] The economic problems of the Carlsbad market are attested to in part by assignor's unsuccessful efforts to sell either or both the television or radio station to persons other than Walton.

that Assignee's father is a man of immense personal wealth, and the political power of the Walton organization reaches "into the very highest government levels"; that petitioner could ill afford to oppose such a person; and that from remarks made by Deme it could be inferred Walton is already in control of KAVE–TV because of $90,000 Assignee has advanced to Assignor to construct a new television tower.

18. Assuming the truth of these statements, Deme's conduct deserves the strictest censure. The abuse of process implicit in such conduct is intolerable. However, nothing in petitioner's letter suggests that Walton was personally involved in any manner, or that he authorized or approved Deme's actions, or that improper influence was brought in any way to bear on the Commission or its staff. Thus, it cannot be said that Deme's conduct alters the public interest considerations which justify approval of the proposed satellite operations.[8] As to the private aspects of Deme's conduct, we note that petitioner alleges Deme "* * * is planning another station in Douglas, Ariz." So far as we have been able to determine, Assignor has not filed any application for facilities in the Douglas market. However, in the event such an application is filed, Assignor's conduct, as it bears on character qualification, will be considered at that time.[9]

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

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

---

[8] The advance of the $90,000 so that Assignor could complete construction under a modification construction permit does not warrant the conclusion that Assignee has assumed control of KAVE–TV prior to Commission approval of the assignment application. The instruments covering this transaction have been put in escrow, the escrow agreement being expressly conditioned on Commission approval of the proposed assignment. In the event of nonapproval of the assignment, Walton (under the escrow agreement) would merely have obtained a mortgage to secure his loan.

[9] Deme has no broadcast interests other than KAVE–AM and TV.

FCC 66R-348

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
OCEAN COUNTY RADIO BROADCASTING CO., TOMS RIVER, N.J.	Docket No. 15944 File No. BPH-4078
SEASHORE BROADCASTING CORP., TOMS RIVER, N.J.	Docket No. 15945 File No. BPH-4632
For Construction Permits	

APPEARANCES

Joseph F. Hennessey, on behalf of Ocean County Radio Broadcasting Co.; *Forbes W. Blair*, on behalf of Seashore Broadcasting Corp.; and *John B. Letterman*, on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted September 8, 1966)

BY THE REVIEW BOARD: NELSON, PINCOCK, AND SLONE.

1. Each of the applicants in this proceeding seeks authorization to construct a new FM broadcast station to operate on an unlimited-time basis on the frequency 92.7 Mc (channel No. 224) with 3 kw effective radiated power at Toms River, N.J. By order (mimeo No. 66828, released April 26, 1965) their applications were designated for consolidated hearing with the then mutually exclusive application of Beach Broadcasting Corp.[1] Each of the applicants was found to possess the requisite statutory qualifications to construct and operate its proposed facility, but because concurrent operation would result in mutually destructive interference, hearing was ordered on the standard comparative issue to determine which of the applications should be granted.

2. After weighing the applicants' comparative showings within the context of the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 R.R. 2d 1901 (1965), Hearing Examiner Forest L. McClenning recommended that Seashore's application be granted. In so holding he concluded: (*a*) That since neither applicant nor any of their respective officers and stockholders own any interest in a medium of mass communication, the Commission's objective of achieving maximum diffusion of control of such media would be equally served by a grant of either application; (*b*) that each applicant fulfilled its responsibility of demonstrating a reasonable knowledge of the community and area through the background of its principals and

[1] At the commencement of the hearing, Beach Broadcasting Corp. requested the dismissal of its application. By order (FCC 65M-1274, released Sept. 30, 1965) the examiner granted the petition for dismissal.

the surveys conducted; (*c*) that there are no material and substantial differences evidencing a superior devotion to public service between the applicants' proposed program plans;[2] (*d*) that neither applicant is entitled to a preference for its proposal with respect to full-time integration; and (*e*) that although the applicants are quantitatively on a par in terms of proposed part-time integration, the slight qualitative credit merited by Seashore's partially integrated stockholders under the element of local residence as enhanced by their participation in civic affairs is the distinguishing feature between the comparative showings, and dictates a grant of Seashore's application.

3. The proceeding is now before the Review Board on exceptions to the initial decision filed by Ocean County and Seashore. We have reviewed the initial decision in light of these exceptions and the oral arguments of the parties held before a panel of the Board on July 6, 1966.[3] In brief, the Board concurs with the examiner's recommendation and, except as modified herein or in the rulings on exceptions contained in the appendix hereto, the examiner's initial decision is adopted.

4. The only aspect of the initial decision which we believe warrants discussion here concerns the examiner's refusal to accord either applicant a preference for its proposed full-time integration. We are in agreement with the examiner's conclusion but in reaching this result have applied a different rationale. Each of the applicants intends to have one of its stockholders serve as general manager and assume day-to-day responsibility for station operations. In the case of Ocean County this position would be held by Frank Foley, a resident of Toms River, who, in addition to owning a 30-percent stock interest in Ocean County, serves as its president. Seashore's proposed general manager is James Westhall, who is a vice president and holder of 16⅔ percent of its stock. In the event Seashore's application is granted, Westhall, who has an impressive background in the broadcast industry, would move to Toms River.

5. Whereas the examiner relied upon Westhall's broadcast experience and his participation in the civic affairs of his former residence communities to compensate for the quantitative credit attributed to Foley's greater stock interest,[4] we are of the view that the local residence attributes of Foley and Westhall are equal, but that the strong qualitative credit merited by the broadcast experience Westhall would bring to Seashore's operation is sufficient to offset the modest quantitative credit due Ocean County. Although the policy statement assigns a greater weight to a participating owner's present local residence

[2] The Commission's policy statement was released on July 28, 1965. The Board reads this statement as barring the adduction of evidence on program plans and preparation in all cases designated for hearing after the release date, absent a specific issue. The policy statement provides that where (as in the subject proceeding) the applications were designated prior to July 28, 1965, the party wishing to adduce such evidence must make an offer of proof to the examiner which demonstrates that the evidence will be of substantial value under the relevant criteria. In admitting evidence with respect to program plans and preparation, the examiner was presumably satisfied with the showings submitted by the applicants herein.

[3] The Broadcast Bureau did not participate in the comparative hearing or in the oral argument, and has not filed exceptions to the initial decision.

[4] Because Ocean County's controlling principals, like Seashore's, will refrain from substantial integration into day-to-day operations, the difference in degree of integration is not impressive.

than to proposed local residence, this general pronouncement assumes the typical comparison of a principal (in one applicant) of long-term local residence [5] against one (in the competing applicant) who has not formerly resided in the area. Such is not the situation before us. Foley moved to Toms River in September 1961, less than 2 years before Ocean County filed its application. Prior to moving to Toms River, Foley lived in New York City and there is no evidence that he had any previous familiarity with the proposed service area. Westhall, on the other hand, was born in nearby Lakewood and was a resident of that community until 1952—a period of 25 years. Moreover, since 1952 Westhall has frequently visited his family and friends in Lakewood. Under these circumstances and viewed realistically within the context of their familiarity with the area, we are of the opinion that the showing made by Westhall must be equated to that made by Foley. In reaching our conclusion to treat the local residence attributes of Foley and Westhall as equal, we have declined to award any credit to either applicant for the past civic participation of their proposed general managers. As part of a participating owner's local residence background, his past civic activities constitute an additional guide in measuring his knowledge of and interest in the welfare of the community to be served.[6] Accordingly, while evidence of Westhall's civic activities in Laconia, N.H., might be indicative of his interest in community affairs, that activity generally is not an indicium of his familiarity with the Toms River area and is not relevant to an evaluation of his local residence attribute. Ocean County, on the other hand, gains no significant credit from Foley's community activities, which appear to be confined to his role in a property owner's association representing only a segment of the population and having objectives of limited scope. He does not belong to any local civic or public service organizations and there is no evidence that since moving to Toms River he has participated in any community projects. Thus, while our rationale differs somewhat from that of the examiner and is substituted therefor, we reach the same conclusion—namely, that the overall showings made by the applicants are so nearly equal as to preclude a preference to either for full-time integration of ownership and management.

6. Because of our basic agreement with all remaining aspects of the examiner's analysis, no useful purpose would be served by a further discussion of the initial decision.

Accordingly, it is ordered, This 8th day of September 1966, that the application of Seashore Broadcasting Corp. (BPH–4632) for a construction permit for a new FM broadcast station to operate on channel No. 224 at Toms River, N.J., *Is granted;* and that the application of Ocean County Radio Broadcasting Co. (BPH–4078) for the same authorization *Is denied.*

DEE W. PINCOCK, *Member.*

[5] In its policy statement, the Commission recognized that, to be meaningful, an owner's present residence should be of "several years' duration."

[6] "Past participation in civic affairs will be considered as a part of a participating owner's local residence background * * *." *Policy Statement,* 1 FCC 2d 396, 5 R.R. 2d 1910.

APPENDIX

RULINGS ON EXCEPTIONS TO INITIAL DECISION

EXCEPTIONS OF OCEAN COUNTY RADIO BROADCASTING CO.

Exception number	*Ruling*
1, 6, 7	Denied. Such of the requested findings as are not already contained in the initial decision, pars. 5 and 15, would contribute nothing of substance to the decision.
2	Denied. The examiner's findings relating to James L. Parker's position on the Ocean County Planning Board are contained in the initial decision, par. 6. The additional requested findings would contribute nothing of substance to the decision.
3	Denied. The requested findings concerning Westhall's position as a radio-television consultant and the duration of his residency in Lakewood are either already contained in the initial decision, par. 11, or are inferable therefrom. The fact that Westhall conducted several UHF programing surveys redounds to his credit and it is irrelevant that these surveys were assigned to him by Seashore's communications counsel.
4	Denied. With the exception of Ocean County's efforts to secure an FM channel allocation to Toms River, such of the requested findings as are not already contained in the initial decision, par. 15, would contribute nothing of substance to the decision. With regard to its efforts to secure the allocation of an FM channel to Toms River, Ocean County relies on the Commission's decision in *Veterans Broadcasting Co., Inc.*, 38 FCC 25, 4 R.R. 2d 375, and argues that the examiner failed to accord proper credit to its efforts. We disagree. In the *Veterans* case the Commission stated that the references to the procedural history of the channel allocation and the applicants' contributions thereto were for the limited purpose of illustrating that the interest of the applicants' stockholders in providing television service to Syracuse was one of long standing and that its application was indigenous to the community to be served. The Commission expressly stated that such references should not be construed as an indication that allocation efforts constitute an independent preference factor. Therefore, Foley's efforts to secure an FM allocation for Toms River cannot constitute the basis for an independent preferential factor. We have, however, considered Ocean County's allocation efforts in the context of Foley's interest in the welfare of the community but they are not of sufficient significance to appreciably enhance his local residence attribute.
5	Denied. The record supports the examiner's finding that the Parker's participation in Ocean County's programing proposal was limited to their review and approval of the plans developed by Foley. The examiner found that James L. Parker did actively participate in the development of the financial, studio, transmitter, and construction phases of the application.
8	Denied. The examiner has adequately summarized the significant facts of record.
9, 11	Denied. The examiner's rulings rejecting Ocean County's exhibits Nos. 6 and 12 because of irrelevance were proper.

RULINGS ON EXCEPTIONS TO INITIAL DECISIONS—Continued

EXCEPTIONS OF OCEAN COUNTY RADIO BROADCASTING CO.—Continued

Exception number	*Ruling*
10	Denied. The examiner's ruling rejecting Ocean County's exhibit No. 7 relating to proposed studios, staffing, and equipment was proper. "Staffing plans and other elements of planning will not be compared in the hearing process except where an inability to carry out proposals is indicated." *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 R.R. 2d 1901 (1965).
12	Denied. The examiner properly considered previous broadcast experience and civic participation in weighing the criterion of integration of ownership and management. See also pars. 4 and 5 of the decision. (The exception apparently goes to the views expressed in par. 5 of the examiner's conclusions.)
13	Granted to the extent that Seashore should not have received credit for Westhall's civic activities in his former residence communities; denied in all other respects. See pars. 4 and 5 of the decision.
14	Denied. The policy statement specifically includes previous broadcast experience as an attribute to be considered in evaluating integration of ownership and management. As defined in the policy statement previous broadcast experience includes activity which would not qualify as a past broadcast record; i.e., where there was no ownership responsibility for a station's performance.
15	Denied. The record indicates interviews were conducted by Seashore's stockholders and that the reports of these interviews together with the results of the telephone survey were used by Westhall in developing Seashore's program proposal. Westhall's work was reviewed by Seashore's remaining stockholders.
16	Denied. In the policy statement the Commission stated no independent factor of likelihood of effectuation will be utilized in the comparative evaluation and that if there is a "substantial indication" that any party will not be able to carry out its proposals to a significant degree, the proposals themselves will be considered deficient. The record does not support such an indication with regard to the proposal of either applicant. See also rulings on Seashore's exceptions 2–5.
17, 18	Denied. The record and the policy statement support the examiner's conclusions and recommendations to grant Seashore's application. (See also ruling on exception 15.)

EXCEPTIONS OF SEASHORE BROADCASTING CORP.

1	Denied. The examiner has adequately summarized the significant facts of record. There is no evidence tending to contradict Foley's testimony that he conducted the telephone survey and made the community contacts.
2, 3, 4, 5	Denied. The examiner's findings of fact are adequate and support his conclusions that both applicants met their responsibility in determining program needs and interests and that their respective proposals are designed to meet these needs and interests.
6	Denied. The examiner's findings are adequate. He recognized Seashore's higher percentage of live programing, but concluded it was largely explained by differences in the classification of news programs.
7	Denied. The examiner's conclusion is supported by the record. See pars. 4 and 5 of the decision.
8, 9, 10	Denied. The examiner's conclusion is supported by the record.
11	Denied. See rulings on exceptions 7–10.

FCC 66D–8

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of OCEAN COUNTY RADIO BROADCASTING CO., TOMS RIVER, N.J. SEASHORE BROADCASTING CORP., TOMS RIVER, N.J. For Construction Permits	Docket No. 15944 File No. BPH–4078 Docket No. 15945 File No. BPH–4632

APPEARANCES

John F. Hennessey (Booth & Lovett), on behalf of Ocean County Radio Broadcasting Co.; *Forbes W. Blair* (Welch & Morgan), on behalf of Seashore Broadcasting Corp.; *Donald E. Ward* (Fly, Shuebruk, Blume & Gaguine), on behalf of Beach Broadcasting Corp.; and *John B. Letterman*, on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER FOREST L. MCCLENNING

(Adopted February 18, 1966)

PRELIMINARY STATEMENT

1. By Commission order released April 26, 1965, pursuant to the provisions of section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications and the application of Beach Broadcasting Corp. were designated for hearing in a consolidated proceeding. All requested a construction permit for a new FM broadcast station to operate on the frequency 92.7 Mc (channel No. 224) at Toms River, N.J. The order of designation found each of the applicants to be legally, technically, financially, and otherwise qualified to construct and operate its proposed station, but that the applications were mutually exclusive as concurrent operation would result in mutually destructive interference. Hearing, accordingly, was ordered on the following issues:

> 1. To determine which of the operations proposed in the above-captioned applications would better serve the public interest, in light of the evidence adduced and the records made with respect to the significant differences between the applicants as to:
>
> (*a*) The background and experience of each having a bearing on the applicant's ability to own and operate the proposed FM broadcast station.
>
> (*b*) The proposals of each of the applicants with respect to management and operation of the proposed station.
>
> (*c*) The programing services proposed in each of the applications.
>
> 2. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. A prehearing conference was held on May 25, 1965, and hearing was held on September 13 through 16, 1965, with the record being closed on the last above date. At commencement of the hearing Beach Broadcasting Corp. filed a petition to dismiss its application, which was granted and its application dismissed by order released September 30, 1965. Proposed findings of fact and conclusions of law were filed by Ocean County Radio Broadcasting Co. (hereinafter also referred to as Ocean County) and by Seashore Broadcasting Corp. (hereinafter also referred to as Seashore) on November 30, 1965. Reply findings were filed by both applicants on December 10, 1965.

FINDINGS OF FACT

Area To Be Served

3. Toms River, N.J., is located in Dover Township and is the county seat of Ocean County. It is also the seat of the township government. Estimated population of the township is 22,007 persons, of which approximately 42 percent reside in Toms River. It is located within a summer resort area on Barnegat Bay, with vacation travel and seasonal resorts making up the largest industry. Second largest industry of the area is agriculture. Other industries include the Toms River Chemical Corp., which is engaged in the manufacture of dyestuffs and plastics, and the Glidden Co. The largest single employer in the area is the Lakehurst Naval Air Station, which is located adjacent to Toms River. The township is governed by a five-man committee, with a mayor named by the committeemen. The county is governed by a three-man board of chosen freeholders. In addition to civic, educational, religious and community organizations general to such communities, the Garden State Philharmonic Symphony Orchestra, the Toms River Music Guild and Summer Musical Theatre are located in Toms River. There are presently no broadcast stations located in Toms River or in Ocean County, N.J.

The Applicants

Ocean County Radio Broadcasting Co.

4. Ocean County Radio Broadcasting Co. is a New Jersey corporation authorized to issue 12,000 shares of common voting stock. One thousand shares of stock have been issued and are outstanding. The officers, directors, and stockholders are as follows:

Name	Office	Stock interest	
		Shares	Percent
Frank Foley	President and director	300	30
James L. Parker	Treasurer and director	650	65
John C. Parker	Secretary and director	50	5

5. *Frank Foley* was born in New York City and since September of 1961 has been a resident of Toms River, N.J. In 1949 or 1950 he received 3 to 4 months' training in a radio school of broadcasting,

106-511—66——8

which included approximately 40 hours of experience in programs produced and presented by the school over station WLIB. He was thereafter employed for a period of 3 months as an announcer at station WHSY. Returning to New York City, he enrolled in a 3-month training course in radio sales and announcing. During this same period and continuing for a total of approximately 18 months he worked as a reporter for a construction news journal and did commercial recording work, including announcing. His experience since 1951 has included various sales positions, including publications, fire extinguishers, insurance, and medical laboratory service. During 1964 Foley also served as a counselor and registrar for a business school located in Newark, N.J. He is past president of the Brook Forest Property Owners Association, Inc., a homeowners' association of South Toms River, N.J. During the period of his courses in radio he visited a number of radio broadcast stations in the New York area and discussed their operations with management personnel. In planning the instant proposal he visited stations in the New Jersey area to observe and discuss their operations. He would serve full time as general manager of the station in the event of a grant of the Ocean County application.

6. *James L. Parker* was born in Forked River, N.J., a village located 10 miles from Toms River. He has resided in this area virtually the entire time since his birth. Parker has been engaged in building construction work for a number of years and has owned his own company since 1936. Other business interests include 50 percent ownership in the Ocean County Washed Sand & Gravel Co., which at the time of hearing was being dissolved; one-third ownership of Lacey Plaza, a shopping center; majority ownership and officer of South Jersey Oil Co., of Forked River, N.J.; one-third ownership and an officer of Diamond Realty Co., of Toms River, N.J.; and director and less than 1 percent stockholder of the First National Bank of Toms River. Parker is past president of the volunteer fire company of Forked River, having served in that capacity for 25 years. Other area associations include member of the board of directors of Good Luck Cemetery in Minoka Harbor, N.J., a nonsalaried position, the cemetery being operated by a nonprofit corporation; since 1958 chairman of the Ocean County Planning Board; member of the Ocean County Economic Agency; and member of the Pinelands Regional Board. Parker would participate in operation of the proposed station to the extent of visiting it daily, in liaison with local group representatives, and calling in to the station any items of local interest encountered in the course of performance of his duties with the planning board and other business activities. Estimated time to be devoted to the station is 20 hours per week.

7. *John C. Parker* was born in Forked River, N.J., and is the son of James L. Parker. He works with his father in the contracting business and is also a sergeant on the police force of Lacey Township, devoting between 16 and 20 hours per week to the latter duties and 8 hours per day to the contracting business. He would serve in the gathering of local news for the station principally as encountered in the course of performance of his other business activities. Time to be devoted to this function is estimated as 10 hours per week.

Seashore Broadcasting Corp.

8. Seashore Broadcasting Corp. is a New Jersey corporation authorized to issue 500 shares of common voting stock having a par value of $100 per share. Issued and outstanding are 360 shares of stock. The officers, directors, and stockholders are as follows:

Name	Office	Stock interest	
		Shares	Percent
Roy G. Simmons	President and director	60	16⅔
Edward M. Levy	1st vice president and director	60	16⅔
James E. Westhall	2d vice president and director	60	16⅔
Stephen V. Lane, Jr.	Secretary-treasurer and director	60	16⅔
Joseph E. Buckelew	Director	60	16⅔
Robert J. Miller	do	60	16⅔

9. *Roy G. Simmons* was born in Manahawkin, N.J., and is presently a resident of Toms River, N.J. From January of 1942 to July of 1946, Simmons was on active duty with the U.S. Marine Corps. He thereafter completed his schooling and since 1952 has engaged in the practice of law in the State of New Jersey, presently being associated with the firm of Camp & Simmons. He serves as attorney for the Stafford Municipal Utilities Authority, for the Jackson Township Municipal Utilities Authority, and his firm represents the township of Stafford, the Stafford Township Board of Health, and the borough of Point Pleasant. Through such representation Simmons has attended the meetings of these municipal bodies over a period of years. His firm also represents the township of Dover, the township of Ocean, and the township of Plumsted. Simmons' partner is solicitor for the boroughs of Island Heights, Lakehurst, Ocean Gate, and Lavallette, and is county counsel of Ocean County. In the absence of his partner Simmons attends all required meetings of the governing bodies of these political entities. Simmons' civic and other associations include membership in the Ocean County Bar Association, Ocean County Lawyers Club, American Bar Association, Elks, Moose, Veterans of Foreign Wars, American Legion, Marine League, Masonic groups, and the Navy League. Simmons estimates he would devote 10 hours per week to his duties as president, chairman of the board of directors, a member of the executive and editorial committees, and "pulse taking" of the public.

10. *Edward M. Levy* was born in Lakewood, N.J., and has resided in this area since birth other than for periods of college and university attendance. Since 1960 he has been a member of Manetta Corp. and of A.E.Z. Holding Corp. The former operated Peterson's Sunset Cabin Restaurant, located in Lakewood. The A.E.Z. Holding Corp. owned the building and land on which the restaurant is located. He is president, a director, and majority stockholder of both corporations which, at the time of hearing, were in the process of liquidation, the restaurant having been sold. Levy is a member of the Lakewood Lions Club, Lakewood Country Club, several trade associations, and Pi Lambda Phi Fraternity. He was one of the founders of the Pop Warner Football League in Lakewood, and officiates in Biddy League and

Little League baseball games in Lakewood. Levy is a member of the executive committee, and testified if his business interests continue as at present he would visit the station daily and would be able to spend 15 to 20 hours per week or more to unspecified activities involving the affairs of the proposed station. He is considering new business opportunities but believes they would not diminish the time he is now able to commit to the proposed station.

11. *James E. Westhall* was born at Lakewood, N.J., in 1927 and remained a resident of that area until his entrance in Duke University in 1948. While attending this university he assisted in the broadcast of college basketball games and football games as a member of the "on the air" crew. After graduation from the university in 1952 he was employed at station WLNH, Laconia, N.H., as an announcer and sports director until 1955. He left this station for a brief period, returning in 1956 as news and sports director. From March of 1957 to December of 1957 he was employed at television station WTVD–TV as an announcer and sports director. He then returned to station WLNH as program director, promotional director, and assistant to the manager, which position he held until December of 1962. Since that time he has held positions as an accountant executive in public relations, as a congressional legal assistant, and is presently a radio and television consultant. His broadcast experience has included both the production and direction of local live programs and the coverage of news events of both local and national interests. He is past president of the United Press Broadcasters Association of New Hampshire, and in Laconia was a member, officer, and division chairman of the chamber of commerce. He was a founder and charter member of the Little League in Laconia. During this period he also assisted in promotion of the United Fund and Cancer drives. Westhall would move to Toms River and serve full time as general manager of the station in the event of grant of the Seashore application.

12. *Stephen V. Lane, Jr.*, was born in Brooklyn, N.Y., in 1927, but has resided in Lakewood, N.J., since 1932. He is president and 32 percent stockholder of Lane Drugs, a firm owning six drugstores, all located in New Jersey. Lane was manager of the Bricktown, N.J., store until May of 1965, at which time he became director of operations. He is vice president and holds a 50-percent stock interest in Morales, Potter & Buckelew, Inc., an insurance and real estate agency located in Toms River, N.J., and holds a 50-percent interest in White Sands Beach Motel, located in Seaside Park, N.J. Lane was appointed to the Lakewood Township Planning Board in 1957, serving as its chairman for 2 years; was reappointed in 1964, serving as its vice chairman, and has recently resigned to accept an appointment to the Lakewood Housing Authority. During 1964 he served as a team captain for the Paul Kimball Hospital fund drive in Lakewood, is a member of and served for 5 years as a director of the Lakewood Chamber of Commerce, is a member of the Lakewood Lions Club, has served on the Lakewood First Aid Squad for the past 12 years, and is a director of the Retail Merchants of Brick Plaza. He would assist through his various business contacts in promotion of the station and time sales in addition to the functions to be performed as an officer and director of

Seashore. For the first year to 18 months, time to be devoted to these duties is estimated as 7 to 10 hours per week.

13. *Joseph E. Buckelew* was born in 1929 in New Brunswick, N.J., but has resided in Lakewood, N.J., since 1933 other than for a 3-year period served in the U.S. Army. He served on the Lakewood Police Department, but resigned in August of 1959 to enter the insurance and real estate business. He is president and 50-percent stockholder of the above-noted firm of Morales, Potter & Buckelew, Inc., and holds a 50-percent interest in the White Sands Beach Motel, of Seaside Park, N.J. He is a member of the Ocean County Board of Realtors, of the National Association of Insurance Agents, and a member of the Lakewood Township Committee, an elective office. His duties on the township committee include chairman of the police department, president of the local assistance board, and membership on the Lakewood Industrial Commission. He is a member and former director and treasurer of the Lakewood Lions Club, member and former director of the Toms River Chamber of Commerce, is a member and director of the Lakewood YMCA, and was the founder and first president of the Lakewood Police Athletic League and of the Lakewood Biddy League. He was one of the founders of the Lakewood Pop Warner League and its first coach, has worked on the Paul Kimball Hospital expansion drive and the YMCA fund drives. He would devote 7 to 10 hours per week to station affairs in his capacity as a director, in community contacts, and the sale of advertising through other business contacts.

14. *Robert J. Miller* was born in Akron, Ohio; resided in Lakewood, N.J., for 3 years, and has been a resident of Toms River since 1949. He is a director of the Surf Building & Loan Association, of Seaside Heights, N.J., and of the First State Bank of Ocean County, of Toms River. Miller is a licensed general insurance broker and real estate salesman. He is serving his second elective 3-year term as a member of the Ocean County Board of Chosen Freeholders, the governing board of Ocean County, and serves as a director of that organization. Other duties as a member of this board are director of the departments of law and public safety, and chairman of committees on parks and recreation, bridges, public relations, and electrical bureau. He is Ocean County civil defense and disaster control coordinator, a member of the Ocean County Planning Board, and a member of the Pinelands Regional Planning Board of Ocean and Burlington Counties. Miller is the official delegate of Ocean County to the New Jersey Association of Chosen Freeholders, a member of its economic development commission, and chairman of its liaison committee with the sheriffs' and wardens' associations of New Jersey. For 3 years he has served on committees studying the revision of laws applying to county government in New Jersey and is a member of the National Association of Counties, serving on its National Civil Defense and Disaster Control Committee. He served for 4 years as an Ocean County undersheriff, is a member and former director of the National Jail Association, member of the American Correctional Association, and is a former member of the Morrow Association in New Jersey. He is a charter member and past president of the Lakewood Lions Club, a charter member of the Toms River Elks Lodge, and a member of the Navy

106-511—66——4

League, American Legion, and Masonic groups. He is a former member of the executive committee of the Ocean County Council of Boy Scouts, has served as chairman for fundraising for the New Jersey Association for Retarded Children, is a member of the Ocean County Historical Society, and served as trustee of the Ocean County Anti-Pollution of Waterways Association. In the course of his governmental and civic activities he has appeared on approximately 50 radio programs since 1959. He would devote 8 to 10 hours a week to station affairs as a member of the board of directors, in community contacts, and sales, with occasional appearances on panel discussion programs.

Preparation and Planning

Ocean County Radio Broadcasting Co.

15. After moving to Toms River in 1961, Foley contacted a number of merchants and other businessmen, estimated as approximately 100, to determine the need for a local radio station, their programing interests and, in some contacts, their interests in investing in a station. He thereafter contacted local and county organizations, including the chamber of commerce, township planning board, Ocean County Planning Board, and Lacey Township Planning Board. Through the Greater Toms River Chamber of Commerce Newsletter of April 1962 response was requested to a series of questions relative to the membership's desires for and support of a local station and to the kind of character and personality they wished the station to have. The record fails to disclose what, if any, response was received. Over a period of 2 months in 1962 Foley conducted a telephone survey of residents within the service area, including Toms River, Forked River, Lakewood, and Point Pleasant, to assess the number of homes having FM receivers, if they had no FM receiver their interest in purchasing one if a local station was constructed, and their programing preferences. Approximately 1,000 calls were completed. He thereafter developed the programing and staffing proposals initially submitted. On June 26, 1964, the application was amended to specify additional hours of operation together with related programing changes. The participation of James L. and John C. Parker was limited to review and approval of the proposal as developed by Foley. James L. Parker did actively participate in development of the financial, studio, transmitter, and construction phases of the application.

Seashore Broadcasting Corp.

16. After formation of Seashore Broadcasting Corp. the stockholders met with Robert Packard, a programing consultant employed by Seashore, and compiled a list of representatives of local civic and other groups to be contacted with reference to proposed programing and program participation. A list of individuals residing within the communities of Toms River, Lakewood, Point Pleasant, and Bricktown to be contacted was assigned to each stockholder. A total of 22 contacts were made prior to the date of filing the application, with 35 being made thereafter as a continuing survey. Under Pack-

ard's supervision a telephone survey of the general listening public was made to determine programing preferences. A random sample was selected from the Toms River-Lakewood-Point Pleasant-Barnegat and vicinity telephone directory and a total of 190 individuals interviewed. Westhall then met with Packard and the initial programing proposal developed which was submitted with the application. The proposal was thereafter reviewed by the other stockholders and as a consequence several changes resulted which were reflected by an amendment submitted on November 5, 1964. During January of 1965 the proposal was reduced to written descriptions by Westhall and as a consequence a second amendment to the programing proposal was filed on January 26, 1965. All stockholders participated in various other phases of preparation of the application, including obtaining the option to lease the transmitter site, securing FAA clearance, adoption of a rate card, and publication of notice pursuant to the Commission's rules.

Proposed Programing

17. The programing proposals of the applicants by type and class are as follows:

		Ocean County	Seashore
TYPE			
Entertainment	percent	80.1	59.16
Religious	do	1.3	1.90
Agricultural	do	1.1	1.56
Educational	do	1.2	2.04
News	do	13.9	14.64
Discussion	do	1.1	2.70
Talks	do	1.3	18.00
CLASS			
Recorded commercial	percent	57.2	52.08
Recorded sustaining	do	15.4	8.68
Wire commercial	do	21.1	
Live commercial	do	1.9	19.76
Live sustaining	do	4.4	19.48
Total commercial	do	80.2	71.84
Total sustaining	do	19.8	28.16
Proposed broadcast hours		126	126.21
Number of spot announcements		1,090	700
Number of noncommercial spot announcements		265	175

Program Descriptions

Ocean County Radio Broadcasting Co.

18. *Entertainment* programing of Ocean County Radio Broadcasting Co. would consist of recorded music of various types using what it terms a "light classical or good music format." *Religious* programing would consist of religious music programs broadcast on Sundays; a 15-minute religious news program at 12:15 p.m. on Sunday, which would include local church news and national and international religious news available through the wire services; and on Sundays short religious comments or prayers for members of all faiths of the area. *Agricultural* programing would include daily, Monday through Saturday, a 5-minute farm news program and a 5-minute farm report program to be presented in cooperation with the local agricultural

agency. On Thursdays at 11:30 p.m. a 25-minute review of the agricultural programs carried for the previous week would be broadcast. *Educational* programs would include a 5-minute daily, Monday through Friday, report of school events throughout the county; on Saturdays, a 5-minute program and a 15-minute program for direct participation of school officials and students for discussion of school events and presentation of school talent; and on Tuesdays, a 25-minute school report. *News* programs would include regularly scheduled local, national, and international news segments throughout the broadcast day with a weekly news review on Sunday. Except for one program all news programs were classified as wire, though local news is to be emphasized, Foley being of the view that rewriting of wire news or as he stated "to just change a few words in it" does not warrant changing the classification to live. Weather and sports news would be regularly included. The program classified as live news would deal with the availability of local jobs and job training programs. *Discussion* programs would include two 5-minute programs, Monday through Friday, on the first of which the station audience would be encouraged to call the station to discuss any topics of interest, with the second program being a continuation of discussion of these topics either by street interviews or by "beeper" phone. A 25-minute roundup of these discussions would be broadcast on Mondays. Regularly scheduled *talk* programs would include, Monday through Friday, a commentary on topics of local interest, a program of hobby news, a program covering food news and other items of interest to homemakers, and a 25-minute talk on hobby clubs broadcast on Wednesdays.

Seashore Broadcasting Corp.

19. *Entertainment* programing of Seashore Broadcasting Corp. would consist of recorded music of various types using what it terms a "good music format." *Religious* programing would include a 3-minute morning devotional message, Monday through Saturday, and a 5-minute evening devotional message daily, these messages to be on a rotating basis among the various religious faiths; a 15-minute program on Saturday announcing church services and other church activities; and a 55-minute Sunday morning program in segments of a sermon, choir, and organ music to be locally originated through advance recording by the various churches of the area. *Agricultural* programing would include a 3-minute segment of agricultural news on the noontime news roundup, Monday through Saturday; and "The Family Farmer," a 10-minute program, Saturday morning, and 5-minute evening program, Monday through Saturday, which would include landscaping, gardening, and farm information to be presented in cooperation with the local agricultural agency and garden club. *Educational* programs would include a 15-minute evening program, Monday through Friday, devoted to vocabulary study and a 30-minute program, Saturday evening, for direct participation of school officials and students. *News* programs would include regularly scheduled local, national, and international news segments throughout the broadcast day, with a weather forecast being included on each program. Sports news is included on a number of news segments and local job

opportunities would be included on one broadcast, Monday through Friday. All news originating by wire service would be edited and accordingly has been classified as live. *Discussion* programs would include two 15-minute programs, "Open Mike," Monday through Friday, on which the station audience would be given the opportunity of calling in their views on various issues. A 55-minute weekly discussion program on Sunday using a moderator would be devoted to local issues. It is contemplated that subjects for this program may develop from the above-noted "Open Mike" program. Regularly scheduled *talk* programs in addition to sports programs would include two daily 5-minute programs, Monday through Saturday, combining a marine weather forecast with fishing information; six weekly 2-minute announcements of local historical events and current developments; "Coffee Shop," Monday through Saturday, a program approximately 50 minutes in length combining information of area events, local news, club news, and interviews, with recorded music; two 25-minute programs daily, Monday through Saturday, combining recorded music with information designed to be of interest primarily to women and talks by local government officials; a 5-minute editorial broadcast twice daily, Monday through Friday; a 5-minute program, Monday through Saturday, of household hints and giving activities of professional businesswomen; "Home Buyer's Guide," a 25-minute program on Sunday described by its title; and a 2-minute program, Monday through Saturday, giving health hints. Special events would be carried as they arise. From 8:05 to 10 p.m., Monday through Friday, music would be combined with news and talk programs, the latter to include, as available, speakers, plays by local theater groups, and play-by-play descriptions of local sports events.

CONCLUSIONS

1. Each of the applicants has been found legally, technically, financially, and otherwise qualified to construct and operate its proposed station. There are presently no broadcast facilities in Toms River, N.J., or in Ocean County, N.J., and a grant of either application would serve the public interest. They are, however, mutually exclusive and the determination of which would better serve the public interest must rest on the record made pursuant to the designated comparative issue.

2. The instant proceeding commenced and the written exhibits to be offered in evidence had been completed prior to issuance on July 28, 1965, of the Commission's *Policy Statement on Comparative Broadcast Hearings*, FCC 65–689, mimeo No. 71120. With reference to proceedings in hearing at the time of release of this policy statement the following appears on page 10:

> **Where cases are now in hearing, the hearing examiner will be expected to follow this statement to the extent practicable. Issues already designated will not be changed, but evidence should be adduced only in accordance with this statement. Thus, evidence on issues which we have said will no longer be designated in the absence of a petition to add an issue should not be accepted unless the party wishing to adduce the evidence makes an offer of proof to the examiner which demonstrates that the evidence will be of substantial value under the criteria discussed herein.**

Accordingly, there was received into evidence only that material which was deemed relevant, material, and of decisional weight pursuant to the provisions of the policy statement. Exhibits relating to studio, staff, equipment, and program policy were not received,[1] no offer of proof having been made indicating that such evidence would be of substantial value to resolution of the proceeding.

3. By this statement the Commission also formalized that which has long been practice with reference to the primary objectives sought to be achieved through the process of comparison. At page 2 of the statement the following appears, "We believe that there are two primary objectives toward which the process of comparison should be directed. They are, first, the best practicable service to the public, and, second, a maximum diffusion of control of the media of mass communications * * *. Several factors are significant in the two areas of comparison mentioned above, and it is important to make clear the manner in which each will be treated * * *."

4. Considering these primary objectives, the objective of achieving diffusion of control of media of mass communications would be equally served by a grant of either application for, as reflected by the record, no party or stockholder of either applicant presently holds an interest in any medium of mass communications. Resolution of the proceeding accordingly must be under the objective of achieving the best practicable service to the public as indicated by the relevant factors. A brief summary of the evidentiary showing of each applicant under the various factors will aid in placing the conclusions reached in proper context.

5. Weighing the full-time participation in station operation by owners, the showing of each applicant rests on a single stockholder. Frank Foley, the president, a director, and 30-percent stockholder of Ocean County, would devote full time to the proposed station as general manager. The attribute brought to this participation which adds to its value is Foley's residence in the city of Toms River for a period of several years' duration. His broadcast experience as an announcer is remote in time and of very limited duration. His participation in local civic activities, insofar as reflected by the record, has been limited to a single organization having objectives limited both in scope and purpose. Thus, the broadcast experience and civic activities of Foley are too limited to add significantly to the value of his integration. James E. Westhall, second vice president, a director, and 16⅔ percent stockholder of Seashore, would move to Toms River, N.J., and devote full time to the proposed station as general manager. The attributes brought to his participation include proposed future residence in the community to be served, broadcast experience of many years' duration in programing and management positions, and civic participation in his former residence communities.

[1] At p. 7 of the policy statement the following appears, "Staffing plans and other elements of planning will not be compared in the hearing process except where an inability to carry out proposals is indicated * * *. We will similarly not give independent consideration to proposed studios or other equipment * * *." This is no more than a formal statement of long-existing practice with reference to proposed studios, staff, and equipment. the Commission having consistently held for a period of years, that, if the proposed staff, studios, and equipment were adequate to effectuate the programing proposals, advanced differences in studio, staff, and equipment proposals in and of themselves were of no decisional weight.

Comparatively, these showings are deemed equal. Each holds a substantial ownership interest, but still a minority interest. The additional attributes of Westhall are superior to those of Foley, particularly in view of Foley's failure to participate significantly in local activities though a resident of the area for a period of years. Foley's greater stock interest is, however, a compensating consideration.

6. The remaining stockholders of neither Ocean County nor of Seashore propose participation in station operations to a degree that can be termed full-time or almost full-time participation as defined under the aforenoted policy statement. James L. Parker, the controlling stockholder of Ocean County, proposes to devote 20 hours per week to station activities. Other than for his duties as an officer and director, however, the duties to be performed would be incidental to and performed in connection with his other regular activities. The same consideration is applicable to the proposed 10-hour per week participation of the remaining Ocean County stockholder, John C. Parker. Levy, of Seashore, also specifies up to 20 hours' participation per week in station activities. The duties to be performed other than his duties as an officer and director are not, however, defined, and Levy is seeking other business interests. The remaining four stockholders of Seashore propose from 7 to 10 hours' participation each per week. Again, however, other than for the duties to be performed as an officer and/or director the proposed activities would largely be incidental to and performed in connection with their other regular activities. Thus, these showings fail to establish the devoting of substantial amounts of time on a daily basis by these stockholders [2] and none would hold a staff position. The proposal of Seashore to operate with an executive committee and an editorial committee made up of various stockholders has been weighed in arriving at these conclusions. There is, however, no showing of specific functions and all stockholders would participate in management as an officer and/or director. These committee proposals accordingly do not add substantively to Seashore's integration showing. No basis of preference is, accordingly, present in this factor.

7. Though not of such nature to merit credit under the integration factor, the factors of local residence and participation in local activities (as a part of the local residence background) of those stockholders other than Foley of Ocean County and Westhall of Seashore do merit comparative consideration. Each would devote some time to station affairs and each would hold corporate positions enabling him to put his knowledge of the community to use in the operation of the station. In this comparative area the superiority of Seashore is evident. Each of its stockholders here being considered is a resident of the area to be served and, as reflected in the findings of fact, each shows broad participation in local activities over a period of years. In contrast the participation of James L. Parker has been more limited in scope, whether weighed individually against these stockholders of Seashore or in combination, and his son, John C. Parker, shows only business associations. None in either applicant shows broadcast experience.

[2] The following appears at p. 2 of the policy statement: "To the extent that time spent moves away from full time, the credit given will drop sharply, and no credit will be given to the participation of any person who will not devote to the station substantial amounts of time on a daily basis."

8. Findings of fact have been made on the preparation and planning and on the programing proposals of each applicant. Each applicant has fulfilled its responsibility for showing a reasonable knowledge of the community and area through the background of its principals and the surveys conducted and, by reason of such knowledge, that its program proposals are designed to meet the needs and interests of the residents of that area. The programing showings of each establish that the basic elements of an adequate service have been included. The validity of these conclusions is enhanced by the similarity of the resulting programing proposals. Percentage differences are present, but none of significance. The differences between entertainment and talks programs are adequately explained through the combination of talk programs with recorded music by Seashore as noted in paragraph 19 of the findings of fact. The difference in live programing arises largely out of the differing views, expressed on the record and reflected in the findings of fact, in the classification of news programs. There are no material or substantial differences showing a superior devotion to public service on the part of either applicant and no basis for preferring one over the other is present. Viewed realistically, the proposal of each is to utilize a music and news format with sufficient variation to provide a generalized service tailored to the immediate area to be served.

SUMMATION

9. As previously noted, a grant of either application here considered would serve the public interest. The comparative showings made are so nearly equal the grant must rest upon the slight credit merited by Seashore Broadcasting Corp. under its showing of local residence as enhanced by the participation in local activities for stockholders who cannot be considered as actively participating in station affairs on a substantially full-time basis, but who will devote some time to station affairs (par. 2 of policy statement on comparative broadcast hearings). This difference does indicate that Seashore would provide the best practicable service to the public. It should remain continually aware of, and thereby prepared to meet, the changing needs of the area through the intimate contacts thus maintained with the various segments of the residents of that area to a greater degree than would Ocean County Broadcasting Co. It is, therefore, concluded that a grant of the application of Seashore Broadcasting Corp. would better serve the public interest.

Accordingly, *It is ordered*, This 18th day of February 1966, that unless an appeal to the Commission from this initial decision is taken 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 application herein of Seashore Broadcasting Corp. *Is granted* and the application herein of Ocean County Radio Broadcasting Co. *Is denied*.

FCC 66R-346

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of LILLIAN LINCOLN BANTA AND DEAN DE VERE BANTA, D.B.A. TELEVISION SAN FRANCISCO, SAN FRANCISCO, CALIF.	Docket No. 15780 File No. BPCT-3303
JALL BROADCASTING CO., INC., SAN FRANCISCO, CALIF.	Docket No. 15781 File No. BPCT-3425
For Construction Permits	

ORDER

(Adopted September 9, 1966)

BY THE REVIEW BOARD.

The Review Board having before it for consideration the petition for leave to amend, filed July 18, 1966, by Jall Broadcasting Co., Inc. (Jall).

It appearing, That the proposed amendment is necessary to reflect a recent change in the broadcast interests of Jall's stockholders; and

It further appearing, That the proposed amendment is not opposed by the other parties to this proceeding and would not result in a comparative advantage to Jall;

Accordingly, it is ordered, This 9th day of September 1966, that the petition for leave to amend, filed July 18, 1966, by Jall Broadcasting Co., Inc., *Is granted*, and that its amendment *Is accepted*.

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

FCC 66R-347

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
LILLIAN LINCOLN BANTA AND DEANE DEVERE BANTA, D.B.A. TELEVISION SAN FRANCISCO, SAN FRANCISCO, CALIF.	Docket No. 15780 File No. BPCT-3303
JALL BROADCASTING CO., INC., SAN FRANCISCO, CALIF.	Docket No. 15781 File No. BPCT-3425
For Construction Permits	

ORDER

(Adopted September 9, 1966)

BY THE REVIEW BOARD.

The Review Board having before it for consideration the petition for leave to amend, filed August 9, 1966, by Television San Francisco (TSF).

It appearing, That the proposed amendment is necessary to reflect a change in the location of TSF's main studio from 2482 Mission Street, San Francisco, Calif., to a site to be determined within that city; and

It further appearing, That the change resulted from the destruction by fire of the building in which the main studio was to be located; and

It further appearing, That the proposed amendment is not opposed by the other parties to this proceeding and would not result in a comparative advantage to TSF;

Accordingly, it is ordered, This 9th day of September 1966, that the petition for leave to amend, filed August 9, 1966, by Television San Francisco, *Is granted*, and that its amendment *Is accepted*.

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

FCC 66R-349

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of KANSAS STATE NETWORK, INC., TOPEKA, KANS.	Docket No. 16606 File No. BPCT-3537
HIGHWOOD SERVICE, INC., TOPEKA, KANS. For Construction Permit for New Television Broadcast Station	Docket No. 16607 File No. BPCT-3561

ORDER

(Adopted September 9, 1966)

BY THE REVIEW BOARD.

The Review Board having under consideration a petition to enlarge and delete issues, filed May 23, 1966, by Highwood Service, Inc. (Highwood), seeking to enlarge issues as to the application of Kansas State Network, Inc. (Kansas State), and seeking to delete issues as to its own application, and a motion for withdrawal and dismissal of the above petition, filed August 10, 1966, by Highwood;

It appearing, That, by order of August 10, 1966 (FCC 66M-1080), the Kansas State application was amended, removed from hearing status, and returned to the processing line; and

It further appearing, That, by initial decision (FCC 66D-51) released August 23, 1966, Hearing Examiner Forest L. McClenning proposed a grant of the Highwood application, as amended; and

It further appearing, That the above amendments and actions have rendered moot the requests made by Highwood in its petition to enlarge and delete, and in its motion for withdrawal and dismissal;

It is ordered, This 9th day of September 1966, that the petition to enlarge and delete issues filed May 23, 1966, by Highwood Service, Inc., and the motion for withdrawal and dismissal filed August 10, 1966, by Highwood Service, Inc., *Are dismissed* as moot.

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

FCC 66R-352

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of TREND RADIO, INC., JAMESTOWN, N.Y.	Docket No. 16712 File No. BPCT-3665
JAMES BROADCASTING CO., INC., JAMESTOWN, N.Y.	Docket No. 16713 File No. BPCT-3694
For Construction Permits for New Television Broadcast Stations	

MEMORANDUM OPINION AND ORDER

(Adopted September 9, 1966)

BY THE REVIEW BOARD: BOARD MEMBER KESSLER ABSENT.

1. The applications of Trend Radio, Inc., and James Broadcasting Co., Inc., who are competing for a UHF television authorization in Jamestown, N.Y., were designated for hearing June 21, 1966 (FCC 66-536). Except for an air hazard issue as to James, both were found fully qualified. Trend has now petitioned for addition of the following issues against James:[1]

> 1. To determine whether there is a reasonable prospect that James Broadcasting Co. will be able to obtain network affiliation for its proposed station and to effectuate its program proposals.
> 2. To determine whether a grant of the James Broadcasting Co. application would create an undue concentration of control of broadcasting media in Chautauqua County, N.Y., or in the area encompassed by the grade B contour of its proposed TV station, contrary to the public interest.
> 3. To determine whether the cross-ownership and cross-control of the CATV system serving Jamestown, N.Y., and of the only television station in Jamestown which would result from a grant of the James Broadcasting application is contrary to the public interest.

AFFILIATION ISSUE

2. The basis for the requested affiliation issue against James is Trend's experience in being refused an affiliation by ABC, the same network proposed by James. Petitioner submits a copy of a letter it received from the American Broadcasting Co. declining a network affiliation with Trend because "too much duplication would exist," and argues that there is no reasonable prospect that James will succeed in getting an affiliation. In opposition, James says a reasonable ex-

[1] The pleadings before the Board are: Petition to enlarge issues, filed July 11, 1966, by Trend; opposition, filed by James, July 25, 1966; opposition, filed by the Broadcast Bureau, July 25, 1966; reply, filed by Trend, Aug. 3, 1966; and errata, filed by James, Aug. 2, 1966. On Sept. 2, 1966, Trend filed a petition for leave to file a supplemental reply and a supplemental reply. In view of the disposition hereinafter made of the petition to enlarge the petition for leave to file is denied.

pectation of ABC affiliation exists and relies on an affidavit of its president, who states that he has discussed with representatives of a Buffalo and Erie television station "the possibilities of some sort of an arrangement whereby we would be a satellite or some other associate in order to get ABC network programing." He avers that he and the representatives of the Erie station "concluded that there is a possibility of an affiliation," but goes on, saying, "actually since we had no grant there is no point in going into all the time necessary to effect the final arrangement. But all have agreed that this can and will be done." The president also states that he discussed the proposal with an ABC representative and was told that ABC "absolutely did not object to this idea; in fact, would encourage it." The Broadcast Bureau opposes enlargement on the ground that the showing made by Trend was insufficient.

3. According to James' application, network programing is to constitute 61.5 percent of the station's broadcast time. The application also says that the station will affiliate with ABC. It is clear from the affidavit of James' president that, in the sense that the term is normally used, an affiliation with ABC is no longer expected. Moreover, the terms of some different kind of arrangement are not specified and all that the Board now has is the vague assurance of James' president that something will be done. The ability of James to carry out its proposal to broadcast as an ABC affiliate with network programing 61.5 percent of the time is in sufficient doubt to warrant addition of an issue.

4. On September 6, 1966, the Board issued a memorandum opinion and order (FCC 66R–339) enlarging the issues herein "To determine whether the staff proposed by Trend Radio, Inc., is adequate to effectuate its television broadcast proposal." This issue was framed on petition by James, who alleged that Trend originally proposed a network operation; that before designation for hearing, the network proposal was eliminated without any proposed changes in staffing; and that, accordingly, the proposed staff was inadequate. Trend proposes the use of eight full-time employees and two part-time employees. James' staffing proposal is not quite clear as to the number of individuals proposed exclusively for its television operation; in some respects its proposed staffing is similar to that of Trend. Accordingly, an issue will be framed to determine, in the event that the network affiliation issue is resolved against James, whether its staffing proposal is adequate for its proposed operation.

Concentration of Control

5. James is licensee of WJTN and WJTN–FM, Jamestown, N.Y., and WGGO, Salamanca, N.Y., James owns the licensee of WDOE, Dunkirk, N.Y., and the licensee of WWYN and WWYN–FM, Erie, Pa. James also owns one-third of Jamestown Cablevision, Inc., operator of a community antenna television system in Jamestown. These are the basic facts upon which Trend grounds its request for a concentration of control issue, but since they were all before the Commission as a part of James' application at the time of designation,

they would not, standing alone, be sufficient to justify the enlargement. However, Trend also relies on some additional material to buttress its request. Some of it merely presents more details relative to the admitted fact that James owns numerous broadcast facilities in the area bordering the south shore of Lake Erie. The most important fact upon which it relies is that James employs combination rates for its four AM stations, the 0.5-mv/m countours of which overlap in varying degrees. Trend asserts that "there is a reasonable likelihood that combination rates will be offered for advertising on the proposed television station and the * * * radio stations * * *," and concludes that consistent with the Board's action in *Brown Broadcasting Company, Inc.*, 3 FCC 2d 887, a concentration issue must be added here against James. James' president has submitted an affidavit promising that the AM and FM stations in Jamestown and the proposed television station in that city would not be sold in combination, but nothing is said about similar arrangements between James' stations in other communities and the television station in Jamestown. This brings the present case within the purview of *Brown Broadcasting*, supra, but the issue will be a limited one to determine whether the television station would be sold in combination with other James-owned or controlled stations and, if so, whether concentration of control inimical to the public interest would result. This limitation will help to prevent the inquiry from going astray into areas which the Board must presume were examined by the Commission at designation.

Cross Ownership

6. The cross-control issue requested by petitioner is based upon James' ownership of a one-third interest in the Jamestown CATV system combined with proposed ownership of the only television station there. The president of James, who is also its general manager and 43.2 percent stockholder, is president of the CATV. Petitioner cites the Commission's *First Report in the Matter of Acquisition of Community Antenna Television Systems by Television Broadcast Licensees*, 1 FCC 2d 387, where the Commission stated, at page 389:

> **The Commission will * * * reserve the right to make appropriate inquiry, and, if it appears necessary or appropriate, hold a formal hearing and take necessary action, in any case in which it is alleged or comes to the attention of the Commission that there *is an actual or threatened abuse arising from cross-ownership.* (Emphasis added.)**

Trend then argues that the situation in Jamestown meets the Commission's test because it involves "an existing CATV system whose program of expansion is threatened by the successful operation of a UHF station in the community" and that the "conflict of interest is so apparent that a presumption of injury to the public interest necessarily arises." Continuing, trend argues that "[i]f the proposed Jamestown TV station is licensed to James Broadcasting, there is a grave danger that the Jamestown TV station will not vigorously compete for programing available to subscribers to the CATV system from other independent stations and that its programing will be less attractive to the television viewer. Not only will there be a lack of

incentive to compete—there will be a danger of suppression of competition."

7. In the *First Report (CATV)*, supra, the Commission concluded, in substance, that the joint ownership in the same community of a TV station and a CATV system was not, per se, objectionable; and that the questions raised by such cross-ownership would, in effect, be considered on a case-to-case basis. Knowledge of James' interest in the Jamestown CATV system was before the Commission when the applications herein were designated for hearing and no separate disqualification issue was framed thereon. After careful consideration of the allegations in the subject petition, we are of the view that they do not constitute a sufficient showing to warrant contrary action by the Board. Clearly, however, such joint ownership is a matter for consideration under the comparative issue.

8. In view of the foregoing, *It is ordered*, This 9th day of September 1966, that the petition to enlarge issues, filed by Trend Radio, Inc., on July 11, 1966, *Is granted* in the manner indicated in the issues hereinafter specified, *And otherwise denied;*

To determine whether James Broadcasting will be able to obtain the network affiliation as proposed in its application and, if not, whether it can effectuate its program proposals;

To determine whether broadcast time on the television station proposed by James Broadcasting will be sold under a combination rate arrangement including other broadcast stations owned and controlled by James Broadcasting and, if so, whether this will result in a concentration of control of broadcast stations in contravention of the Commission's rules and the diversification policy underlying said rules; and

It is further ordered, On the Board's motion, that the issues *Are further enlarged* by addition of the following issue:

To determine, in the event the network affiliation issue is resolved against James Broadcasting, whether the staff proposed by that applicant is adequate to effectuate its television broadcast proposal; and

It is further ordered, That the petition for leave to file a supplemental reply, filed on September 2, 1966, by Trend, *Is denied.*

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

FCC 66R-353

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of GORDON SHERMAN, ORLANDO, FLA.	Docket No. 16536 File No. BPCT-3529
OMICRON TELEVISION CORP., ORLANDO, FLA. For Construction Permits for New Television Broadcast Stations	Docket No. 16537 File No. BPCT-3596

ORDER

(Adopted September 13, 1966)

BY THE REVIEW BOARD: BOARD MEMBERS NELSON AND KESSLER NOT PARTICIPATING.

The Review Board having under consideration a joint request for approval of agreement, filed July 6, 1966, by the above-entitled applicants; the Broadcast Bureau's comments on the joint request, filed July 28, 1966; a joint reply to the Broadcast Bureau's comments, filed August 8, 1966, by the above-entitled applicants; and an addendum to option to subscribe, filed August 16, 1966, by the above-entitled applicants;

It appearing, That the parties have shown compliance with section 1.525 of the rules in all respects;[1] that dismissal of the application of Gordon Sherman would permit an immediate grant of the application of Omicron Television Corp.;[2] and that approval of the agreement would serve the public interest in that the institution of a new television service in Orlando, Fla., would be expedited;

It is ordered, This 13th day of September 1966, that the joint request for approval of agreement, filed July 6, 1966, by Gordon Sherman and Omicron Television Corp., *Is granted;* that the agreement as modified in the joint reply and attached addendum *Is approved;* that the application of Gordon Sherman (BPCT-3529) *Is dismissed* with prejudice; that the application of Omicron Television Corp. (BPCT-3596) for a construction permit for a new UHF television station to operate on channel 35 in Orlando, Fla., *Is granted;* and that this proceeding *Is terminated.*

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

[1] The only objection raised by the Bureau relates to an option which, the Bureau asserts, should be conditioned so as to require Commission approval prior to the option's being exercised. Attached to the joint reply is a modification of that agreement containing the condition, as urged by the Bureau.

[2] Dismissal of Gordon Sherman's application moots all existing issues.

FCC 66-796

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of CEASE AND DESIST ORDER TO BE DIRECTED AGAINST JACKSON TV CABLE CO., OWNER AND OPERATOR OF A COMMUNITY ANTENNA TELEVISION SYSTEM AT JACKSON AND BLACKMAN TOWNSHIP, MICH.	Docket No. 16711

APPEARANCES

Robert M. Booth, Jr., on behalf of Jackson TV Cable Co., and *Joseph Chachkin*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted September 7, 1966)

COMMISSIONER LEE FOR THE COMMISSION: COMMISSIONERS BARTLEY, WADSWORTH, AND JOHNSON ABSENT; COMMISSIONER LOEVINGER DISSENTING.

1. This proceeding was initiated by an order to show cause, FCC 66-530, 4 F.C.C. 2d 246, released June 20, 1966, and as modified by Commission order, FCC 66-691, released July 28, 1966, directing Jackson TV Cable Co. (Jackson TV) to show cause why it should not be ordered to cease and desist from further operation of a community antenna system (hereinafter CATV) in Jackson and Blackman Township, Mich., in violation of section 74.1107 of our rules. Because expeditious resolution of this matter was deemed essential, we further ordered that, immediately after closing, the record be certified to the Commission for final decision and that the parties file their proposed findings of fact and conclusions of law within 7 days after the date the record is closed. Jackson TV's petition for reconsideration of the order to show cause was denied by the Commission's order (FCC 66-618), released July 11, 1966.

2. A prehearing conference was held before Hearing Examiner Forest L. McClenning on July 13, 1966. The evidentiary hearing was held on August 2, 3, and 8, 1966, and the record was closed on the latter date. As directed by the order to show cause, the hearing examiner certified the record to the Commission by order (FCC 66M-1089), released August 12, 1966. By a separate order (FCC 66M-1088), also released August 12, 1966, the hearing examiner corrected the transcript of record in various respects. A motion to correct transcript was filed on August 12, 1966, directed to the hearing examiner by Jackson TV, which requests that a number of corrections be

106-511—66——5

made to the transcript in addition to those already made by the examiner. Jackson TV served a copy of the motion on counsel for Chief, Broadcast Bureau, by mail, and no objections to the motion have been filed by the Chief, Broadcast Bureau. The Commission will entertain Jackson TV's motion to correct transcript inasmuch as the proceeding is no longer within the jurisdiction of the hearing examiner; the motion will be granted, and the transcript of record will be considered as corrected in the respects indicated in the motion. Jackson TV and the Chief, Broadcast Bureau, each filed proposed findings of fact and conclusions of law on August 15, 1966. The Chief, Broadcast Bureau, filed on August 16, 1966, an errata to his proposed findings of fact and conclusions of law.

3. Rules governing the regulation of all CATV [1] systems were adopted by the Commission's second report and order in dockets Nos. 14895, 15233, and 15971, 2 F.C.C. 2d 725, released March 8, 1966, and these rules were published in the Federal Register on March 17, 1966 (31 F.R. 4540). Section 74.1107, which is the basis for the charges in the order to show cause issued in this proceeding, was made effective immediately upon publication. The portions of that section pertinent to this proceeding provide as follows:

> (a) No CATV system operating 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. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.
>
> (b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their grade B contours, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within thirty (30) days after such public notice. A reply to such responses or statement may be filed within a twenty (20) day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.
>
> * * * * * * *
>
> (d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date; * * *.

[1] Sec. 74.1101(a) defines a CATV system as "any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of 1 or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house."

4. Jackson, Mich., population 50,720, is the county seat of Jackson County, and it is also the principal city of the Jackson urbanized area as defined by the Census Bureau. Blackman Township, population 16,060, lies within Jackson County and is contiguous to the city of Jackson on the west, north, and east. Jackson TV was issued a franchise to operate a CATV system by the city of Jackson on May 11, 1965, and it was issued a franchise by Blackman Township on January 18, 1966. As of March 13, 1966, the CATV in Jackson and Blackman Township had 20 subscribers, some of whom were in Blackman Township and some in the city of Jackson. The subscribers had paid a fee for their services. The head end of the CATV operation is located 1 mile northeast of the city of Jackson in Blackman Township. A trunkline and subtrunkline runs through the city of Jackson. Subtrunk and distribution lines penetrate Blackman Township to the west, north, and east, having first run through the city of Jackson.

5. The parties to this proceeding stipulated to the following facts: Jackson TV is the owner and operator of a CATV system located wholly within Jackson and Blackman Township, Jackson County, Mich.; the CATV system, which serves Jackson and Blackman Township, is a CATV system as defined by section 74.1101 of the Commission's rules, and service is not limited to residents of 1 or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house; Jackson and Blackman Township are located within the predicted grade A contours of stations WJIM–TV, Lansing, Mich., and share-time stations WMSB and WILX–TV, Onondaga, Mich.; Lansing, Mich., is ranked by the American Research Bureau as the 47th largest television market based on net weekly circulation figures for 1965; CATV service in Jackson and Blackman Township was first begun on March 13, 1966, and is continuing up to and including the present date; prior to commencement of such service, Jackson TV did not seek an evidentiary hearing pursuant to section 74.1107 of the rules; a petition for waiver thereof was filed by Jackson TV on July 20, 1966; and as of July 30, 1966, there were 1,454 subscribers to the CATV system in Jackson and 7 subscribers in Blackman Township. It was also stipulated by the parties that the following television stations are being carried on the CATV system in Jackson and Blackman Township:[2]

WJBK–TV (channel 2)	Detroit, Mich.
WKZO (channel 3)	Kalamazoo, Mich.
WWJ–TV (channel 4)	Detroit, Mich.
WJIM–TV (channel 6)	Lansing, Mich.
WXYZ–TV (channel 7)	Detroit, Mich.
WOOD–TV (channel 8)	Grand Rapids, Mich.
CKLW–TV (channel 9)	Windsor, Ontario, Canada.
WILX–TV and WMSB–TV (share-time stations, channel 10).	Onondaga, Mich.
WTOL–TV (channel 11)	Toledo, Ohio.
WSPD–TV (channel 13)	Do.
WKBD–TV (channel 50)	Detroit, Mich.

[2] Although the Commission's order to show cause indicates that station WJRT, channel 12, Flint, Mich., was being carried on the CATV, that station is no longer carried.

In addition, the CATV system originates and carries on one channel of its system a weather scan, or weather program material, which is a continuous presentation in sequence of temperature, time, humidity, wind velocity, and wind direction.

6. We must first determine whether the CATV operation serving both the city of Jackson and Blackman Township is to be deemed a separate system as to each community, or whether it should be treated as one system serving both communities, because this determination has a significant bearing upon the permissible carriage of television signals beyond their grade B contours. The fact that the two communities are served by the CATV system from the same head end is not dispositive of the question presented. While Jackson TV urges that its system is an integrated one, the evidence shows that it nonetheless obtained separate franchises from both Jackson and Blackman Township. We hold that since the city of Jackson and Blackman Township are separate and distinct communities with readily definable boundaries, the CATV serving each community is to be deemed a separate system for the purposes of section 74.1107(a) of the rules. *Telerama, Inc.*, 3 F.C.C. 2d 585; *Booth American Company*, 4 F.C.C. 2d 509.

7. We now turn to the question of whether Jackson TV's CATV operation is extending signals of some television stations beyond their grade B contours in violation of section 74.1107(a). Of the television stations described in paragraph 5, supra, we are concerned only with the following stations: WOOD–TV, WTOL–TV, WSPD–TV, and WKBD–TV. The record discloses that carriage by the Jackson TV CATV of the other stations listed in paragraph 5, supra, does not violate section 74.1107.

8. The grade B contour of WOOD–TV includes approximately one-half of Blackman Township, and, at its nearest point, falls tangent to the northwest corner of the city of Jackson. The carriage of WOOD–TV on the Jackson TV CATV in the city of Jackson is not permissible, because such system does not operate within the grade B contour of WOOD–TV, either in whole or in part.[3] *Buckeye Cablevision, Inc.*, 3 F.C.C. 2d 798. With regard to WTOL–TV, its grade B contour penetrates the southeast corner of the city of Jackson, but no portion of Blackman Township lies within the grade B contour of that station. The grade B contour of WSPD–TV does not include any portion of the city of Jackson or Blackman Township. We thus conclude that, pursuant to section 74.1107, carriage of WOOD–TV is permissible on the CATV system in Blackman Township, and that such carriage is not permissible on the CATV system in the city of Jackson; that carriage of WTOL–TV is permissible on the CATV system in the city of Jackson, and that it is not permissible on the CATV system in Blackman Township; and that neither the CATV

[3] Sec. 74.1103 of the rules requires a CATV system to carry, upon request, and within the limits of its channel capacity, all stations "within whose grade B contours the system operates, *in whole or in part*" (emphasis supplied).

system in the city of Jackson nor the CATV system in Blackman Township may carry the signal of WSPD–TV.[4]

9. The evidence of record discloses that station WKBD–TV, Detroit, Mich., presently operates on channel 50 with a power of 25.4 dbk (347 kw) in the horizontal plane, and a height above average terrain of 970 feet. The grade B contour of WKBD–TV, as presently operating, does not fall over any portion either of the city of Jackson or Blackman Township. WKBD–TV holds a construction permit [5] for operation of the station with a power of 28.3 dbk (678 kw) in the horizontal plane, and the same antenna height above average terrain of 970 feet. The principal engineering dispute between the parties concerns whether the grade B contour of WKBD–TV, when operating with higher power, will penetrate any portion of Blackman Township, particularly the northeast corner thereof, which is the point closest to the WKBD–TV transmitter site. All parties agree that, when operating with higher power, WKBD–TV's grade B contour would still not include any portion of the city of Jackson.

10. Jackson TV endeavored to show that the predicted grade B contour of WKBD–TV, when operating with higher power, would penetrate the northeast contour of Blackman Township by a fraction of a mile. In support of its showing, Jackson TV contended that under section 73.684 of the rules only those profile radials required to establish antenna height above average terrain may be used in the determination of the distance from the transmitter site to the predicted grade B contour. Thus, according to Jackson TV, the Broadcast Bureau's determination, by use of an additional profile radial toward the northeast corner of Blackman Township, that the predicted grade B contour of WKBD–TV (operating with an effective radiated power of 678 kw) would not reach Blackman Township was invalid. Jackson TV is in error. The hearing examiner correctly held that those radials required to establish antenna height above average terrain are the minimum required to establish the grade B contour, not the maximum.

11. Jackson TV's consulting engineer testified that from the WKBD–TV transmitter site the distance to the grade B contour at the azimuth of 270° would be 52.5 miles, and at 225°, 56 miles; and that the computed distances to the closest point of Jackson and Blackman Township, respectively, are 56.9 miles and 54.8 miles. The consulting engineer further testified, with respect to the location of TV contours, that "using the data on file in the Commission, the distances to the grade A-grade B contours are checked to determine whether we agree with the engineering on file with the Commission. Assuming

[4] Because no existing station and no person or party other than the Commission has expressed any concern or objection over the carriage of the signals of WSPD–TV, Jackson TV argues that it cannot be concluded as a matter of law that carriage of such signals will adversely affect the public interest. The short answer to this contention is that the Commission, acting in the public interest in these matters, has determined that extension of the signals of television stations beyond their grade B contours by CATV systems operating within the predicted grade A contour of television stations in the 100 largest television markets raises serious public interest questions, and that these questions must generally be reached in a hearing, prior to the establishment and extensive entrenchment of the service in issue.

[5] BPCT–3773, which was granted June 24, 1966. WKBD–TV has not yet obtained program test authorization for operation with increased power.

that we do, we then project each of these contour distances at each of the eight azimuths and connect those contour distances with a smooth line." The Broadcast Bureau's engineer testified that the arc subtended by Blackman Township includes the azimuth angles of 261 to 251.5°.

12. We must reject Jackson TV's showing that the predicted grade B contour of WKBD–TV, when operating with higher power, will penetrate the northeast corner of Blackman Township. Even assuming that Jackson TV's consulting engineer's calculations were accurate, then, with the radial distances to the grade B contour at 270° and 225° being 52.5 and 56 miles, respectively, it would follow that the radial distance at the azimuth of 247.5° would be only 54.25 miles, and that the radial distance to the grade B contour would eventually decrease to 52.5 miles as the azimuth increased to 270°. Thus, the predicted grade B contour of WKBD–TV, when operating with higher power, lies wholly outside Blackman Township.

13. Based upon the foregoing findings that the predicted grade B contour of WKBD–TV, either as presently operating or when operating with higher power, does not fall over any portion of either Jackson or Blackman Township, we conclude that carriage of the signals of WKBD–TV on either Jackson TV's CATV system at Jackson or its CATV system at Blackman Township is not permissible.

14. Jackson TV argues that the Commission does not have statutory authority to assume and exercise jurisdiction over CATV systems not employing microwave or other facilities which are subject to the Commission's jurisdiction. Because of our assertion of jurisdiction in the *Second Report and Order* in dockets Nos. 14895, 15233, and 15971 (FCC 66–220; 2 F.C.C. 2d 725), Jackson TV states that no useful purpose will be served by a prolonged discussion of the question at this time. We agree. In addition to those matters set forth in paragraphs 10 through 19 of the *Second Report and Order* (2 F.C.C. 2d at 729–734) and in our memorandum of law on this question (appendix C of the second report), we have had occasion recently to set forth our position on the jurisdictional question. *Buckeye Cablevision, Inc.*, 3 F.C.C. 2d 798; *Mission Cable TV, Inc. and Trans-Video Corp.*, 4 F.C.C. 2d 236; *Booth American Company*, 4 F.C.C. 2d 509, 7 R.R. 2d 713; and *Telesystems Corporation*, FCC 66–694, 4 F.C.C. 2d 628.

15. Jackson TV next argues that section 74.1107 of the Commission's rules and regulations is not lawful and enforceable against it because: (*a*) The notice requirements of section 4 of the Administrative Procedure Act (5 USC sec. 1003) were not satisfied,[6] (*b*) the

[6] Because only one commercial television channel was assigned to Jackson at the time of release of the *Second Report and Order* (and Jackson now has only the one channel assigned, for which a construction permit was issued on Aug. 24, 1966), Jackson TV argues that its CATV system is outside the provisions of the *Second Report and Order* inasmuch as par. 2 of that order referred to a community with four or more commercial channel assignments and three or more stations in operation and one or more stations authorized or applied for. The contention is not persuasive because Jackson TV overlooks pertinent language of the *Notice of Inquiry* (1 F.C.C. 2d 453, 471), which stated that inquiry is warranted to determine the conditions under which CATV should be permitted to operate in areas with potential for independent stations, and that such areas include not only communities with four or more commercial channel assignments "but also those

premise upon which section 74.1107 was adopted—that CATV systems either do or might adversely affect the establishment and operation of UHF television stations—is not supported by fact but mere speculation, and (*c*) giving retroactive effect to section 74.1107 was arbitrary and capricious. The answers to these contentions are found in our *Second Report and Order*, supra, and in our memorandum opinion and order in docket No. 14895, et al. (3 F.C.C. 2d 816, denying petitions for stay of the effective dates of the second report and order), where a full discussion is had of contentions substantially similar to those here made by Jackson TV.

16. *C. J. Community Services, Inc.* v. *F.C.C.*, 100 U.S. App. D.C. 379, 246 F. 2d 660 (1957) is cited by Jackson TV for the proposition that a respondent in a cease and desist hearing may offer evidence on the impact of enforcement of the rule. In this connection, Jackson TV asserts that it was not permitted to offer evidence to demonstrate why a cease and desist order should not be issued, even though the order to show cause so directed, because the hearing examiner ruled that such evidence was irrelevant since the only issue herein concerns compliance or noncompliance with section 74.1107 of the rules. We agree with the examiner's ruling, and for the reasons stated in *Booth American Company*, supra, we hold that *C. J. Community Services, Inc.*, supra, is inapposite here.[7] See also *Telesystems Corporation*, supra.

17. Jackson TV submits that the expedited procedures adopted herein are not supported by the record finding required by section 409(a) of the Communications Act of 1934, as amended, and that the expedited procedures not only deprive Jackson TV of the hearing safeguards specified by section 5 of the Administrative Procedure Act, but also deprive it of the right to petition for reconsideration or rehearing under section 405 of the Communications Act. Similar contentions were advanced in *Buckeye Cablevision, Inc.*, supra, and were there rejected after an extended discussion by the Commission of the questions presented. For the reasons there set forth, we must reject Jackson TV's contentions.

18. Jackson TV specifically preserved its exception to the denial of its petition for reconsideration of the order to show cause by the Commission's order (FCC 66–618), released July 11, 1966, and its exceptions to each and every adverse ruling made by the hearing examiner during the course of this proceeding. We are of the view that the exception to our denial of its petition for reconsideration must be denied for the reasons set forth in our order of denial and in this decision. Moreover, we have considered Jackson TV's excep-

areas where any new station would rely very substantially upon independent programing sources because of overshadowing by three network services from nearby communities." The argument is further defective for the reasons stated in our memorandum opinion and order of May 27, 1966, 3 F.C.C. 2d 816, 824, pars. 23–26.

[7] On July 20, 1966, Jackson TV filed a petition for consolidation of any hearing on its simultaneously filed request for waiver of sec. 74.1107 of the rules with the instant hearing on the order to show cause. The petition will be denied for the same reasons that a similar petition was denied in another proceeding of this nature, *Buckeye Cablevision, Inc.*, supra. The public interest would be disserved by prolongation of this adjudicatory proceeding by broadening the scope of the hearing to include considerations relating to a request for waiver while the CATV system continues to be operated in violation of our rules. It is imperative that Jackson TV comply fully with our rules so that the public will not be led to rely on a service which we may ultimately find not to be in the public interest. The nature of the problem is mirrored in the growth of the Jackson TV CATV system—from 20 subscribers to the service as of Mar. 13, 1966, to 1,454 subscribers as of July 30, 1966.

tions to every adverse ruling of the hearing examiner, and we hereby affirm the rulings and deny the exceptions.

19. In summary, the record in this proceeding establishes: That Jackson TV owns and operates a CATV, as defined by section 74.1101 (a) of the Commission's rules and regulations, and which, for the purposes of section 74.1107 of the rules, is to be deemed a separate system for each of the communities of Jackson and Blackman Township; that Jackson TV's CATV operates within the grade A contours of stations WJIM–TV, Lansing, Mich., and share-time stations WMSB and WILX–TV, Onondaga, Mich.; that Lansing, Mich., is the 47th largest television market; that Jackson TV's CATV system began operation after February 15, 1966; and that since March 13, 1966, Jackson TV's CATV system in Blackman Township and its system in the city of Jackson have each been extending the signals of three television stations (in the case of Blackman Township, WKBD–TV, WTOL–TV, and WSPD–TV; and in the case of the city of Jackson, WSPD–TV, WKBD–TV, and WOOD–TV) beyond their grade B contours without requesting and obtaining the necessary Commission approval. We conclude, therefore, that in those respects, Jackson TV is operating its CATV system in Jackson, Mich., and its CATV system in Blackman Township, Mich., in violation of section 74.1107(a) of the Commission's rules and regulations and section 312(b) of the Communications Act of 1934, as amended.[8] We also conclude, for the reasons stated herein and in *Buckeye Cablevision, Inc.*, supra; *Mission Cable TV, Inc. and Trans-Video Corp.*, supra; *Booth American Company*, supra; and *Telesystems Corporation*, supra, that the public interest requires the issuance of an order requiring Jackson TV to cease and desist from the unlawful operation of its CATV system in Jackson, Mich., and its CATV system in Blackman Township, Mich. It may be that in the evidentiary hearing (or if petitioner comes into compliance with section 74.1107(a), in the petition for waiver), petitioner can establish that carriage of one or more of the distant signals here involved is consistent with the public interest. For the reasons developed in the above-cited decisions, our second report, and our memorandum opinion of May 27, 1966, in our judgment the public interest calls for issuance of the cease and desist order.

20. Jackson TV Cable Co. must comply with this cease and desist order within 2 days, excluding Saturdays, Sundays, and holidays, if any, after its release, unless it notifies the Commission during that period of its intention to seek judicial review of this order; in that event, Jackson TV Cable Co. will be afforded 14 days from the release date of this order within which to file its appeal and seek a stay of this order; and if it appeals and seeks such a judicial stay, this order will be stayed for 35 days from its date of release or until the court acts on the stay request, whichever occurs sooner.

---

[8] Sec. 502 of the Communications Act of 1934, as amended, provides as follows: "Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexd thereto to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs."

21. *Accordingly, it is ordered*, This 7th day of September 1966, that within 2 days after the release of this decision and order Jackson TV Cable Co. *Cease and desist* from the operation of its community antenna television system at Jackson, Mich., and from the operation of its community antenna television system at Blackman Township, Mich., in such a way as to extend the signals of television broadcast stations beyond their grade B contours in violation of section 74.1107 of the Commission's rules and regulations, and specifically to cease and desist from supplying to its subscribers in Blackman Township, Mich., the signals of stations WKBD–TV, Detroit, Mich., and WTOL–TV and WSPD–TV, both located in Toledo, Ohio, and from supplying to its subscribers in Jackson, Mich., the signals of stations WOOD–TV, Grand Rapids, Mich., WKBD–TV, Detroit, Mich., and WSPD–TV, Toledo, Ohio; provided, however, that if Jackson TV Cable Co. notifies the Commission within 2 days of the release of this order (exclusive of Saturdays, Sundays, or holidays, if any) that it intends to seek judicial review and if it seeks judicial review and a judicial stay within 14 days of this order, this order shall be stayed for 35 days from its date of release or until judicial determination of the motion for stay, whichever occurs sooner; and

22. *It is further ordered*, That the motion to correct transcript, filed by Jackson TV Cable Co. on August 12, 1966, and directed to the hearing examiner, initially, *Is granted*, and the transcript of record herein *Is corrected* in the respects indicated in the motion; and

23. *It is further ordered*, That the petition for consolidation of any hearing on the request for waiver of Section 74.1107 of the rules with the instant hearing on the order to show cause, filed by Jackson TV Cable Co. on July 20, 1966, *Is denied*; and

24. *It is further ordered*, That the exception of Jackson TV Cable Co. to the denial of its petition for reconsideration of the order to show cause, and its exceptions to each and every adverse ruling of the hearing examiner, *Are denied.*

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

FCC 66-809

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of CEASE AND DESIST ORDER TO BE DIRECTED AGAINST BACK MOUNTAIN TELECABLE, INC., OWNER AND OPERATOR OF COMMUNITY ANTENNA TELEVISION SYSTEMS AT DALLAS BOROUGH, DALLAS TOWNSHIP, KINGSTON TOWNSHIP, LEHMAN TOWNSHIP, LAKE TOWNSHIP, AND THE "HARVEYS LAKE" AREA, PA.	Docket No. 16866

ORDER TO SHOW CAUSE

(Adopted September 7, 1966)

BY THE COMMISSION: COMMISSIONERS BARTLEY, WADSWORTH, AND JOHNSON ABSENT.

1. The Commission has under consideration the issuance of an order directed against Back Mountain Telecable, Inc., owner and operator of community antenna television systems at Dallas Borough, Dallas Township, Kingston Township, Lehman Township, Lake Township, and the "Harveys Lake" area, to cease and desist from operations in violation of sections 74.1105 and 74.1107 of the Commission's rules and regulations. Informal inquiries have been made into the operations of Back Mountain.

2. From the information before the Commission, the relevant facts appear to be as follows: On May 2, 1966, the Commission received a sworn statement from the CATV director of station WBRE-TV, Wilkes-Barre, Pa., to the effect that on the basis of personal examination and a conversation with Back Mountain's president, he believed that the CATV system began supplying distant signals to subscribers in Dallas Borough and Dallas Township, Pa., after February 15, 1966. In response to Commission inquiries, Back Mountain advised, "operation of system begun prior to effective date of Commission's rules second report and order as issued March 8, 1966, dated February 15, 1966. Local UHF channels WBRE-TV 28 and WNEP-TV 16 being carried without simultaneous duplication as per prior agreement with these channels." We are also told by Back Mountain that operation in Dallas Township, Dallas Borough, and Kingston Township began as of February 1, 1966. On May 27, 1966, station WNEP-TV advised

the Commission of its understanding, as of March 1, 1966, that the Dallas Borough and Dallas Township operations were not yet in operation, and denied the existence of an agreement respecting either nonduplication or distant signal importation on the CATV system. By separate letter dated May 12, 1966, Back Mountain gave notice to the Commission and to the stations to be carried (listed below) that effective 30 days from date of receipt of letter, Back Mountain would furnish cable facilities to Lehman Township, Lake Township, and "Harveys Lake" area. On June 15, 1966, Back Mountain advised "since no written objection has been received from the Federal Communications Commission nor from any of the interested parties," on that date construction commenced and subscribers would be furnished service in the specified areas. The Commission's independent investigation has disclosed that electric power was not supplied to the Dallas Borough line amplifiers until April 20, 1966, and later to the rest of the system.

3. Back Mountain is carrying the following distant signals into Dallas Borough, Dallas Township, and Kingston Township, and may be providing these signals to Lehman Township, Lake Township, and the "Harveys Lake" area.

KYW–TV, channel 3	Philadelphia.
WNEW–TV, channel 5	New York City.
WOR–TV, channel 9	Do.
WPIX–TV, channel 11	Do.

Back Mountain states that it supplies to its subscribers the signals of television stations WDAU–TV, channel 22, in Scranton; WNEP–TV, channel 16, and WBRE–TV, channel 28, in Wilkes-Barre; and WNBF–TV, channel 12, in Binghamton, N.Y. Scranton-Wilkes-Barre is ranked by the American Research Bureau as the 70th television market based on net weekly circulation figures for 1965. Dallas Borough, Dallas Township, Kingston Township, Lehman Township, Lake Township, and the "Harveys Lake" area are within the predicted grade A contours of all three stations in the Scranton-Wilkes-Barre area.

4. On March 8, 1966, the Commission adopted rules for the regulation of all CATV systems. The rules are set forth in the Commission's second report and order in dockets Nos. 14895, 15233, and 15971 (FCC 66–220, 2 FCC 2d 725), which was published in the Federal Register on March 17, 1966 (31 F.R. 4550). Section 74.1105 of the rules provides that after March 17, 1966, no CATV system shall commence operations or commence supplying to subscribers distant signals unless 30-day prior notice is given to all stations within whose predicted grade B contour the system will operate, and has furnished a copy of each such notice to the Commission within 60 days after obtaining a franchise or entering into a lease or other arrangement to use the facilities. Section 74.1107 of the rules sets forth certain

requirements and procedures for CATV systems operating in the 100 highest ranked television markets as determined by the American Research Bureau net weekly circulation figures for the most recent year, and pertinently provides that effective upon publication in the Federal Register no CATV system commencing operation after February 15, 1966, and located within the predicted grade A contour of a television station in 1 of the 100 largest television markets, shall provide service to subscribers which would extend the signals of any television station beyond its predicted grade B contour, except upon a showing, made in evidentiary hearing and approved by the Commission, that such extension of the signal would be consistent with the public interest.[1]

5. Back Mountain has not given the requisite notice of its operations in Dallas Borough, Dallas Township, and Kingston Township pursuant to section 74.1105 of the rules. Nor has it sought approval pursuant to section 74.1107 for its operations in these areas or Lehman Township, Lake Township, and the "Harveys Lake" area. Back

[1] On Feb. 15, 1966, the Commission had issued a public notice (No. 79927) announcing its intentions to regulate CATV systems. The Commission announced that it was asserting jurisdiction over all CATV systems, whether or not served by microwave relay, and that parties obtaining State or local franchises to operate CATV systems in the 100 highest ranked television markets, where the system would extend the signals of television broadcast stations beyond their predicted grade B contours, would be required to obtain Commission approval before such CATV service to subscribers could be commenced. It was announced at that time that an evidentiary hearing would be held as to all such requests for Commission approval, subject to the general waiver provisions of the Commission's rules. Notice was given that this aspect of the Commission's regulatory program would be applicable to all CATV operations commenced after Feb. 15, 1966.

Mountain has offered no corroborating proof for its assertion that service to subscribers in Dallas Borough, Dallas Township, and Kingston Township began before February 15, 1966. By letters dated May 12, 1966, and June 15, 1966, it has notified the Commission of its intent to proceed with additional operations on June 15, 1966, in Lehman Township, Lake Township, and the "Harveys Lake" area, all apparently in violation of the requirements in section 74.1107.

6. In the second report and order we indicated that we would take action expeditiously in the event of a violation of section 74.1107 of the rules. We acknowledged "the very great desirability" of avoiding the disruption of CATV service to the public which would result from action applicable to an operating CATV system. Clearly, time is of the essence here. This part of the rules was made effective upon publication so that the Commission could proceed forthwith against any system contravening the rules. The public interest requires that, insofar as possible, the situation in Dallas Borough, Dallas Township, Kingston Township, Lehman Township, Lake Township, and the "Harveys Lake" area be held in status quo. The Commission finds that due and timely execution of its functions in this matter imperatively and unavoidably requires that the examiner certify the record, 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 7 calendar days after the date the record is closed. There is only one real issue to be resolved—the question of compliance with sections 74.1105 and 74.1107.

7. *It is ordered*, This 7th day of September 1966, that, pursuant to sections 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), Back Mountain Telecable, Inc., *Is directed to show cause* why it should not be ordered to cease and desist from further operation of CATV systems in Dallas Borough, Dallas Township, and Kingston Township in violation of sections 74.1105 and 74.1107 of the Commission's rules and regulations, and in Lehman Township, Lake Township, and the "Harveys Lake" area, in violation of section 74.1107 of the Commission's rules and regulations.

8. *It is further ordered*, That Back Mountain Telecable, Inc., is directed to appear and to give evidence with respect to the matters recited above at a hearing to be held at Washington, D.C., at a time and before an examiner to be specified by subsequent order, unless the hearing is waived, in which event a written statement may be submitted.

9. *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 7 days after the date the record is closed.

10. *It is further ordered*, That the Secretary of the Commission shall send copies of the order by certified mail, return receipt requested, to Back Mountain Telecable, Inc.

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

The following are notations of Commission actions which are not printed in full

APPARENT LIABILITY FOR FORFEITURE

Station WDAO (FM), Dayton, Ohio. Notice of Apparent Liability in amount of $500 for violations of sections 73.265(b), 73.922, 37.283(a)(3) and 73.254(b) of Rules. June 29, 1966.

Tri-Cities Broadcasting Corp., Columbia, Pa. Notice of Apparent Liability. July 13, 1966.

KIKI, Ltd., Honolulu, Hawaii. Notice of Apparent Liability for multiple violations of operator and log keeping requirements. July 27, 1966.

Richmond County Broadcasting Co. (WKDX), Wadesboro, N.C. Notice of Apparent Liability for $500. August 24, 1966.

Highlands Radio, Inc., Sebring, Fla. August 31, 1966.

The Willis Broadcasting Co., Willimantic, Conn. August 31, 1966.

Hillard Co., Scottsbluff, Nev. August 31, 1966.

APPLICATIONS ACCEPTED FOR FILING

Smiles of Monroe, Inc., Monroe, N.C. June 22, 1966.

Old Hickory Broadcasting Corp., Monroe, N.C. June 22, 1966.

Beasley, George G., Benson, N.C. July 13, 1966.

Baranowski, Frank, Nogales, Ariz. July 13, 1966.

KDSX, Inc., Denison-Sherman, Tex. July 27, 1966.

"What the Bible Says, Inc.", Rochester, N.Y. August 10, 1966.

Mid-State Broadcasting Co., Lakewood, N.J. August 10, 1966.

Faulkner Radio, Inc., Slidel, La. August 10, 1966.

Treasure Valley Broadcasting Co., Boise, Idaho. August 10, 1966.

Clear Tone Broadcasting Co., Inc., Greensburg, Ind. August 10, 1966.

Radio Station WRDS, South Charleston, W. Va. August 17, 1966.

APPLICATIONS FOR REVIEW

Orange County Radiotelephone Service Inc., Los Angeles, Calif. Review Granted. July 7, 1966.

Capital Broadcasting Corp, Frankfort, Ky. Review denied. July 27, 1966.

Brown Broadcasting Co., Inc., Jacksonville, N.C. Review denied. July 27, 1966.

Clay County Broadcasting Co., Manchester, Ky. Review denied. August 17, 1966.

Wilkesboro Broadcasting Co., Wilkesboro, N.C. Review denied. August 17, 1966.

APPLICATIONS DESIGNATED FOR HEARING

KJRD, Inc., Monroe, Wash. Mountlake Terrace, Wash. Designated mutually exclusive applications for hearing. July 13, 1966.

KFIZ Broadcasting Co., Fond du Lac, Wis. Designated mutually exclusive applications for hearing. July 13, 1966.

TVie Associates, Inc., Galveston, Tex. Mutually exclusive applications designated for consolidated hearing. June 29, 1966.

Adirondale Television Corp., Albany, N.Y. Mutually exclusive applications designated for hearing. June 29, 1966.

Station KTCA-TV, St. Paul, Minn. Application designated for consolidated hearing. July 20, 1966.

American Television Service, Kingsport, Tenn. Mutually exclusive application for television station designated for consolidated hearing. July 13, 1966.

Chapman Radio & Television Co., Homewood, Ala., Birmingham, Ala. Mutually exclusive application for television station designated for consolidated hearing. July 13, 1966.

Fox River Broadcasting Co., Oshkosh, Wis. Mutually exclusive application designated for hearing. August 17, 1966.

Branch Associates, Inc. Houma, La., Donaldsonville, La. Mutually exclusive application designated for hearing. August 17, 1966.

245-843—68——3

Bay Broadcasting Co., San Francisco, Calif. Mutually exclusive application for television station designated for hearing. Aug. 24, 1966.

KWHK Broadcasting Co., Inc. (KWHK), Hutchinson, Kans., Philadelphia Pa., Wichita, Kans., Guymon, Okla. Mutually exclusive applications for standard broadcast construction permit. August 31, 1966.

Arthur Powell Williams. Las Vegas, Nev. Application for renewal of license of KLAV. September 7, 1966.

Goodman Broadcasting Co., Madison, Ala. Application for standard broadcast station designated for hearing. September 7, 1966.

BBPS Broadcasting Corp., Ellwood City, Pa. Applications designated for hearing. September 7, 1966.

CONSTRUCTION PERMIT

Emerald Broadcasting Co., Bijou, Calif. Application for standard broadcast construction permit—denied. June 22, 1966.

Pickens County Broadcasters, Carrollton, Ala. Request for construction permit for class C FM broadcast station—granted. June 29, 1966.

Fosston Broadcasting Co., Fosston, Minn. Application for construction permit for standard broadcast station. July 6, 1966.

KBUB, Inc., Reno, Nev. Application for construction permit for class C FM Broadcast station—granted. July, 1966.

Service Broadcasting Co., Murray, Ky. Application for construction permit for class C FM Broadcast station—granted. July 13, 1966.

United Broadcasting Co., Inc. West Terre Haute, Ind. Application for construction permit for Class A FM Broadcast station—granted. July 20, 1966.

WRMF Inc., Tikesville, Fla. Application for construction permit for Class A FM broadcast station—granted. July 20, 1966.

Lawson, H. F., Crossville, Tenn. Application for construction permit for Class A FM broadcast station—granted. July 20, 1966.

Lancaster Broadcasters, Lancaster, Ky. Application for construction permit for standard broadcast station—granted. July 27, 1966.

Wisconsin Radio, Inc., River Falls, Wis. Application for construction permit for Class A FM Broadcast station—granted. July 27, 1966.

Enid Radiophone Co., Enid, Okla. Application for construction permit for Class C FM broadcast station—granted. July 27, 1966.

Duhamel Broadcasting Enterprises, Lead, S. Dak. Section 73.636(a)(1) waived and application granted. June 29, 1966.

Northern Indiana Broadcasters, Inc., Huntington, Ind. Construction permit for UHF television translator station—granted. July 13, 1966.

University of North Carolina, Chapel Hill, N.C. Aplication for new educational television broadcast station—granted after waiver of section 73.614(a) and 73.685(e) of Rules. July 13, 1966.

Central Virginia Educational Television Corp., Rustburg, Va., Lynchburg, Va., Gretna-Elba, Va. Construction permit for translators—granted after waiver of section 74.735 of Rules. July 13, 1966.

Pacific FM, Inc. (KPEN), San Francisco, Calif. Set aside previous action granting construction permit for FM Co-Channel Booster station. July 15, 1966.

Southington Broadcasters, Southington, Conn. Petition for review denied. June 22, 1966.

Board of Governors of West Virginia University, Morgantown, W. Va. Waiver of sections 73.685(e) and 73.614(b) of Rules and application for construction permit for educational TV station—granted. August 10, 1966.

H. Sid Comer, Sparta, N.C. Construction permit for standard broadcast station—granted. August 10, 1966.

Electronic Broadcasting Co., Oklahoma City, Okla. Construction permit for Class C FM station—granted. August 17, 1966.

Northwestern Publishing Co., Danville, Ill. Construction permit for Class B FM station—granted. August 17, 1966.

Rust Craft Broadcasting Co., Toledo, Ohio. Construction permit for new television station—dismissed. August 24, 1966.

Jackson Television Corp., Dearborn, Mich. Construction permit for television station—granted. August 24, 1966.

Henryetta Radio Co., Henryetta, Okla. For new Class C FM broadcast station—granted. August 31, 1966.

Thumb Broadcasting Co., Bad Axe, Mich. For new Class A FM broadcast station—granted. August 31, 1966.

Board of Cooperative Educational Services for the Third Supervisory District of Delaware. Construction permit for UHF and VHF translators for educational television—granted. August 31, 1966.

Guy Christian, Santa Fe, N. Mex. Construction permit for Class C FM broadcast station—granted. September 7, 1966.

The Board of Cooperative Educational Services of the Third Supervisory District of Delaware. Construction permit granted. September 14, 1966.

EXTENSION OF TIME

World Administrative Radio Conference. For filing comments in docket—short time granted. July 29, 1966.

Pasadena Community Station, Inc., Pasadena, Calif. Appeal of ruling against extension of time to exchange exhibts—appeal denied. August 25, 1966.

FAIRNESS DOCTRINE—LETTERS

Rochester Area Council of Churches, Inc., Rochester, N.Y. Complaint against station WHAM—denied. July 27, 1966.

INCREASE OF POWER

KFIZ Broadcasting Co., Fond du Lac, Wis. Class IV daytime power increase—granted. August 31, 1966.

JOINT REQUEST TO DISMISS ONE APPLICATION AND GRANT ANOTHER

Pick Radio Co., Pickens, S.C. Agreement between competing applicants acepted; Pick application for construction permit granted; amendment to change frequency by competitor accepted for filing. June 29, 1966.

Trentone, Inc., Trenton, Tenn. Joint accepted for filing. June 29, 1966. 6, 1966.

ORAL AGREEMENT

Kent-Sussex Broadcasting Co., Mulford, Del. Request for oral argument—denied. July 29, 1966.

McLendon Pacific Corp., Oakland, Calif. Argument for September 15, 1966. July 13, 1966.

McLendon Pacific Corp., Oakland, Calif. Argument rescheduled for September 29, 1966. July 20, 1966.

Orange County Radiotelephone Service, Inc., Los Angeles, Calif. Argument scheduled for September 29, 1966. July 20, 1966.

McLendon Pacific Corp., Oakland, Calif. Petition for addition time for oral argument of AM forfeiture proceeding—granted. August 3, 1966.

RECONSIDERATION, PETITION OF

Voice of Middlebury, Middlebury, Vt. Petition for reconsideration of construction permit grant—denied. July 20, 1966.

REQUEST FOR STAY

Voice of Middlebury, Middlebury, Vt. Request for stay—denied. July 20, 1966.

A.T. & T. Requesting a stay order—denied. August 23, 1966.

REVOCATION OF LICENSE

Palmetto Communications Corp. (WHHL) Holly Hill, S.C. August 11, 1966.

RULEMAKING

Amendment of part 83 of Rules to eliminate paragraph (e) of section 83.405 that requires ship-radar station licensees to maintain an operating performance record of shipboard radar. July 7, 1966.

Amendment of part 97 of Rules to authorize on a permanent basis the Radio Amateur Civil Emergency Service (RACES) on an integral phase of the Amateur Radio Service for Civil Defense operations. July 13, 1966.

Amendment of Rules and Application Form concerning Instructional Television Fixed Service (section 74.902 and FCC Form 330–P). July 6, 1966.

Amendment of sections 73.202(a), 73.205(a), 73.207(a), 73.210(c), 73.211, 73.209(c), 73.242(a), 73.311(b), 73.312(c)—approved. July 20, 1966.

Petition by Board of Regents of University of State of New York to amend Part 74 of rules—denied. July 20, 1966.

Amendment of Commission's Ethical Conduct Regulation re employees required to submit statements of employment and financial interests—adopted. July 20, 1966.

Amendment of part 97 of Rules governing Amateur Radio Service to reduce the authorized maximum power input for amateur stations from 1 kw. to 125 w.—denied. August 24, 1966.

Amendment of TV Broadcast Auxiliary Rules, part 74, subpart F, to Modify and Clarify Permissible Use of Television STL and Television Intercity Relay Stations. August 31, 1966.

NOTICE OF PROPOSED RULEMAKING

Proposed Amendment of section 95.95 (d) to exempt certain citizens radio stations from station identification requirements. July 7, 1966.

Proposed Amendment of part 87—aviation services to allow use of single sideband by Civil Air Patrol stations. July 18, 1966.

Proposed waiver of the requirement for a construction permit in Safety and Special Radio Services. July 20, 1966.

Proposed amendment of section 93.357 to provide for "hot box" detection by means of radio. July 20, 1966.

Proposed amendment of part 89 of Rules to permit surveillance activities on frequencies available to Police Radio Service. July 20, 1966.

Amendment of section 73.202. Table of Assignment, FM broadcast stations, San Bernardino, Calif. June 29, 1966.

Amendment of part 2 of Rules to delete restriction imposed by paragraph 167 of international Radio Regulation on emission from band 90–160 kc/s. July 6, 1966.

Amendment of parts 2 and 74 of Rules relating to 150.8–162 Mc/s band. July 20, 1966.

RENEWAL OF LICENSE

Station KCTY, Salinas, Calif. Designation of renewal aplication for hearing on issues of unauthorized transfer of control, broadcast of lottery, teaser announcements, and falsification of logs. July 13, 1966.

Bi-States Co., Holdrege, Neb. Renewal of translator station licenses—granted without nonduplicating conditions requested by Bi-States but subject to outcome of docket No. 15971. July 13, 1966.

KENO, Las Vegas, Nev., Newport, Oreg., Port Hueneme, Calif. Three licenses renewed. July 7, 1966.

WCBG, Chambersburg, Pa. et al. Station WIP and station WCMB renewal aplications—granted. July 27, 1966.

WCHS–AM–TV Corp., Charleston, W. Va. Renewal of license of WCHS–AM—granted. September 7, 1966.

Pacifica Foundation, New York City, N.Y. Renewal of license of WBAI–FM—granted. September 7, 1966.

SHOW CAUSE ORDER

Asheboro Broadcasting Corp., Asheboro, N.C. Order to show cause why license for station WGWR AM–FM should not be revoked. July 20, 1966.

SITE CHANGES

WCHS AM–TV Corporation, Charleston, W. Va. Request granted. June 29, 1966.

Columbia View Properties, Inc., Pasco, Wash. Request granted. June 29, 1966.

William V. Whetstone, Jr., Bamberg, S.C. Request granted. June 29, 1966.

TRANSFER OF CONTROL AND ASSIGNMENT OF LICENSE

Duval Television Corp., Jacksonville, Fla. Assignment of construction permit—granted. June 22, 1966.

Town and Country Radio, Inc., Rockford, Ill. Transfer of control—granted. July 7, 1966.

Coast Broadcasting Co., Georgetown, S.C. Assignment of license—granted. July 7, 1966.

Capitol Broadcasting Co., Jefferson City, Mo. Assignment of three licenses—all granted. July 13, 1966.

Atlantic States Industries, Inc., Pensacola, Fla. Transfer of control—granted. July 20, 1966.

Coast Radio Broadcasting Corp., Los Angeles, Calif. Transfer of control—granted. July 20, 1966.

International Telephone and Telegraph. Letter re proposed merger with American Broadcasting Co., Inc. July 20, 1966.

Pan Florida, Inc., Sarasota, Fla. Letter concerning de facto transfer of control of station WSAF, Sarasota, Florida. July 6, 1966.

New Boston Television, Inc. Transfer of control of UHF station WIHS–TV—granted. July 27, 1966.

Melody Music, Inc., Hollywood, Fla. Assignment of license of station WGMA—granted. July 27, 1966.

Dalworth Broadcasting Co., Inc. Fort Worth Tex., Amarillo, Tex. Assignment of license and construction permit—granted. July 27, 1966.

Dixie Broadcasting Co., Jackson, Tenn. Assignment of licenses of stations WDXI, WDXI–TV—granted. August 17, 1966.

WDTM, Inc., Detroit, Mich. Transfer of control of WDTM, Inc.—granted. August 17, 1966.

WBJA–TV, Inc., Binghamton, N.Y. Transfer of control of WBJA–TV, Inc. through sale of majority of stock in Empire Television and Radio, Inc.—granted. August 17, 1966.

Hawaiian Paradise Park, Corp., Honolulu, Hawaii. Assignment of licenses of stations KTRG–TV and KUT–67—August 17, 1966.

Friendly Broadcasting Co., Washington, D.C. Assignment of license of station KTRG–TV (Honolulu, Hawaii)—denied. August 17, 1966.

WJPB–TV, Inc., Weston, W. Va. Transfer of control from Thomas P. Johnson, to Medallion Pictures Corp.—granted. August 24, 1966.

Churchill Broadcasting Corp. (KYA, KOIT), San Francisco, Calif. Transfer of control from Churchill to Avco Broadcasting Corp.—granted. August 24, 1966.

Pembina Broadcasting Co., Pembina, N. Dak. Assignment of license of KCND–TV—granted. August 24, 1966.

Adams, Lawrence W., Bardstown, Ky. Renewal and assignment of license of station WBRT to Nelson County Broadcasting Co., Inc.—granted. August 31, 1966.

Bloomquist, Carl, Hibbing, Minn. Assignment of construction permit for WIRT–TV to Channel 10, Inc.—granted. August 31, 1966.

Television Broadcasters, Inc., Beaumont, Tex. Assignment of licenses related to KBMT–TV to Essex Corp. August 31, 1966.

FM TABLE OF ASSIGNMENTS

Notice of Proposed Rulemaking re amendment of section 73.202—adopted. Reedsburg, Wis.; Portland, Ind.; Brazil, Ind.; Winter, S. Dak.; Ardmore, Okla.; Hutchinson and St. Cloud, Minn.; Gonzales, Tex.; Cullman, Ala.; Deland, Fla.; Winter Park, Fla.; Live Oak, Fla.; Osala, Fla.; Rockford, Ill.; Adrian, Mich.; Jackson, Mich.; Corinth, Miss. July 13, 1966.

TV TABLE OF ASSIGNMENTS

Ohio Radio, Inc., Defiance, Ohio. Request to amend 73.606 to assign new UHF channel to Defiance, Ohio—denied. June 29, 1966.

Petition for reconsideration by National Association of Educational Broadcasters of the Revised Tables of Assignments for UHF in Fifth Report and Order—denied. July 7, 1966.

Petition for reconsideration of UHF assignment in Newark, N.J.—denied. July 7, 1966.

Petition for reconsideration of Television Broadcast assignment at Arkadelphia, Ark.—denied. July 7, 1966.

Notice of Proposed rulemaking re amendment of 73.606 to add a channel to Fayetteville, Ark.—granted. July 7, 1966.

Notice of Proposed Rulemaking re Table of Assignments, TV Broadcast stations in Dallas and Tyler, Tex. and Lawton, Okla.—approved. July 13, 1966.

Notice of Proposed Rulemaking re New Brunswick-Newark, N.J. July 20, 1966.

Petition for reconsideration—denied. Las Vegas, Boulder City, Goldfield, Nev. and Cedar City, Utah. July 27, 1966.

Notice of Proposed Rulemaking re Courtland, Va. August 24, 1966.

Notice of Proposed Rulemaking re Norfolk, Nebr. August 24, 1966.

WAIVER OF RULES

Collins Radio Co. Request for waiver of parts 81, 83 and 85 of rules—granted. June 29, 1966.

Cities Service Oil Co. Request for waiver of section 91.303(b)(2) of rules—denied. July 7, 1966.

Yellow Cab Co. of California. Request for waiver of section 93.402(b) of Taxicab Radio Service Rules to permit operation on tertiary or 15 Kc/s channels—granted. July 20, 1966.

Baltimore Radio Show, Inc., Baltimore, Md. Request for waiver of section 317(a) of Communications Act of 1934 in connection with the station's classified advertising program—granted. June 29, 1966.

Friendship Broadcasters Inc., Havelock, N.C. Request for waiver of section 1.569 of Rules—denied. June 22, 1966.

Hanna, Boyce J., Gastonia, N.C. Request for waiver of section 1.569(b)(c)(i)—denied. June 22, 1966.

Smiles of Monroe, Inc., Monroe, N.C. Request for waiver of section 1.569(b)(2)(i)—granted. June 22, 1966.

Old Hickory Broadcasting Corp., Monroe, N.C. Request for waiver of section 1.569(b)(2)(i)—granted. June 22, 1966.

Seashore Broadcasting Co., Inc., Orleans, Mass. Request for waiver of section 1.569(b)(2)(i) of rules—denied. July 13, 1966.

Randolph Broadcasting, Asheboro, N.C. Request for waiver of section 1.569(b)(2)(i) of rules—denied. July 13, 1966.

Beasley, George G., Benson, N.C. Request for waiver of section 1.569 of Rules—granted. July 13, 1966.

Baranowski, Frank, Nogales, Ariz. Request for waiver of section 73.37 of Rules—granted. July 13, 1966.

KDSX, Inc., Denison-Sherman, Tex. Request for waiver of section 73.207(a) of Rules—granted. July 27, 1966.

United Transmission, Inc., Roaring Spring, Martinsburg, Freedom Township, Greenfield Township, Pa. Request for waiver of section 74.1107 of Rules—granted. July 27, 1966.

"What the Bible Says, Inc.," Rochester, N.Y. Request for waiver of section 1.569(b)(2)(i)—granted. August 10, 1966.

Mid-State Broadcasting Co., Lakewood, N.J. Request for waiver of section 1.569(b)(2)(i)—granted. August 10, 1966.

Faulkner Radio, Inc., Slidell, La. Request for waiver of 1.569(b)(2)(i) of Rules—granted. August 10, 1966.

Clear Tone Broadcasting Co., Inc., Greensburg, Ind. Request for waiver of section 73.213(f)(1) of Rules—granted. August 10, 1966.

Portorican American Broadcasting Co., Inc., P.R. Request for waiver of section 73.207(a) of Rules—denied. August 10, 1966.

Inland Communications, Inc. Request for waiver of sections 81.104(b)(2) and 81.191(c)(2) of Rules—denied. August 17, 1966.

Arizona Automobile Association. Request for waiver of 93.503(b) of Rules—denied. August 17, 1966.

Radio New York Worldwide, Inc., New York, N.Y. Request for waiver of section 73.37(a) of Rules—granted. August 17, 1966.

Radio Station WRDS, South Charleston, W. Va. Request for waiver of section 73.37(a) of Rules—granted. August 17, 1966.

Broadcasting Co. of the Carolinas, Inc., Cherryville, N.C. Request for waiver of section 73.37(a) of Rules—granted. August 17, 1966.

Eastern Carolina Broadcasters, Inc., Florence, S.C. Request for waiver of section 73.37(a) of Rules—granted. August 17, 1966.

Golden Triangle Broadcasting, Inc., Pittsburgh, Pa. Request for waiver of section 73.37(a) of Rules—granted. August 17, 1966.

Sundial Broadcasting Co., Parma, Ohio. Request for waiver of section 73.37 of Rules—granted. August 17, 1966.

South Bend Tribune (WSBT-TV), South Bend, Ind. Request for waiver of section 73.614(b), footnote 1 of Rules—granted. August 17, 1966.

Texoma Broadcasters, Inc., Sherman, Tex. Request for waiver of section 74.732(e)(1) of Rules—granted. August 17, 1966.

Bay Area Educational Television Association, San Francisco, Calif. Request for waiver of section 73.682 of Rules—granted. August 17, 1966.

Newberry Broadcasting Co., Carsonville, Mich. Request for waiver of section 73.37(a) of Rules—granted. August 31, 1966.

Radio 1170, Inc., Hazelton, Pa. Request for waiver of section 1.569(b)(2)(i) of Rules—denied. August 31, 1966.

Breckinridge Broadcasting Co., Hardinsburg, Ky. Request for waiver of section 1.569(b)(2)(i) of Rules—denied. August 31, 1966.

General Motors Research Corp. Waiver of sections 2.106(a), 91.102 and 91.109(b) allowing utilization of frequency 217.550 Mc/s—granted. August 31, 1966.

Lemont Construction Co., Tex. Request for waiver of section 91.554(b)(15) of Rules—denied. September 7, 1966.

Radio Staion WPFB, Inc., Middletown, Ohio. Request for waiver of section 73.24(b) of Rules—denied. September 7, 1966.

Screen Gems Broadcasting of Utah, Inc. Waiver of sections 74.702(c) and 74.785(b) of Rules—granted. September 7, 1966.

Siera Broadcasting, Inc. KICU-TV, Visalia, Colo. Waiver of sections 73.614(a), 73.614(b)(4) and 73.685(e). August 17, 1966.

Community Television of Southern California, KCET, Los Angeles, Calif. Waiver of transmission standards—granted. September 14, 1966.

Northwest Television Company, KQTV, Fort Dodge, Iowa. Waiver of call letter assignment and change—granted. September 14, 1966.

MISCELLANEOUS

Jelen, Frederic C. Application for renewal of amateur radio license—granted. July 27, 1966.

Harrington Broadcasting Co., New Petoskey, Mich. Petition for expedited consideration of application—denied. June 29, 1966.

WJRZ, Inc., Newark, N.J. Request for expeditious consideration of application—granted. July 6, 1966.

Kaysbier, Fred, Alamogordo, N. Mex., Request for expeditious consideration of application—denied. July 6, 1966.

Mutual Broadcasting System, New York, N.Y. Letter refusing Mutual's request that its affiliates be exempt from counting commercials aired during network newscasts. June 22, 1966.

Communications Satellite Corp. Application for authority to construct six synchronous communication satellites—granted. June 22, 1966.

Western Union Telegraph, New York, N.Y. Prescription of percentage of depreciation for Wicetelegraph plant—approved. July 6, 1966.

General Waterworks Corp. Participation in the Domestic Public Land Mobile Radio Service (DPLMRS) through miscellaneous common carriers—approved. July 27, 1966.

American Broadcasting Companies, San Francisco, Calif. Letter regarding condition to grant of application for authority to increase antenna height. July 7, 1966.

Nammar Electronics, Inc., Oklahoma City, Okla. Order to cease operation of transmitter. July 18, 1966.

Trans-World Electronics, Inc. Request of Bureau of Customs for recommendations concerning settlement of claims resulting from violations of all-channel television receiver rules—approved. August 10, 1966.

Procedures governing U.S. Government instructions to ComSat in its role as U.S. representative to the Interim Communications Satellite Committee (ICSC)—letter approved. August 10, 1966.

Childress Broadcasting Corp. of West Jefferson, Sylva, N.C. Request for expedited consideration—denied. August 24, 1966.

Tri-County Broadcasting Co., Safford, Ariz. Request for expedited consideration—denied. August 24, 1966.

ITT Communications, Inc. Application for modification of license to authorize communication with San Jose, Costa Rica—granted. August 24, 1966.

Amendment of delegation of powers concerning tort claims. August 31, 1966.

CATV, San Diego, Calif. Petition for modification of order relating to relief—granted. August 8, 1966.

SUBJECT DIGEST

ACQUISITION

The Bare assertion that an applicant had available funds is insufficient to deny an enlargement of issues with respect to finances. A reliance on ownership reports of acquisition of a station during pendency of a comparative hearing for a new station does not satisfy section 1.65 and an application amendment is required. *Gordon Sherman*, 337.

A request for a multiple ownership (73.35) issue against one applicant, which would exceed the limit of stations if granted, was denied where the grant would be conditioned on disposal of a station, and requested issue concerning a net work applicant for extension of coverage, was denied since extension of service would not alter the diversification of ownership policy. *KWHK B/cing Co., Inc.*, 365.

ADVERTISING

Permission was granted under sec. 303(g) on a one year trial basis, for change in programming format to a classified ads and public service announcements only format, subject to filing requested reports. *The McLendon Pacific Corp.*, 722.

Although applicant would serve a substantial portion of the larger city, the presumption that it proposed to serve the larger city was rebutted by showing antenna location, first service need of the smaller community program proposals, advertising commitments, and local stockholders. *Clay B/cers, Inc.*, 932.

AERONAUTICAL SERVICE

Two applications for aeronautical advisory stations (sec. 87.251) to serve the Key West International Airport were designated for hearing. *Key West Areo*, 783.

AFFIDAVIT, NEED FOR

An affidavit by a person having actual knowledge of the facts alleged must support a petition to enlarge issues (Sec. 1.229(c)). *Cosmopolitan Enterprises, Inc.*, 637.

AGREEMENT, REIMBURSEMENT

An agreement for dismissal of one of two competing applicants and retention of the other in hearing status, upon payment of a portion of out-of-pocket expenses was approved along with an amendment (sec. 1.522(b)) which would permit substitution of original transmitter site (sec. 73.188(a)) by retained applicant. *Wilkesboro B/cing Co.*, 164.

The withdrawal of one application and dismissal of another upon the partial reimbursement of expenses requested by a joint agreement, granted (secs. 311, 1.525). *The Corinth B/cing Co., Inc.*, 278.

The dismissal of one application and the granting of the other requested by a joint petition which provided for reimbursement expenses, granted. Waiver of 5 day provision of sec. 1.525 granted. *Hennepin B/cing Associates, Inc.*, 279.

Approval of an agreement to dismiss an application, payment of out-of-pocket expenses, and a right of first refusal for 10 years to transfer control of the license was granted. *McAlister B/cing Corp.*, 381.

A reimbursement of expenses (sec. 311(c)) was approved over objections by the Broadcast Bureau which alleged that the withdrawing applicant was the better one. *WDIX, Inc.*, 653.

A request for reimbursement of expenses and withdrawal of application was denied where it was indeterminable from the submitted material whether there would be any underserved areas with either applicants service contours (sec. 1.525 (b)(1). *James L. Hutchens*, 700.

A reimbursement of expenses agreement was approved over the objections of the Broadcast Bureau on the grounds that the Bureau had made an insufficient showing to challenge the sworn statements submitted. *Central B/cing Corp.*, 776.

A joint request for approval of agreement for reimbursement of expenses conditioned on withdrawal of one application and grant of another was held in abeyance for other persons to apply since one applicant would serve a larger, and different area, and no showing was made of other available FM service to their respective areas. Publication under sec. 1.525(b)(2) required since 307(b) issue remains. *Lafayette B/cing Co., Inc.*, 778.

A joint request for approval of agreement (sec. 1.525) withdrawing one application granting another, and reimbursement of expenses, was granted. *Semo B/cing Co.*, 826.

A petition for reconsideration of order (3 FCC 2d 907) allowing in part reimbursement of expenses (sec. 1.525) which presented facts not previously relied on (sec. 1.106(c)) but which did not relate to changed circumstance, was denied. *Richard O'Connor*, 827.

A joint agreement for reimbursement of expenses upon withdrawal of one applicant and grant of another was approved. *Heath-Reasoner B/cers*, 850.

An agreement to withdraw reimbursement (sec. 311(c)(3)) which was filed after the five day required period (sec. 1.525) was accepted. The financial issue as to the remaining applicant was examined and the application granted. *Keith L. Reising*, 868.

An agreement for reimbursement of expenses, upon condition that applicant who will receive reimbursement will either dismiss or amend to a different frequency, was granted (sec. 1.525), the amendment accepted, and amended applications returned to the processing line (secs. 1.564(b) and 1.571(i)) and other application granted. *Abacoa Radio Corp.*, 940.

A reimbursement of expenses agreement was approved for UHF–TV applicants for Orlando, Fla. *Gordon Sherman*, 978.

AGREEMENT TO WITHDRAW

The withdrawal of one application and dismissal of another upon the partial reimbursment of expenses requested by a joint agreement, granted (secs. 311, 1.525). *The Corinth B/cing Co., Inc.*, 278.

The dismissal of one application and the granting of the other requested by a joint petition which provided for reimbursement expenses, granted. Waiver of 5 day provision of sec. 1.525 granted. *Hennepin B/cing associates, Inc.*, 279.

A request for reimbursement of expenses and withdrawal of application was denied where it was indeterminable from the submitted material whether there would be any underserved areas with either applicants service contours (sec. 1.525(b)(1). *James L. Hutchens*, 700.

A joint request for approval of agreement for reimbursement of expenses conditioned on withdrawal of one application and grant of another was held in abeyance for other persons to apply since one applicant would serve a larger, and different areas, and no showing was made of other available FM service to their respective areas. Publication under sec. 1.525(b)(2) required since 307(b) issue remains. *Lafayette B/cing Co., Inc.*, 778.

A joint request for approval of agreement (sec. 1.515) withdrawing one appliion granting another, and reimbursement of expenses, was granted. *Semo B/cing Co.*, 826.

A joint agreement for reimbursement of expenses upon withdrawal of one applicant and grant of another was approved. *Heath-Reasoner B/cers*, 850.

An agreement to withdraw with reimbursement (sec. 311(c)(3)) which was filed after the five day required period (sec. 1.525) was accepted. The financial issue as to the remaining applicant was examined and the application granted. *Keith L. Reising*, 868.

A joint petition for approval of agreement for the dismissal of one application and grant of another was found to be in the public interest (sec. 1.525). *City Index Corp.*, 876.

AIRDROME CONTROL STATIONS

Section 87.403(b)(1) of the rules was waived to permit licensee to maintain a listening watch on 122.6 mc/s. *City of Fort Lauderdale, Fla.*, 785.

ALLEGATIONS, TIMING OF

Allegations by a CATV operator in the same community that applications for translator CPS were filed for the purpose of coercing petitioner to purchase or lease certain property, were sufficiently serious to warrant a hearing. Sec. 1.45 waived permitting applicant to respond late, and its answer accepted even though not conforming to sec. 309(d) (supporting affidavit). *McCulloch County Translator Co-Op*, 392.

AMENDMENT

An amendment, proposing a directional antenna and reduced power by one applicant which eliminated the necessity for a consolidated hearing, was properly granted since section 1.571(j)(1) encourages amendments which remove potential conflicts. An applicant may amend as a matter of right (sec. 1.522) and sec. 1.227 (a)(2) does not require consolidation the moment conflict appears. *Mansfield B/cing Co.*, 154.

Subpart b of part 25 of the rules was amended specifying that parties making procurement in the space segment of a ComSat system shall not include foreign persons or companies. *Comm. Sat. Procurement Reg.*, 251.

The frequency 2400 kc/s (coast and ship) was made available for public shipshore use for those employing telephony in Baltimore, Md., area for continuous hours of service by amending parts 81 and 83 of the Commission's rules. *Ship-Shore Freq. for Balt., Md. area*, 325.

Part 83 of the rules was amended to permit use of low power transmissions without complying with the multichannel requirement by marine utility stations. *Marine Utility Station Frequencies*, 327.

Where an amendment would improve the competitive position, delay the proceeding and good cause has not been shown (sec. 1.522(b)), a petition to amend from a shared time operation to full time, when the shared time applicant withdrew was denied. *Flower City TV Corp.*, 384.

An uncontested motion to amend an order to show cause by adding subsequent violations to the order issued by the Chief, Safety and Special Radio Services Bureau, was granted. *Raymond W. Gill*, 397.

Parts 87, 89, and 93 of the rules were amended to broaden the policy regarding sharing of private microwave facilities. Unrestricted sharing will be permitted on frequencies above 10,000 mc/s, cross-service sharing below 10,000 mc/s will be limited in order to observe developments of cooperative systems on a cross-service basis. *Co-Op Sharing of Oper Fixed Stations*, 406.

The rules of the Commission (sec. 91.351) were amended governing eligibility in the forest products radio service to include log haulers and persons who have dual eligibility in the forest products and manufacturers radio service. *Forest Products Radio Service*, 807.

An appeal from an allowance of an amendment specifying competing applicants physical plant and purchase of all its assets, was granted, and in view of a finding that none of the consideration was for reimbursement of expenses (sec. 311 (c)) (not allowable because of unresolved issues), the petition for amendment, dismissal, and grant was granted (sec. 1.525). *Brown Radio & Television Co.*, 852.

The Commission's order of June 22, 1965 as amended, file No. 1–A–CSG–L–65 is amended to include authority for ComSat to make available to the Canadian Overseas Telecommunications Corp. one additional unit of Andover Earth Station for public message voice service between Montreal, Canada and Rome, Italy. *ComSat Corp.*, 931.

In granting a petition for amendment (sec. 1.522(b)) and return to the processing line, it was held that a possible suburban community issue would not prohibit the requested relief since it is possible that the issue could be resolved on the processing line. *Norristown B/cing Co., Inc.*, 937.

Amendments to reflect changes in stockholders broadcast interests and in main studio location were allowed. *TV San Francisco*, 971.

AMERICAN BROADCASTING COMPANY

Applications for assignments of licenses and transfers of control of American Broadcasting Cos., Inc., to ITT were designated for oral argument before the Commission, en banc. *American B/cing Cos.*, 709.

AMERICAN TELEPHONE AND TELEGRAPH

A proposal to increase rates on an interim basis with a specific hearing on the TWX service has been consolidated with petitioners other requests, in a separate proceeding although the increase as now proposed cannot be found, on the basis of the evidence, to be just and reasonable. *Amer. Tel. & Tel.*, 545.

A petition for reconsideration (sec. 1.106) of the Commissions memorandum opinion and order of July 22, 1966, in Docket 15011 was denied on the grounds that the evidence of record supports the conclusion that TWX earnings should be adjusted upward and that the Commission did not prescribe rates in violation of the act. *Amer. Tel. & Tel.*, 891.

ANNUAL REPORT

Secs. 89.13, 91.6, and 93.4 are modified only for the purpose of deleting therefrom provisions concerning sharing of fixed radio stations. Annual statements not required for sharing by governmental agencies nor for free-of-charge services, but are required for governmental and nongovernmental sharing. *Co-Op Sharing of Oper. Fixed Stations*, 406.

Licensee was fined $150 for willful and repeated failure to file annual financial reports (sec. 1.611). ***Powell County B/cing Co.*, 866.**

ANTENNA CHANGE

Petition to dismiss application for authority to change antenna to increase radiation in null area filed during AM freeze denied because applicant entitled to compartive hearing. Designated issues concerned service area and population, transmitter site, mou, interference (sec. 73.28 (d)) and local transmission service (secs. 73.30, 73.188(b), 73.31, 73.24(b)). *Woodward B/cing Co.*, 457.

Application for FM facility granted even though it violates overlap provisions of duoploy rule (sec. 73.240(a)(11)) in the event it and applicants existing station operated under maximum power (secs. 73.211 and 73.221) because feasible to comply with duopoly rule by moving antennas of stations and would enhance efficiency of proposed station (307(b)). *New South B/cing Corp.*, 809.

ANTENNA, COMMON USE

A request for a condition that grantee of pending UHF application be permitted to use antenna towers of applicants for relocation of antenna sites in the instant proceeding, under sec. 73.635, denied, since there is no allegation that tall tower applicants will not comply. *WTCN TV, Inc.*, 773.

ANTENNA, DIRECTIONAL

In granting the removal of a directional condition to a UHF television licensee, it was held that the respondent licensee had failed to sustain its burden of proof under the impact issue, and, although the principal city of the licensee is a UHF island, about half of its population is served by the grade B signal of five VHF stations. *WHAS, Inc.*, 724.

ANTENNA HEIGHT

An application to reduce power, increase antenna height, and change transmitter site to a point which would reduce the mileage separation to six miles less than required, was designated for hearing on issues concerning whether another site could be found, programming, areas to be served, and whether a waiver of section 73.610(a) would be warranted. *Black Hawk B/cing Co.*, 282.

ANTENNA STRUCTURE

Although applicant would serve a substantial portion of the larger city, the presumption that it proposed to serve the larger city was rebutted by showing antenna location, first service need of the smaller community program proposals, advertising commitments, and local stockholders. *Clay B/cers Inc.*, 932.

APPLICANT, MUTUALLY EXCLUSIVE

In a comparative hearing for increased facilities, the applicant who would provide second and third primary services as opposed to a sixth service to urban areas by the other, was preferred (307 (b)). *Palmetto B/cing System, Inc.*, 894.

APPLICANT, RENEWAL

Renewal application was granted despite opposition by Anti-Defamation League when violations of Fairness Doctrine were isolated and licensee promised to comply in the future. *Anti-Defamation League*, 217.

APPLICATION, ACCEPTANCE OF

Two applications for FM construction permits were accepted for filing, although one applicant was dismissed less than one year previous (sec. 73.207) for failure to construct, but it would become eligible for filing before the 30-day statutory waiting period of other applicant. Section 1.519 of the rules waived. *Central Conn. B/cing Co.*, 650.

APPLICATION, AMENDMENT OF

The petitioner was granted leave to amend where the amendment is necessary to reflect new broadcast interests recently acquired and where the amendment would not result in comparative advantage. *TV San Francisco*, 235.

A petition for reconsideration was denied, where the FM table of assignments was amended to specify St. Paul rather than Minneapolis for the applied for channel, and the application of the dismissing applicant was amended ments was amended to specify St. Paul rather than Minneapolis for the ap- to the new city with no other change, it was not a new application (sec. 1.106), and reimbursement (sec. 311(c)) would be allowed. *Hennepin B/cing Assoc. Inc.*, 872.

An agreement for reimbursement of expenses, upon condition that applicant who will receive reimbursement will either dismiss or amend to a different frequency, was granted (sec. 1.525), the amendment accepted, and amended applications returned to the processing line (secs. 1.564 (b) and 1.571 (i)) and other application granted. *Abacoa Radio Corp.*, 940.

A petition to amend application (in a comparative hearing) to change studio site was granted because the originally designated site was destroyed by fire and the amendment neither was opposed nor offered a comparative advantage. *TV San Francisco*, 972.

APPLICATION, COMPETING

Two applications for aeronautical advisory stations (sec. 87.251) to serve the Key West International Airport were designated for hearing. *Key West Aero*, 783.

APPLICATION, CONFLICTING

Petition for rehearing requesting dismissal of application for improved facilities, denied, where applicant proposed to dispose of its station which would be in violation of overlap rule (sec. 73.35). *KWHK B/cing Co., Inc.*, 598.

APPLICATION DENIED

A denial of request for additional time to construct followed by an order reconsidering that action (sec. 329(b)) and granting an application to assign (Sec. 310 (b)) was affirmed over objections by prospective applicant who was held not to have standing since the original cp was outstanding when prospective applicant filed his application. *Conn. Radio Foundation, Inc.*, 389.

APPLICATION, DISMISSAL OF

Motions by an applicant for enlargement of issues, deletion of issues, and withdrawal and dismissal of application, were dismissed as moot. *Kansas State Network, Inc.*, 973.

APPLICATION, DISMISSAL, REQUESTS FOR

Petition for rehearing requesting dismissal of application for improved facilities, denied, where applicant proposed to dispose of its station which would be in violation of overlap rule (sec. 73.35). *KWHK B/cing Co., Inc.*, 598.

APPLICATION, MODIFICATION

Applications for modification of microwave radio services facilities at West Unity, Ohio, and for new facilities at Bluffton and Ayersville, Ohio, were granted to A.T. & T. upon dismissal of applications by United Telephone Company. *Amer. Tel. & Tel.*, 847.

APPLICATION, PROCESSING OF

In granting a petition for amendment (sec. 1.522(B)) and return to the processing line, it was held that a possible suburban community issue would not prohibit the requested relief since it is possible that the issue could be resolved on the processing line. *Norristown B/cing Co., Inc.*, 937.

An agreement for reimbursement of expenses, upon condition that applicant who will receive reimbursement will either dismiss or amend to a different frequency, was granted (sec. 1.525), the amendment accepted, and amended applications returned to the processing line (secs. 1.564(B) and 1.571(I)) and other application granted. *Abacoa Radio Corp.*, 940.

APPLICATION, WITHDRAWAL

Upon withdrawal of competing applicant, application for FM station was granted where applicant was qualified in all respects (sec. 311(A)(2)). *Haddox Enterprises, Inc.*, 924.

Motions by an applicant for enlargement of issues, deletion of issues, and withdrawal and dismissal of application, were dismissed as moot. *Kansas State Network, Inc.*, 973.

ASSIGNMENT

An application for assignment of license was designated for hearing on issues concerning adequacy of survey of needs of the community and programing, upon petition by an existing licensee. *City of Camden*, 646.

Where misconduct occurred in the operation of petitioners station, a motion to stay the effective date of its revocation order to permit assignment of its license was denied. *Carol Music, Inc. (WCLM)*, 780.

An application for assignment and renewal of license and a new application for a construction permit for the same frequency were designated for hearing with the assignee designated as a party since the application for assignment of license preceded the construction permit application. Suburban community 307(B) issue not included since existing facilities are involved. *1400 Corp. (KBMI)*, 715.

Assignment of license for conversion to a satellite station granted on the grounds that despite overlap of the grade B contours (sec. 73.636), both stations had been operating at a loss and as a satellite station would not compete with local station. The restrictions on a satellite apply only where the community appears able to support a full scale operation. *Voice of the Caverns, Inc.*, 946.

ASSIGNMENT SEPARATION, DIFFERENT SERVICES

A further notice of inquiry on the optimum frequency spacing between assignable frequencies in the land mobile service and the feasibility of frequency sharing by television and land mobile services was issued. *Freq. Sharing by TV & Land Mobile*, 541.

ASSETS

An appeal from an allowance of an amendment specifying competing applicants physical plant and purchase of all its assets, was granted, and in view of a finding that none of the consideration was for reimbursement of expenses (sec. 311(C)) (not allowable because of unresolved issues), the petition for amendment, dismissal, and grant was granted (sec. 1.525). *Brown Radio & Television Co.*, 852.

AUTHORITY, DELEGATION OF

Part O of the rules amended to delegate authority to waive filing of blanket applications in the safety and special radio services to the Chief, Safety and Special Radio Services Bureau. *Delegation of Authority*, 399.

BLANKETING

An application for increase in power and a waiver of section 73.24(g) of the rules (blanketing) were granted where the applicant demonstrated that no blanketing or cross-modulation interference problems will occur. The examiner was held to have properly precluded improper cross-examination under sec. 1.243(f) *WHOO Radio, Inc.*, 437.

BROADCAST BUREAU

A reimbursement of expenses (sec. 311(c)) was approved over objections by the Broadcast Bureau which alleged that the withdrawing applicant was the better one. *WDIX, Inc.*, 653.

A reimbursement of expenses agreement was approved over the objections of the Broadcast Bureau on the grounds that the Bureau had made an insufficient showing to challenge the sworn statements submitted. *Central B/cing Corp.*,776.

BROADCAST STATIONS

An application for a first AM station granted on the grounds that interference areas presently suffer interference, and a first local outlet and a nighttime service to a white area would be provided. The Commission previously waived sections 73.24(b)(1) and 73.37, and applied standard in 73.182(v), resulting in grant. *B & K B/cing Co.*, 902.

BURDEN OF PROOF

Application designated for hearing on the issue of adequacy of revenue and burden of proof placed on the petitioner. Petitioner held to be party in interest because of competition (sec. 309(d)(1)). Need for new station need not be shown since there are no 307(b) on technical issues. *Rice Capital B/cing Co.*, 592.

BUSINESS PRACTICES

Where there is substantial competition in each business activity and where petitioner fails to show preferential treatment by the broadcast facilities to its other interests an economic dominance issue will not be added, and competing applications designated for hearing on financial and studio location (sec. 73.613) issues. *Kentucky Central TV, Inc.*, 227.

CALL SIGN ASSIGNMENT

Section 1.550, rules of practice and procedure, is amended by requiring only a copy of a request for a new or modified call sign assignment to be mailed rather than a separate notice to the stations in question. *Call Sign Assignments*, 401.

CATV

A CATV system (sec. 74.1107) which began operations prior to 2/15/65 located within grade B service contours but served unincorporated areas extending slightly beyond the contours of several stations, held not to be in violation of section 74.1107(a) but was ordered to cease and desist from supplying the signal of a station whose grade B contour did not reach the CATV system. *Mission Cable TV, Inc.*, 236.

A CATV system, which began to carry the signals of stations beyond their grade B contours subsequent to February 15, 1966, was directed to show cause why it should not cease and desist from further operation in violation of section 74.1107. *Jackson TV Cable Co.*, 246.

A petition to provide microwave service to CATV systems in Glendive and Sidney, Mont., and Williston, N. Dak., after other applications were dismissed or withdrawn granted. *Western Microwave*, 549.

Since A.T.&T. serves as a common carrier for the CATV systems which are interstate (sec. 202(b)), they should file a tariff (sec. 203(a)). *Com. Car. Tariffs for CATV Systems*, 257.

The evidentiary hearing requirements were waived (sec. 74.1107) because the total market to be served represents an insignificant percentage of the service of stations whose grade A and B contours encompass the area of the proposed CATV. *Martin County Cable Co., Inc.*, 348.

The evidentiary hearing requirement for CATV was waived (sec. 74.1107) where the small city (8,880) was served by one shared-time station with a grade A signal and with three grade B signals, none of which were ABC affiliates nor UHF grade B signals. *Coldwater Cablevision, Inc.*, 351.

Since there is presently substantial CATV penetration in the area, the evidentiary hearing requirements are waived (sec. 74.1107). *Chenor Communications, Inc.*, 354.

A cease and desist order was issued for the violation of section 74.1107 of its rules concerning extension of service beyond the grade B contours of certain stations by a CATV system (sec. 74.1101(a)). *Booth American Co.*, 509.

A modification of a show cause order (sec. 74.1107) was granted so that the company may include its other operation in order to avoid a second proceeding against the latter operation. *Jackson TV Cable Co.*, 635.

A waiver of the evidentiary hearing requirement in section 74.1107(a) was granted where the communities to be served were small and a nearby city already had a CATV system. *United Transmission, Inc.*, 791.

Permission granted to substitute carriage of one educational station for another during the summer months (secs. 74.1107 and 1.3). *Buckeye Cablevision, Inc.*, 798.

A CATV operator who allegedly commenced operations subsequent to February 12, 1966, without having obtained approval, was ordered to show cause why it should not cease and desist (secs. 74.1105 and 74.1107). *Back Mountain Telecable, Inc.*, 988.

CATV, BAND

A CATV system (sec. 74.1107) which began operations prior to 2/15/65 located within grade B service contours but served unincorporated areas extending slightly beyond the contours of several stations, held not to be in violation of section 74.1107(a) but was ordered to cease and desist from supplying the signal

of a station whose grade B contour did not reach the CATV system. ***Mission Cable TV, Inc.***, 236.

CATV, CARRIAGE

The carriage and program exclusivity rules with regard to CATV systems are adequate protection to a licensee of an existing TV station, so his petition to deny an application for microwave service to CATV systems was denied. ***Valley Cable TV Corp.***, 685.

CATV, EXTENSION OF SERVICE BY SYSTEM

A CATV system serving two communities was held to be deemed a separate system for each, and was held to have been operating in violation of section 74.1107(a) of the rules as to extending the signals of various stations beyond their grade B contours without having obtained the necessary approval. A cease and desist order was issued. *Jackson TV Cable Co.*, 979.

CATV, FCC CEASE AND DESIST ORDER

Where substantially similar contentions were made concerning validity of rules concerning CATV (sec. 74.1107) in another case, a petition for reconsideration of a show cause order was denied. *Jackson TV Cable Co.*, 396.

A CATV system serving two communities was held to be deemed a separate system for each, and was held to have been operating in violation of section 74.1107(a) of the rules as to extending the signals of various stations beyond their grade B contours without having obtained the necessary approval. A cease and desist order was issued. *Jackson TV Cable Co.*, 979.

CATV, INTERFERENCE FROM

A CATV system (sec. 74.1101 (a)) has been ordered to cease and desist its operations pending notice to TV stations in accordance with sec. 74.1105 because distant signals were extended beyond their grade B contours without obtaining necessary approval (sec. 74.1107). *Telesystems Corps.*, 628.

CATV, JURISDICTION OVER, BY FCC

A CATV operator who allegedly commenced operations subsequent to February 12, 1966, without having obtained approval, was ordered to show cause why it should not cease and desist (secs. 74.1105 and 74.1107). ***Back Mountain Telecable, Inc.***, 988.

CATV, PROGRAM EXCLUSIVITY

The carriage and program exclusivity rules with regard to CATV systems are adequate protection to a licensee of an existing TV station, so his petition to deny an application for microwave service to CATV systems was denied. ***Valley Cable TV Corp.***, 685.

CATV AND TELEVISION RELATIONSHIP

Temporary relief against CATV systems (secs. 74.1107, 74.1109) carrying signals of Los Angeles stations into the San Diego area was granted, and the case was designated for hearings. Jurisdiction to grant the temporary relief requested is provided in secs. 4(i) and 303 (f) and (r) of the act, and is not limited by the provision of sec. 312. ***Midwest TV, Inc.***, 612.

CATV AND TELEVISION RELATIONSHIP

Temporary relief against CATV systems (secs. 74.1107, 74.1109) carrying signals of Los Angeles stations into the San Diego area was granted, and the

case was designated for hearing. Jurisdiction to grant the temporary relief requested is provided in secs. 4(i) and 303 (f) and (r) of the act, and is not limited by the provision of sec. 312. ***Midwest TV, Inc.***, 612.

CEASE AND DESIST ORDER

A cease and desist order was issued for the violation of section 74.1107 of its rules concerning extension of service beyond the grade B contours of certain stations by a CATV system (sec. 74.1101(a)). ***Booth American Co.***, 509.

A CATV system (sec. 74.1101(a)) has been ordered to cease and desist its operations pending notice to TV stations in accordance with sec. 74.1105 because distant signals were extended beyond their grade B contours without obtaining necessary approval (sec. 74.1107). ***Telesystems Corp.***, 628.

CENSORSHIP

The renewal of a license, over the opposition of Anti-Defamation League of Bnai Brith charging the licensee with having permitted anti-Semite material and personal attacks on the ADL officers, was granted on the grounds that the right to a license renewal cannot be made dependent on judgments whether broadcasts were in themselves false and defamatory. ***Anti-Def. League of Bnai Brith***, 190.

A contest run by the licensee, in which it was virtually impossible for listeners to win, was not of the required degree of licensee responsibility and the letter of censure was placed in licensee's file. ***WCHS-AM-TV Corp.***, 376.

CHANNEL, ASSIGNMENT

Reconsideration of UHF assignments (sec. 73.606) removing channel 19 from Stockton to Modesto, Cal., substituting channel 31 in Stockton, and modifying the CO of station KLOC-TV to specify channel 19 in Modesto, was denied. No premature construction within sec. 319(A) was found where the transmitter building had not been wired nor antenna foundations laid, nor was there a violation of sec. 309(b). ***UHF TV Channels***, 839.

CHANNEL, SHARING OF

A further notice of inquiry on the optimum frequency spacing between assignable frequencies in the land mobile service and the feasibility of frequency sharing by television and land mobile services was issued. ***Freq. Sharing by TV & Land Mobile***, 541.

A committee was established to test the sharing of television channels by land mobile radio services as professionally and expeditiously as possible. ***Frequency Sharing by TV & Other Ser.***, 543.

CHARACTER QUALIFICATIONS

Two mutually exclusive applications for a standard broadcast construction permit were denied one on the grounds that it failed to sustain its burden of proof under the site-availability issue, and the other by reason of trafficking (sec. 1.597), failure to establish adequate character qualifications, and premature assumption of control of a broadcast station (sec. 310(b)). ***Edina Corp.***, 36.

CHARGES

Issues in a previous order for consolidated hearing were amended to specify the charges in question. *Amer. Tel. & Tel.*, 548.

CIRCUMCTANCES, CHANGE IN

A petition for reconsideration of order (3 FCC 2d 907), allowing in part reimbursement of expenses (sec. 1.525) which presented facts not previously relied on (sec. 1.106(c)) but which did not relate to changed circumstance, was denied. *Richard O'Connor*, 827.

CIRCUMSTANCES, UNIQUE

Public notice issued announcing that telecommunications channels or services may be obtained directly from ComSat only in those instances where appropriate authority has been issued upon a finding that there are unique or exceptional circumstances warranting such authorizations. *ComSat-Authorized Users*, 12.

CIRCUMSTANCES, UNIQUE

A request for sta was granted under section 309(f) since the authorization was an extension of the 60-day sta under section 309(c)(2)(g) of the act, granted on the basis of extraordinary circumstances. The extension under the latter section was limited to 60 days. *Lorac Service Corp.*, 877.

CIRCUMSTANCES, EXTRAORDINARY

A petition requesting assignment was denied on the grounds that spacing requirements will not be waived in the absence of extraordinary circumstances (sec. 73.207) and an interesting mountain is not one. *FM Table of Assignments*, 887.

CITIZENS RADIO SERVICE

A citizens radio service license was revoked for operating beyond permissible frequency tolerance (sec. 95.45) failure to identify by call sign (sec. 95.95(c)) and operation as a hobby (sec. 95.83(a)(1)). *E. B. Christopher*, 689.

CIVIC PARTICIPATION

An applicant whose 30 percent stockholder with full-time integration held not to have met the local residence criteria for a participating owner where his residence was two years with limited civic participation. The applicant with partially integrated stockholders whose local residence is enhanced by participation in civic affairs was preferred. *Ocean County Radio B/cing Co.*, 953.

CLASS 2–A ASSIGNMENT

Applications for a new class II–A facility on 1030 kc and a petition for denial and various petitions favoring and opposing these two were designated for a consolidating proceeding on issues concerning areas and populations, financial, protection to clear channel station, air hazard, and city coverage (sec. 73.188). *Harriscope, Inc.*, 600.

COLLEGES

Section 73.35 of the rules was waived to permit a licensee of an AM station to serve as a member of the board of regents of a college which holds a license of a station serving the same area. *Charles Smithgall*, 838.

COLUMBIA BROADCASTING COMPANY

A petition for reconsideration by CBS of an order (3 F.C.C. 2d 409) designating applications for hearing, denied, since no new facts have been advanced by CBS and its contentions may be presented at the hearing. *KWHK B/cing Co., Inc.*, 721.

COMMON CARRIER

Since A.T. & T. serves as a common carrier for the CATV systems which are interstate (sec. (202(B)), they should file a tariff (sec. 203(A)). *Com. Car. Tariffs for CATV Systems*, 257.

A petition for reconsideration (sec. 1.106) of the Commission's memorandum opinion and order of July 22, 1966, in docket 15011 was denied on the grounds that the evidence of record supports the conclusion that TWX earnings should be adjusted upward and that the Commission did not prescribe rates in violation of the act. *Amer. Tel. & Tel.*, 891.

COMMUNITY NEEDS

An application for assignment of license was designated for hearing on issues concerning adequacy of survey of needs of the community and programming, upon petition by an existing licensee. *City of Camden*, 646.

COMPARATIVE CASES

An applicant whose 30 percent stockholder with full-time integration held not to have met the local residence criteria for a participating owner where his residence was two years with limited civic participation. The applicant with partially integrated stockholders whose local residence is enhanced by participation in civic affairs was preferred. *Ocean County Radio B/cing Co.*, 953.

COMPARATIVE HEARING

Petition to dismiss application for authority to change antenna to increase radiation in hull area filed during AM freeze denied because applicant entitled to comparative hearing. Designated issues concerned service area and population, transmitter site, MOU, interference (sec. 73.28(d)) and local transmission service (secs. 73.30, 73.188(b), 73.31, 73.24(b)). *Woodward B/cing Co.*, 457.

In a comparative hearing for increased facilities, the applicant who would provide second and third primary services as opposed to a sixth service to urban areas by the other, was preferred (307 (b)). *Palmetto B/cing System, Inc.*, 894.

COMPETITIVE PRACTICES

Where there is substantial competition in each business activity and where petitioner fails to show preferential treatment by the broadcast facilities to its other interests an economic dominance issue will not be added, and competing applications designated for hearing on financial and studio location (sec. 73.613) issues. *Kentucky Central TV, Inc.*, 227.

COMSAT

Subpart B of part 25 of the rules was amended specifying that parties making procurement in the space segment of a ComSat system shall not include foreign persons or companies. *Comm. Sat. Procurement Reg.*, 251.

COMSAT AND FCC

In order for noncommon carrier concerns to obtain satellite telecommunications services directly from the Communications Satellite Corporation, the concerns and ComSat must set forth specific information indicated by the Commission, and ComSat may be authorized to provide such services only in unique and exceptional circumstances. *Authorized Entities and Users-ComSat*, 421.

COMSAT, CARRIER PARTICIPATION

Public notice issued announcing that telecommunications channels or services may be obtained directly from ComSat only in those instances where appropriate authority has been issued upon a finding that there are unique or exceptional circumstances warranting such authorizations. *ComSat-Authorized Users*, 12.

In order for noncommon carrier concerns to obtain satellite telecommunications services directly from the Communications Satellite Corporation, the concerns and ComSat must set forth specific information indicated by the Commission, and ComSat may be authorized to provide such services only in unique and exceptional circumstances. *Authorized Entities and Users-ComSat*, 421.

COMSAT FACILITIES

ComSat was required to obtain appropriate approval for furnishing any services or facilities via the six synchronous communications satellites which they were granted authority to construct (sec. 721(c)(9)). *ComSat Corp.*, 8.

Where requested modifications would improve operations, an extension of time for completion was granted. *ComSat Corp.*, 553.

The Commission's order of June 22, 1965 as amended, file No. 1-A-CSG-L-65 is amended to include authority for ComSat to make available to the Canadian Overseas Telecommunications Corp. one additional unit of Andover Earth Station for public message voice service between Montreal, Canada, and Rome, Italy. *ComSat Corp.*, 931.

COMSAT TERMINAL STATIONS

A petition to amend the rules providing alternate spectrum availability in Hawaii only of the 6525–6575 mc/s band from mobile to fixed services, because of potential interference to fixed domestic radio services, denied; however, rule waiver would be considered on a case-to-case basis. *Reallocate 6525–06575 Mc/s Band Hwa.*, 1.

COMSAT, INTERFERENCE

A petition to amend the rules providing alternate spectrum availability in Hawaii only of the 6525–6575 mc/s band from mobile to fixed services, because of potential interference to fixed domestic radio services, denied, however, rule waiver would be considered on a case-to-case basis. *Reallocate 6525–6575 Mc/s Band Hwa.*, 1.

CONCENTRATION OF CONTROL

A concentration of control issue was added where applicant, licensee of four AM and FM stations in the area employed combination rates and may employ such rates for its proposed TV station. An issue was added concerning an alternate proposal if network affiliation could not be obtained. *Trend Radio, Inc.*, 974.

CONDITION PRECEDENT

A request for a condition that grantee of pending UHF application be permitted to use antenna towers of applicants for relocation of antenna sites in the instant proceeding, under sec. 73.635, denied, since there is no allegation that tall tower applicants will not comply. *WTCN TV, Inc.*, 773.

CONFERENCE

Assignment of the proceeding to a conference before the Review Board was denied, because it was not shown that such a conference might reasonably be expected to contribute to the prompt resolution of this proceeding. *Flower City TV Corp.*, 383.

CONSOLIDATION

Applications for a new class II–A facility on 1030 kc and a petition for denial and various petitions favoring and opposing these two were designated for a consolidating proceeding on issues concerning areas and populations, financial, protection to clear channel station, air hazzard, and city coverage (sec. 73.188). *Harriscope, Inc.*, 600.

CONSTRUCTION

A petition to enlarge issues as to the basis for estimated revenues, construction and operating costs, and failure to advise (sec. 1.65) of a pending lawsuit granted. No basis had been shown for estimated revenue which was to be used for part of construction and operation. Requested issue concerning publication (sec. 1.580) denied the allegation of too much information in the notice being deminimis. *Royal B/cing Co., Inc.*, 857.

There being but one TV assignment for Bend, Oreg., and that reserved for noncommercial educational use, a UHF channel was assigned since petitioner proposed to construct. *TV Table of Assignments*, 927.

CONSTRUCTION PERMIT

A construction permit was granted for a new FM station when a competing applicant withdrew and requested another channel. *Tri-City B/cing Co.*, 378.

A larger city with two AM stations received a 307(b) preference for TV over the smaller city with no broadcast station even though the latter would serve a larger white area, since it proposed little locally oriented programming, has a relatively small population, and aural service is not a substitute for a local TV outlet. *Charles Vanda*, 655.

An application for assignment and renewal of license and a new application for a construction permit for the same frequency were designated for hearing with the assignee designated as a party since the application for assignment of license preceded the construction permit application. Suburban community 307(b) issue not included since existing facilities are involved. *1400 Corp.* (*KBMI*), 715.

Although applicant would serve a substantial portion of the larger city, the presumption that it proposed to serve the larger city was rebutted by showing antenna location, first service need of the smaller community program proposals, advertising commitments, and local stockholders. *Clay B/cers, Inc.*, 932.

A concentration of control issue was added where applicant, licensee of four AM and FM station in the area employed combination rates and may employ such rates for its proposed TV station. An issue was added concerning an alternate proposal if network affiliation could not be obtained. *Trend Radio, Inc.*, 974.

CONSTRUCTION PERMIT EXTENSION

A denial of request for additional time to construct followed by an order reconsidering that action (sec. 319(b)) and granting an application to assign (sec. 310(b)) was affirmed over objections by prospective applicant who was held not to have standing since the original CP was outstanding when prospective applicant filed his application. *Conn. Radio Foundation, Inc.*, 389.

Upon remand for further hearing on issues involving violations of secs. 73.111 and 73.112, an application for a construction permit was denied because of prior conduct in the falsification of logs after competing applicant, receiving grant in initial decision, withdrew his application. *The Prattville B/cing Co.*, 555.

A request for additional time to construct (sec. 319) was denied where the applicant had misinformed the Commission as to the reasons for its request by not disclosing its intention to sell even if the intent arose after the application. *Z–B B/cing Co.*, 642.

Two applications for FM construction permits were accepted for filing, although one applicant was dismissed less than one year previous (sec. 73.207) for failure to construct, but it would become eligible for filing before the 30-day statutory waiting period of other applicant (section 1.519 of the rules waived). *Central Conn. B/cing Co.*, 650.

CONSTRUCTION PERMIT ISSUANCE

A construction permit was granted to one applicant in order to avoid violation of the multiple ownership rules, where both applicants were otherwise found to be qualified. *The Prattville B/cing Co.*, 567.

An applicant was found qualified to construct and operate its TV station for one year where it lacked $41,000 of the $609,000 required, by assuming revenues of the first year of at least $41,000. *Washoe Empire*, 638.

CONTESTS, DECEPTIVE

A contest run by the licensee, in which it was virtually impossible for listeners to win, was not of the required degree of licensee responsibility and the letter of censure was placed in licensee's file. *WCHS–AM–TV Corp.*, 376.

CONTOUR, NORMALLY PROTECTED

A CATV system, which began to carry the signals of stations beyond their grade B contours subsequent to February 15, 1966, was directed to show cause why it should not cease and desist from further operation in violation of section 74.1107. *Jackson TV Cable Co.*, 246.

A CATV system (sec. 74.1107) which began operations prior to 2/15/65 located within grade B service contours but served unincorporated areas extending slightly beyond the contours of several stations, held not to be in violation of section 74.1107(a) but was ordered to cease and desist from supplying the signal of a station whose grade B contour did not reach the CATV system. *Mission Cable TV, Inc.*, 236.

CONTOUR, SERVICE

A request for reimbursement of expenses and withdrawl of application was denied where it was indeterminable from the submitted material whether there would be any underserved areas with either applicants service contours (sec. 1.525(b)(1)). *James L. Hutchens*, 700.

CONTRIBUTIONS—CHARITABLE

Sponsorship identification (sec. 317) based on public interest considerations was waived since sponsors are nonprofit organizations even though the station receives a portion of the contributions. *Kansas Assn. of Radio B/cers*, 267.

COSTS

Petition for reconsideration was denied on the grounds that the previous decision denying a request to consider the jurisdictional cost separations issue in phase 1 of the A.T. & T. hearings on changes would require modification of existing orders. *Amer. Tel. & Tel.*, 253.

COSTS, ALLOCATION OF

A petition to enlarge issues as to the basis for estimated revenues, construction and operating costs, and failure to advise (sec. 1.65) of a pending lawsuit granted. No basis had been shown for estimated revenue which was to be used for part of construction and operation. Requested issue concerning publication (sec. 1.580) denied the allegation of too much information in the notice being deminimis. *Royal B/cing Co., Inc.*, 857.

CROSS MODULATION

An application for increase in power and a waiver of section 73.24(g) of the rules (blanketing) were granted where the applicant demonstrated that no blanketing or cross-modulation interference problems will occur. The examiner was held to have properly precluded improper cross-examination under sec. 1.243(f). *WHOO Radio, Inc.*, 437.

DATA, SUPPORTING

Enlargement of issues will not be granted concerning the status of the competing applicants general manager, where the petition lacks supporting data (sec. 1.229(c)), and is founded upon assumptions, speculations, and surmise. *Ocean County Radio B/cing Co.*, 335.

DEFAMATION

The renewal of a license, over the opposition of Anti-Defamation League of Bnai Brith charging the licensee with having permitted Anti-Semite material and personal attacks on the ADL officers, was granted on the grounds that the right to a license renewal cannot be made dependent on judgments whether broadcasts were in themselves false and defamatory. *Anti-Def. League of Bnai Brith*, 190.

DESIGNATION FOR HEARING

Application designated for hearing on the issue of adequacy of revenue and burden of proof placed on the petitioner. Petitioner held to be party in interest because of competition (sec. 309(d)(1). Need for new station need not be shown since there are no 307(b) on technical issues. *Rice Capital B/cing Co.*, 592.

An application for assignment and renewal of license and a new application for a construction permit for the same frequency were designated for hearing with the assignee designated as a party since the application for assignment of license preceded the construction permit application. Suburban community 307(b) issue not included since existing facilities are involved. *1400 Corp. (KBMI)*, 715.

Two applications for aeronautical advisory stations (sec. 87.251) to serve the Key West International Airport were designated for hearing *Key West Aero*, 783.

DIRECTIONAL ANTENNA SYSTEM ADJUSTMENT

The objective of the clear channel report in referring to white area was nighttime service to the largest number of persons presently without service, rather than land area. *Flathead Valley B/cers*, 14.

An amendment, proposing a directional antenna and reduced power by one applicant which eliminated the necessity for a consolidated hearing, was properly granted since section 1.571(j)(1) encourages amendments which remove potential conflicts. An applicant may amend as a matter of right (sec. 1.522) and sec. 1.227(a)(2) does not require consolidation the moment conflict appears. *Mansfield B/cing Co.*, 154.

DISCLOSURE

The examiner has the authority to require disclosure of exhibits and the names of witnesses in advance since he has authority to control the course and conduct of a hearing, and on that basis a petition for review of Review Board's order is granted. *Tinker, Inc.*, 372.

DISCLOSURE, FULL

A petition to enlarge issues as to the basis for estimated revenues, construction and operating costs, and failure to advise (sec. 1.65) of a pending lawsuit granted. No basis had been shown for estimated revenue which was to be used for part of constrction and operation. Requested issue concerning publication (sec. 1.580) denied the allegation of too much information in the notice being deminimis. *Royal B/cing Co., Inc.*, 857.

DISCRIMINATION

The renewal of a license, over the opposition of Anti-Defamation League of Bnai Brith charging the licensee with having permitted Anti-Semite material and personal attacks on the ADL officers, was granted on the grounds that the right to a license renewal cannot be made dependent on judgments whether broadcasts were in themselves false and defamatory. *Anti-Def. League of Bnai Brith*, 190.

DIVERSIFICATION

A request for a multiple ownership (73.35) issue against one applicant, which would exceed the limit of stations if granted, was denied where the grant would be conditioned on disposal of a station, and requested issue concerning a network applicant for extension of coverage, was denied since extension of service would not alter the diversification of ownership policy. *KWHK B/cing Co., Inc.*, 365.

The successful applicant was preferred in diversification of control of mass media and integration of ownership with management, while the competing applicant proposed a more efficient utilization of the frequency. *Charles Vanda*, 655.

A petition to amend the rules providing alternate spectrum availability in Hawaii only of the 6525–6575 Mc/s band from mobile to fixed services, because of potential interference to fixed domestic radio services, denied; however, rule waiver would be considered on a case-to-case basis. *Reallocate 6525–6575 Mc/s Band Hwa.*, 1.

Part 21 of the rules amended to conform with action taken in Docket Nos. 14712 and 14729 (27 F.R. 12372 and 28 F.R. 7476). *Dom. Pub. Radio Ser. Frequencies*, 539.

DUEL CITY IDENTIFICATION

A first local transmission service application was granted and the Duel City identification requirements of section 73.30(b) was waived, where the cities were relatively small and were shown to have an identity of interests for programming, even though there was no showing that an unreasonable burden would be placed on the station if it were licensed to serve only one city. *Saul M. Miller et al.*, 150.

DUOPOLY RULE

Application for FM facility granted even though it violates overlap provisions of duopoly rule (sec. 73.240(a)(11)) in the event it and applicants existing

station operated under maximum power (secs. 73.211 and 73.221) because feasible to comply with duopoly rule by moving antennas of stations and would enhance efficiency of proposed station (307(b)). *New South B/cing Corp.*, 809.

Section 73.35 of the rules was waived to permit a licensee of an AM station to serve as a member of the board of regents of a college which holds a license of a station serving the same area. *Charles Smithgall*, 888.

ECONOMIC DOMINATION

Where there is substantial competition in each business activity and where petitioner fails to show preferential treatment by the broadcast facilities to its other interests an economic dominance issue will not be added, and competing applications designated for hearing on financial and studio location (sec. 73.613) issues. *Kentucky Central TV, Inc.*, 227.

ECONOMIC INJURY

VHF channel 7 assigned (73.606) for the purpose of allowing a translator station to increase power (74.702(g)) over the objectives of an existing VHF licensee at Dickinson, neither econimic injury nor mileage separation (73.611(a)(4)) violations having been shown. *TV Table of Assignments*, 885.

EDUCATIONAL RESERVATIONS

A petition to reserve a VHF channel for education use in a city to which was assigned 3 VHF and one UH channels, was denied, where the UHF channel is presently reserved for educational use. *TV Table of Assignments*, 889.

EDUCATIONAL TELEVISION BROADCAST STATION, NONCOMMERCIAL

Permission granted to substitute carriage of one educational station for another during the summer months (secs. 74.1107 and 1.3). *Buckeye Cablevision, Inc.*, 798.

EMERGENCY COMMUNICATIONS

The petroleum and gas industry communications emergency plan was approved as the industry's interim basic plan for operation during emergency conditions. *Public Notice of Aug. 17, 1966*, 704.

EQUIPMENT, DEFECTIVE

A renewal of license was granted replacing the 1962 short term renewal; however, the licensee was required to forefit $7500 for violations concerning primarily power output (sec. 73.40), operating logs (sec. 73.93 and 73.57) log entries (sec. 73.111). *United B/cing Co., Inc.*, 293

EQUITABLE DISTRIBUTION

A larger city with two AM stations received a 307(b) preference for TV over the smaller city with no broadcast station even though the latter would serve a larger white area, since it proposed little locally oriented programming, has a relatively small population, and aural service is not a substitute for a local TV outlet. *Charles Vanda*, 655.

In a comparative hearing for increased facilities, the applicant who would provide second and third primary services as opposed to a sixth service to urban areas by the other, was preferred (307(b)). *Palmetto B/cing System, Inc.*, 894.

EVIDENCE, NEWLY DISCOVERED

A new bank commitment was not newly discovered evidence in a petition for reconsideration where the applicant had failed to meet its financial burden either

before or during the hearing and although the corrective amendment was accepted the record is not reopened since it is not newly discovered evidence which is preferred. *Associated TV Corp.*, 886.

EXHIBITS

The examiner has the authority to require disclosure of exhibits and the names of witnesses in advance since he has authority to control the course and conduct of a hearing, and on that basis a petition for review of Review Board's order is granted. *Tinker, Inc.*, 372.

EXPENSES

An agreement for dismissal of one of two competing applicants and retention of the other in hearing status, upon payment of a portion of out-of-pocket expenses was approved along with an amendment (sec. 1.522(b)) which would permit substitution of original transmitter site (sec. 73.188(a)) by retained applicant. *Wilkesboro B/cing Co.*, 164.

Approval of an agreement to dismiss an application, payment of out-of-pocket expenses, and a right of first refusal for 10 years to transfer control of the license was granted. *McAlister B/cing Corp.*, 381.

A reimbursment of expenses (sec. 311(c)) was approved over objections by the Broadcast Bureau which alleged that the withdrawing applicant was the better one. *WDIX, Inc.*, 653.

A request for reimbursement of expenses and withdrawal of application was denied where it was indeterminable from the submitted material whether there would be any underserved areas with either applicants service contours (sec. 1.525(b)(1)). *James L. Hutchens*, 700.

A reimbursement of expenses agreement was approved over the objections of the Broadcast Bureau on the grounds that the Bureau had made an insufficient showing to challenge the sworn statements submitted. *Central B/cing Corp.*, 776.

A joint request for approval of agreement for reimbursement of expenses conditioned on withdrawal of one application and grant of another was held in abeyance for other persons to apply since one applicant would serve a larger, and different areas, and no showing was made of other available FM service to their respective areas. Publication under sec. 1.525(b)(2) required since 307(b) issue remains. *Lafayette B/cing Co., Inc.*, 778.

A joint request for approval of agreement (sec. 1.525) withdrawing one application granting another, and reimbursement of expenses, was granted. *Semo B/cing Co.*, 826.

A joint agreement for reimbursement of expenses upon withdrawal of one applicant and grant of another was approved. *Heath-Reasoner B/cers*, 850.

EXTENSION

An extension of time was denied where, after seven previous extensions and a reinstatement of the permit, the applicant sought to maintain his permit for the purpose of assigning it to others (sec. 319(b)). *Telemusic Co.*, 221.

A request for STA was granted under section 309(f) since the authorization was an extension of the 60-day STA under section 309(c)(2)(g) of the act, granted on the basis of extraordinary circumstances. The extension under the latter section was limited to 60 days. *Lorac Service Corp.*, 877.

FACILITY, IMPROVEMENT OF

An application to reduce power, increase antenna height, and change transmitter site to a point which would reduce the mileage separation to six miles

less than required, was designated for hearing on issues concerning whether another site could be found, programming, areas to be served, and whether a waiver of section 73.610(a) would be warranted. *Black Hawk B/cing Co.*, 282.

FAIRNESS DOCTRINE

Renewal application was granted despite opposition by Anti-Defamation League when violations of fairness doctrine were isolated and licensee promised to comply in the future. *Anti-Defamation League*, 217.

FALSE STATEMENTS

Revocation of license was ordered for repeated violations of sections 95.41, 95.83, 95.91, 95.95 and 95.115 of the rules and a false statement of fact made in response to a communication from the Commission. *John W. Collins, Jr.*, 879.

FILING, TIME FOR

A petition for reconsideration of a grant for microwave facilities to serve CATV system was (secs. 74.1107 and 74.1109) denied on the grounds of untimely filing (sec. 1.106(c). It was filed several months after the application was filed. *New York-Penn Microwave Corp.*, 786.

Where a petition for enlargement of the issues was filed five and one half months after the information upon which it was based was discovered and the record closed, the petition was denied as untimely. *West Central Ohio B/cers, Inc.*, 934.

FINANCIAL DATA

A new bank commitment was not newly discovered evidence in a petition for reconsideration where the applicant had failed to meet its financial burden either before or during the hearing and although the corrective amendment was accepted the record is not reopened since it is not newly discovered evidence which is preferred. *Associated TV Corp.*, 386.

FINANCIAL ISSUE

A letter by stockholders committing them to loan funds to applicant, if needed, was sufficient even though not submitted as an amendment and not until in answer to petition requesting enlargement of issues, and no specific questions concerning estimates of operating costs were submitted by petitioner as required by sec. 1.229. *Cosmopolitan Enterprises, Inc.*, 161.

A financial issue in a comparative hearing for an FM license was added because certain alleged facts which raised the issue were not refuted. *Century B/cing Co., Inc., et al*, 332.

The bare assertion that an applicant had available funds is insufficient to deny an enlargement of issues with respect to finances. A reliance on ownership reports of acquisition of a station during pendency of a comparative hearing for a new station does not satisfy section 1.65 and an application amendment is required. *Gordon Sherman*, 337.

Where sufficient funds are available and only a portion of anticipated revenues would be required to finance proposals, a financial issue will not be added. Petition denied for lack of specificity (sec. 1.229). *Gordon Sherman*, 344.

A new bank commitment was not newly discovered evidence in a petition for reconsideration where the applicant had failed to meet its financial burden either before or during the hearing and although the corrective amendment was accepted the record is not reopened since it is not newly discovered evidence which is preferred. *Associated TV Corp.*, 386.

A transfer of control granted where lack of financing was held to constitute an exception to the hearing requirements of section 1.597 of the rules (authorization held for less than 3 years). *TeleSanJuan, Inc.*, 865.

FINANCIAL QUALIFICATIONS

The application for renewal of license was denied on the grounds that applicant failed to sustain the burden of proof as to its financial qualifications, violated technical rules (secs. 73.60, 73.40(b), 73.114), failed to submit financial reports, failed to publish (sec. 1.594) and failed to have a first class radio-telephone operator on duty at all times (sec. 73.93(a)). *The Kent-Sussex B/cing Co.*, 169.

An application for an FM construction permit was denied since the petitioners financial statements were contradictory, inadequate and uncertain. *The Tuscaravas B/cing Co.*, 466.

Application designated for hearing on the issue of adequacy of revenue and burden of proof placed on the petitioner. Petitioner held to be party in interest because of competition (see 309(d)(1)). Need for new station need not be shown since there are no 307(b) on technical issues. *Rice Capital B/cing Co.*, 592.

An applicant was found qualified to construct and operate its TV station for one year where it lacked $41,000 of the $609,000 required, by assuming revenues of the first year of at least $41,000. *Washoe Empire*, 638.

An agreement to withdraw with reimbursement (sec. 311(c)(3)) which was filed after the five day required period (sec. 1.525) was accepted. The financial issue as to the remaining applicant was examined and the application granted. *Keith L. Reising*, 868.

FINANCIAL REPORTS

The application for renewal of license was denied on the grounds that applicant failed to sustain the burden of proof as to its financial qualifications, violated technical rules (sec. 73.60, 73.40(b), 73.114), failed to submit financial reports. failed to publish (sec 1.594) and failed to have a first class radio-telephone operator on duty at all times (sec. 73.93(a)). *The Kent-Sussex B/cing Co.*, 169.

The licensee was ordered to forfeit $150 for willful and repeated failures to comply with section 1.611, financial reports and failure to reply to notice (sec. 1.621(b)). *William Blizzard, Jr.*, 268.

The licensee was ordered to forfeit $150 for willful and repeated failures to comply with section 1.611, financial reports and failure to reply to notice (sec. 1.621(b)). *Montana B/cing Co.*, 270.

The licensee was ordered to forfeit $150 for willful and repeated failures to comply with section 1.611, financial reports and failure to reply to notice (sec. 1.621(b)). *Radio 940*, 272.

Lincensee was fined $150 for willful and repeated failure to file annual financial reports (sec. 1.611). *Powell County B/cing Co.*, 866.

FIXED STATION

Parts 87, 89, and 93 of the rules were amended to broaden the policy regarding sharing of private microwave facilities, unrestricted sharing will be permitted on frequencies above 10,000 mc/s, cross-service sharing below 10,000 mc/s will be limited in order to observe developments of cooperative systems on a cross-service basis. *Co-Op Sharing of Oper Fixed Stations*, 406.

Secs. 89.13, 91.6 and 93.4 are modified only for the purpose of deleting therefrom provisions concerning sharing of fixed radio stations. Annual statements not required for sharing by governmental agencies nor for free-of-charge services,

but are required for governmental and nongovernmental sharing. *Co-Op Sharing of Oper Fixed Stations*, 406.

FM BROADCAST STATION

An assignment of channel 270 to Gulfport, La. and its deletion from New Orleans was denied as not being in the public interest. *FM Table of Assignments*, 6.

FM BROADCAST STATION, APPLICATIONS

Application for FM facility granted even though it violates overlap provisions of duopoly rule (sec. 73.240(a)(11)) in the event it and applicants existing station operated under maximum power (secs. 73.211 and 73.221) because feasible to comply with duopoly rule by moving antennas of stations and would enhance efficiency of proposed station (307(b)). *New South B/cing Corp.*, 809.

Upon withdrawal of competing applicant, application for FM station was granted where applicant was qualified in all respects. (sec. 311(a)(2)). *Haddox Enterprises, Inc.*, 924.

FM BROADCAST STATION, CHANGES

An assignment of channel 270 to Gulfport, La., and its deletion from New Orleans was denied as not being in the public interest. *FM Table of Assignments*, 6.

FOREIGN COMMUNICATION

Subpart B of part 25 of the rules was amended specifying that parties making procurement in the space segment of a ComSat system shall not include foreign persons or companies. *Comm. Sat. Procurement Reg.*, 251.

FOREST PRODUCTS RADIO SERVICE, ELIGIBILITY

The rules of the Commission (sec. 91.351) were amended governing eligibility in the forest products radio service to include log haulers and persons who have dual eligibility in the forest products and manufacturers radio service. *Forest Products Radio Service*, 807.

FORFEITURE

The licensee was ordered to forfeit $150 for willful and repeated failures to comply with section 1.611, financial reports and failure to reply to notice (sec. 1.621(b)). *William Blizzard, Jr.*, 268.

The licensee was ordered to forfeit $150 for willful and repeated failures to comply with section 1.611, financial reports and failure to reply to notice (sec. 1.621(b)). *Montana B/cing Co.*, 270.

The licensee was ordered to forfeit $150 for willful and repeated failures to comply with section 1.611, financial reports and failure to reply to notice (sec. 1.621(b)). *Radio 940*, 272.

A forfeiture in the amount of $1,000 was imposed for improper use of frequency (sec. 73.59) and failure to provide a first class operator (sec. 73.93(c)). *William and Katherine Mende*, 274.

A forfeiture in the amount of $500 was imposed for improper use of power, (sec. 73.57) use of a defective monitor, (73.56(a)) and failure to provide a first class operator (73.93(b)). *Green Mountain Radio, Inc.*, 276.

A renewal of license was granted replacing the 1962 short term renewal, however, the licensee was required to forfeit $7,500 for violations concerning primarily power output (sec. 73.40), operating logs (sec. 73.93 and 73.57) log entries (sec. 73.111). *United B/cing Co., Inc.*, 293.

A forfeiture of $500 for violation of sections 73.265(b) (operation without a properly licensed operator), 73.284 (failure to keep a maintenance log) and

73.275(a)(1) (unauthorized use of transmitter) was ordered. ***FM B/cing, Inc.***, 507.

FORFEITURE, AMOUNTS

A forfeiture of $1,000 was ordered for willful and repeated violation of sections 73.47(b), 73.57(a), 17.38(c), and repeated failure to observe the provisions of sections 73.39(d)(4) and 17.38(d) of the rules. ***High Fidelity Stations, Inc.***, 829.

Licensee was fined $150 for willful and repeated failure to file annual financial reports (sec. 1.611). ***Powell County B/cing Co.***, 866.

Licensee of television station ordered to forfeit $1,000 for violations of rebroadcast provisions of the rules (sec. 73.655 and 325(a)) and for failure to properly maintain its station logs (sections 73.670, 73.669. ***George G. T. Hernreich***, 913.

FORFEITURE, NOTICE OF APPARENT LIABILITY

The licensee was relieved of liability for log maintenance violations (sec. 73.114) when it was shown that the required information was being logged in a combined transmitter and maintenance log. ***Arcadia-Punta Gorda B/cing, Co., Inc.***, 834.

FREEZE, AM

Petition to dismiss application for authority to change antenna to increase radiation in null area filed during AM freeze denied because applicant entitled to comparative hearing. Designated issues concerned service area and population, transmitter site, mou, interference (sec. 73.28 (d)) and local transmission service (secs. 73.30, 73.188(b), 73.31, 73.24(b)). ***Woodward B/cing Co.***, 457.

FREQUENCY

A further notice of inquiry on the optimum frequency spacing between assignable frequencies in the land mobile service and the feasibility of frequency sharing by television and land mobile services was issued. ***Freq. Sharing by TV & Land Mobile***, 541.

A committee was established to test the sharing of television channels by land mobile radio services as professionally and expeditiously as possible. ***Frequency Sharing by TV & Other Ser.***, 543.

FREQUENCY ALLOCATION

A petition to amend the rules providing alternate spectrum availability in Hawaii only of the 6525–6575 mc/s band from mobile to fixed services, because of potential interference to fixed domestic radio services, denied; however, rule waiver would be considered on a case-to-case basis. ***Reallocate 6525–6575 Mc/s Band Hwa.***, 1.

The frequency 2400 kc/s (coast and ship) was made available for public ship-shore use for those employing telephony in Baltimore, Md., area for continuous hours of service by amending parts 81 and 83 of the Commission's rules. ***Ship-Shore Freq. for Balt., Md. Area***, 825.

FREQUENCY TOLERANCE

A citizens radio service license was revoked for operating beyond permissible frequency tolerance (sec. 95.45) failure to identify by call sign (sec. 95.95(c)) and operation as a hobby (sec. 95.83(a)(1). ***E. B. Christopher***, 689.

FREQUENCY, USE OF

A forfeiture in the amount of $1,000 was imposed for improper use of frequency (sec. 73.59) and failure to provide a first-class operator (sec. 73.93(c)). ***William and Katherine Mende***, 274.

Part 21 of the rules amended to conform with action taken in Docket Nos. 14712 and 14729 (27 F.R. 12372 and 28 F.R. 7476). *Dom. Pub. Radio Ser. Frequencies*, 539.

A petition to amend sec. 91.504(a) to make the frequency 43.04 mc/s available for general use in limited areas was denied because it is an itinerant frequency, and although it is not crowded at present, some licensees may move into the area where petitioner operates. *Use of 4304 Mc/s Sp. Ind. Radio Ser.*, 705.

FUNDS

The bare assertion that an applicant had available funds is insufficient to deny an enlargement of issues with respect to finances. A reliance on ownership reports of acquisition of a station during pendency of a comparative hearing for a new station does not satisfy section 1.65 and an application amendment is required. *Gordon Sherman*, 337.

Where sufficient funds are available and only a portion of anticipated revenues would be required to finance proposals, a financial issue will not be added. Petition denied for lack of specificity (sec. 1.229). *Gordon Sherman*, 344.

GOOD FAITH

The failure to raise a substantial question concerning the applicants good faith was the ground for the denial of a request for an added issue concerning the availability of a site for a new television broadcast station. *Marbro B/cing Co., Inc.*, 290.

GOOD CAUSE

Good cause not demonstrated for waiver of rules to permit filing petition for reconsideration and petition for waiver of sections 1.106 and 1.115 denied. North Central Video, Inc. (KWEB), FCC 66-473 distinguished. *Ottawa B/cing Corp.*, 264.

GOOD CAUSE

A petition to enlarge issues, filed late, was denied because good cause had not been shown. *Southington B/cers*, 907.

HEARING

A petition for reconsideration by CBS of an order (3 FCC 2d 469) designating applications for hearing, denied, since no new facts have been advanced by CBS and its contentions may be presented at the hearing. *KWHK B/cing Co., Inc.*, 721.

HEARING, DESIGNATION FOR

Applications for a new class II-A facility on 1030 kc and a petition for denial and various petitions favoring and opposing these two were designated for a consolidating proceeding on issues concerning areas and populations, financial, protection to clear channel station, air hazard, and city coverage (sec. 73.188). *Harriscope, Inc.*, 600.

HEARING EXAMINER

An application for increase in power and a waiver of section 73.24(g) of the rules (blanketing) were granted where the applicant demonstrated that no blanketing or cross-modulation interference problems will occur. The examiner was held to have properly precluded improper cross-examination under sec. 1.243(f). *WHOO Radio, Inc.*, 437.

245-843—68——5

HEARING EXAMINER, AUTHORITY

The examiner has the authority to require disclosure of exhibits and the names of witnesses in advance since he has authority to control the course and conduct of a hearing, and on that basis a petition for review of Review Boards order is granted. *Tinker, Inc.*, 372.

HEARING, NECESSITY FOR

Allegations by a CATV operator in the same community that applications for translator cps. were filed for the purpose of coercing petitioner to purchase or lease certain property, were sufficiently serious to warrant a hearing. Sec. 1.45 waived permitting applicant to respond late, and its answer accepted even though not conforming to sec. 309(d) (supporting affidavit). *McCulloch County Translator Co-Op*, 392.

HEARING, PROCEDURE

A transfer of control granted where lack of financing was held to consititute an exception to the hearing requirements of section 1.597 of the rules (authorization held for less than 3 years). *TeleSanJuan, Inc.*, 865.

Where the initial decision overlooked the issues going to petitioners program and technical proposals, the decision is remanded to the examiner. *Southington B/cers*, 906.

HEARING, REVIEW OF

A petition for review of an order denying reconsideration of an earlier order, held to have been properly filed within the rules (sec. 1.303) but was denied on the grounds that the examiner's order was not arbitrary. *WTCN TV, Inc.*, 917.

HEARING, RIGHT TO

A waiver of the evidentiary hearing requirement in section 74.1107(a) was granted where the communities to be served were small and a nearby city already had a CATV system. *United Transmission, Inc.*, 791.

HEARING STATUS

As a result of court remand, questions concerning equal channel facilities of the networks and need for service were removed from hearing and placed in abeyance pending further order in the clear channel proceedings. *Hubbard B/cing, Inc.*, 606.

HOBBY USE

A citizens radio service license was revoked for operating beyond permissible frequency tolerance (Sec. 95.45), failure to identify by call sign (Sec. 95.95(C)), and operation as a hobby (Sec. 95.83(A)(1)). *E. B. Christopher*, 689.

INDUSTRIAL RADIO SERVICE

A petition to amend sec. 91.504(A) to make the frequency 43.04 MC/S available for general use in limited areas was denied because it is an itinerant frequency, and although it is not crowded at present, some licensees may move into the area where petitioner operates. *Use of 43.04 MC/S Sp. Ind. Radio Ser.*, 705.

A request for STA was granted under section 309(F) since the authorization was an extension of the 60-day STA under section 309(C)(2)(G) of the act.

granted on the basis of extraordinary circumstances. The extension under the latter section was limited to 60 days. *Lorac Service Corp.*, 877.

INSURANCE

In view of a State law which apparently precludes insurance company officers from holding stock in excess of 10 percent in a corporation such as applicant, a legal qualifications issue must be added. *City Index Corp.*, 342.

INTEGRATION

An applicant whose 30-percent stockholder with full-time integration held not to have met the local residence criteria for a participating owner where his residence was two years with limited civic participation. The applicant with partially integrated stockholders whose local residence is enhanced by participation in civic affairs was preferred. *Ocean County Radio B/cing Co.*, 953.

INTERFERENCE

A petition to amend the rules providing alternate spectrum availability in Hawaii only of the 6525–6575 MC/S band from mobile to fixed services, because of potential interference to fixed domestic radio services, denied; however, rule waiver would be considered on a case-to-case basis. *Reallocate 6525–6575 Mc/s Band Hwa.*, 1.

Application for a change of frequency with increased power, granted where the change would provide more complete nighttime coverage, a portion of which now has no primary service and the remainder has but one. Waiver of sec. 73.24(B) granted, since the RSS limitation was increased. 99.4 percent coverage of the city applied for by a 25 mv/m signal is virtually complete compliance with sec. 73.188. *Charlottesville B/cing Corp.*, 140.

INTERFERENCE, AM STATIONS

An application for a first AM station granted on the grounds that interference areas presently suffer interference, and a first local outlet and a nighttime service to a white area would be provided. The Commission previously waived sections 73.24(B)(1) and 73.37, and applied standards in 73.182(V), resulting in grant. *B & K B/cing Co.*, 902.

INTERVENTION

An applicant, whose application had been returned, was not entitled to intervene either as a matter of right (sec. 1.223(A)) or discretion (sec. 1.223(B), since its requested intervention is primarily to press its private interests, but it is not precluded from making its evidence available to the Broadcast Bureau or participating as a nonparty (1.225). *Conn. Radio Foundation, Inc.*, 719.

INTERNATIONAL TELEPHONE & TELEGRAPH CORP.

Applications for assignments of licenses and transfers of control of American Broadcasting Cos., Inc., to ITT were designated for oral argument before the Commission, en banc. *American B/cing Cos.*, 709.

ISSUE, AMENDMENT OF

Issues in a previous order for consolidated hearing were amended to specify the charges in question. *Amer. Tel. & Tel.*, 548.

ISSUE, CLARIFICATION OF

A motion seeking clarification of issues to shift the burden of proof to the party having knowledge of the facts was denied. The burden of proof and burden of proceeding was to remain on the party making the charges. Generally, the hearing examiner should first consider clarification of issues at prehearing conference (sec. 1.251(c)). *Royal B/cing Co., Inc.*, 863.

ISSUE, DELETION OF

Motions by an applicant for enlargement of issues, deletion of issues, and withdrawal and dismissal of application, were dismissed as moot. *Kansas State Network, Inc.*, 978.

ISSUE, ENLARGEMENT OF

The failure to raise a substantial question concerning the applicants good faith was the ground for the denial of a request for an added issue concerning the availability of a site for a new television broadcast station. *Marbro B/cing Co., Inc.*, 290.

A financial issue in a comparative hearing for an FM license was added because certain alleged facts which raised the issue were not refuted. *Century B/cing Co., Inc., et al*, 332.

The bare assertion that an applicant had available funds is insufficient to deny an enlargement of issues with respect to finances. A reliance on ownership reports of acquisition of a station during pendency of a comparative hearing for a new station does not satisfy section 1.65 and an application amendment is required. *Gordon Sherman*, 337.

In view of a state law which apparently precludes insurance company officers from holding stock in excess of 10 percent in a corporation such as applicant, a legal qualifications issue must be added. *City Index Corp.*, 342.

Where sufficient funds are available and only a portion of anticipated revenues would be required to finance proposals, a financial issue will not be added. Petition denied for lack of specificity (sec. 1.229). *Gordon Sherman*, 344.

Issues will not be added where they had been previously considered at the time the application was designated for hearing. *Cosmopolitan Enterprises, Inc.*, 639.

An affidavit by a person having actual knowledge of the facts alleged must support a petition to enlarge issues (sec. 1.229(c)). *Cosmopolitan Enterprises, Inc.*, 637.

An appeal from an allowance of an amendment specifying competing applicants physical plant and purchase of all its assets, was granted, and in view of a finding that none of the consideration was for reimbursement of expenses (sec. 311(c)) (not allowable because of unresolved issues). The petition for amendment, dismissal, and grant was granted (sec. 1.525). *Brown Radio & Television Co.*, 852.

A petition to enlarge issues as to the basis for estimated revenues, construction and operating costs, and failure to advise (sec. 1.65) of a pending lawsuit granted. No basis had been shown for estimated revenue which was to be used for part of construction and operation. Bequested issue concerning publication (sec. 1.580) denied the allegation of too much information in the notice being deminimis. *Royal B/cing Co., Inc.*, 857.

Enlargement of issues will not be granted concerning the status of the competing applicants general manager, where the petition lacks supporting data (sec. 1.229(c)), and is founded upon assumptions, speculations, and surmise. *Ocean County Radio B/cing Co.*, 335.

A petition to enlarge issues, filed late, was denied because good cause had not been shown. *Southington B/cers*, 907.

A petition to enlarge issues concerning staff proposals was granted where applicant has amended the proposal from network to nonnetwork operation without a commensurate increase in staff. *Trend Radio, Inc.*, 920.

Where a petition for enlargement of the issues was filed five and one half months after the information upon which it was based was discovered and the record closed, the petition was denied as untimely. *West Central Ohio B/cers, Inc.*, 934.

In the absence of newly discovered facts (sec. 1.229), the designated issues will not be modified. A designated suburban community issue (307(b)), where increase power and renewal of license were requested, will not be extended to include the present operation even though a portion of a nearby larger community is being served. *Atlantic B/cing Co.*, 943.

Motions by an applicant for enlargement of issues, deletion of issues, and withdrawal and dismissal of application, were dismissed as moot. *Kansas State Network, Inc.*, 973.

A concentration of control issue was added where applicant, licensee of four AM and FM stations in the area employed combination rates and may employ such rates for its proposed TV station. An issue was added concerning an alternate proposal if network affiliation could not be obtained. *Trend Radio, Inc.*, 974.

ISSUE, MODIFICATION OF

In the absence of newly discovered facts (sec. 1.229), the designated issues will not be modified. A designated suburban community issue (307(b)), where increase power and renewal of license were requested, will not be extended to include the present operation even though a portion of a nearby larger community is being served. *Atlantic B/cing Co.*, 943.

ISSUE, NEED FOR

A request for an issue concerning whether a competiting applicant has violated section 1.65 of the rules pertaining to program changes denied since it should be addressed to the examiner in the first instance. *Chicagoland TV Co.*, 492.

An issue concerning what efforts were made to ascertain programming needs and interests was designated but other issues were denied because the allegations were unsupported. *D. H. Overmeyer Comms. Co.*, 496.

ISSUE, SCOPE OF

Where the initial decision overlooked the issues going to petitioners program and technical proposals, the decision is remanded to the examiner. *Southington B/cers*, 906.

ITT

A petition by ITT to withdraw the tariff revision at issue in its proposal for timeturn service was granted. *ITT World Comm.*, 929.

LAND MOBILE SERVICE

A further notice of inquiry on the optimum frequency spacing between assignable frequencies in the land mobile service and the feasibility of frequency sharing by television and land mobile services was issued. *Freq. Sharing by TV & Land Mobile*, 541.

A committee was established to test the sharing of television channels by land mobile radio services as professionally and expeditiously as possible. *Frequency Sharing by TV & Other Ser.*, 543.

LEGAL QUALIFICATIONS

In view of a State law which apparently precludes insurance company officers from holding stock in excess of 10 percent in a corporation such as applicant, a legal qualifications issue must be added. *City Index Corp.*, 342.

LICENSE, RENEWAL OF

The renewal of a license, over the opposition of Anti-Defamation League of B'nai B'rith charging the licensee with having permitted anti-Semite material and personal attacks on the ADL officers, was granted on the grounds that the right to a license renewal cannot be made dependent on judgments whether broadcasts were in themselves false and defamatory. *Anti-Def. League of B'nai B'rith*, 190.

A renewal of license was granted replacing the 1962 short term renewal, however, the licensee was required to forfeit $7,500 for violations concerning primarily power output (sec. 73.40), operating logs (sec. 73.93 and 73.57) log entries (sec. 73.111). *United B/cing Co., Inc.*, 293.

LICENSE, REVOCATION

A station whose license had been revoked was permitted to continue to operate for an additional 90 days for consideration of applications for the frequency. *WWIZ, Inc.*, 363.

Revocation of license was ordered for repeated violations of sections 95.41, 95.83, 95.91, 95.95, and 95.115 of the rules and a false statement of fact made in response to a communication from the Commission. *John W. Collins, Jr.*, 879.

LICENSE, SHORT TERM

A renewal of license was granted replacing the 1962 short term renewal, however, the licensee was required to forfeit $7,500 for violations concerning primarily power output (sec. 73.40), operating logs (sec. 73.93 and 73.57) log entries (sec. 73.111). *United B/cing Co., Inc.*, 293.

LICENSE, WAIVER

Section 87.403(b)(1) of the rules was waived to permit licensee to maintain a listening watch on 122.6 mc/s. *City of Fort Lauderdale, Fla.*, 785.

LOAN COMMITMENT, TERMS OF

A letter by stockholders committing them to loan funds to applicant, if needed, was sufficient even though not submitted as an amendment and not until in answer to petition requesting enlargement of issues, and no specific questions concerning estimates of operating costs were submitted by petitioner as required by sec. 1.229. *Cosmopolitan Enterprises, Inc.*, 161.

LOCAL RESIDENCE

An applicant whose 30 percent stockholder with full-time integration held not to have met the local residence criteria for a participating owner where his residence was two years with limited civic participation. The applicant with partially integrated stockholders whose local residence is enhanced by participation in civic affairs was preferred. *Ocean County Radio B/cing Co.*, 953.

LOCAL STATION

An application for a first AM station granted on the grounds that interference areas presently suffer interference, and a first local outlet and a nighttime service to a white area would be provided. The Commission previously waived sections

73.24(b)(1) and 73.37, and applied standards in 73.182(v), resulting in grant. *B & K B/cing Co.*, 902.

LOGS, FALSE

Upon remand for further hearing on issues involving violations of secs. 73.111 and 73.112 an application for a construction permit was denied because of prior conduct in the falsification of logs after competing applicant, receiving grant in initial decision, withdrew his application. *The Prattville B/cing Co.*, 555.

LOGS, MAINTENANCE OF

A renewal of license was granted replacing the 1962 short-term renewal, however, the licensee was required to forfeit $7,500 for violations concerning primarily power output (sec. 73.40), operating logs (sec. 73.93 and 73.57) log entries (sec. 73.111). *United B/cing Co., Inc.*, 293.

A forfeiture of $500 for violation of sections 73.265(b) (operation without a properly licensed operator,) 73.284 (failure to keep a maintenance log) and 73.275(a)(1) (unauthorized use of transmitter was ordered. *FM B/cing, Inc.*, 507.

The licensee was relieved of liability for log maintenance violations (sec. 73.114) when it was shown that the required information was being logged in a combined transmitter and maintenance log. *Arcadia-Punta Gorda B/cing, Co. Inc.*, 834.

Licensee of television station ordered to forfeit $1,000 for violations of rebroadcast provisions of the rules (sec. 73.655 and 325(a)) and for failure to properly maintain its station logs (sections 73.670, 73.669). *George G. T. Herneich*, 913.

LOSS

Assignment of license for conversion to a satellite station, granted on the grounds that despite overlap of the grade B contours (sec. 73.636), both stations had been operating at a loss and as a satellite station would not compete with local station. The restrictions on a satellite apply only where the community appears able to support a full-scale operation. *Voice of the Caverns, Inc.*, 946.

MAINTENANCE

A forfeiture of $500 for violation of sections 73.265(b) (operation without a properly licensed operator), 73.284 (failure to keep a maintenance log), and 73.275(a)(1) (unauthorized use of transmitter) was ordered. *FM B/cing, Inc.*, 507.

MARINE UTILITY STATIONS, LAND, FREQUENCIES

Part 83 of the rules was amended to permit use of low-power transmissions without complying with the multichannel requirement by marine utility stations. *Marine Utility Station Frequencies*, 327.

MEASUREMENTS, RELIABILITY OF

Proposed measurements must be justified before an overlap issue will be added (sec. 73.37), and a petition alleging the ground conductivity is higher than shown on figure M-3 of the rules is denied since reliable measurements were not submitted. *Cosmopolitan Enterprises Inc.*, 265.

MICROWAVE

A petition to provide microwave service to CATV systems in Glendive and Sidney, Mont., and Williston, N. Dak., after other applications were dismissed or withdrawn granted. *Western Microwave*, 549.

The carriage and program exclusivity rules with regard to CATV systems are adequate protection to a licensee of an existing TV station, so his petition to deny an application for microwave service to CATV systems was denied. ***Valley Cable TV Corp.***, 685.

A petition for reconsideration of a grant for microwave facilities to serve CATV system was (secs. 74.1107 and 74.1109) denied on the grounds of untimely filing (sec. 1.106(c)), it was filed several months after the application was filed. *New York-Penn Microwave Corp.*, 786.

MICROWAVE FREQUENCIES

Parts 87, 89, and 93 of the rules were amended to broaden the policy regarding sharing of private microwave facilities, unrestricted sharing will be permitted on frequencies above 10,000 mc/s, cross-service sharing below 10,000 mc/s will be limited in order to observe developments of cooperative systems on a cross-service basis. *Co-Op Sharing of Oper Fixed Stations*, 406.

MICROWAVE RELAY FACILITIES

Applications for modification of microwave radio services facilities as West Unity, Ohio, and for new facilities at Bluffton and Ayersville, Ohio, were granted to A.T. & T. upon dismissal of applications by United Telephone Company. *Amer. Tel. & Tel.*, 847.

MILEAGE SEPARATIONS

VHF channel 7 assigned (73.606) for the purpose of allowing a translator station to increase power (74.702(g)) over the objections of an existing VHF licensee at Dickinson, neither economic injury nor mileage separation (73.611(a)(4)) violations having been shown. *TV Table of Assignments*, 885.

MINIMUM MILEAGE SEPARATION

An application to reduce power, increase antenna height, and change transmitter site to a point which would reduce the mileage separation to six miles less than required, was designated for hearing on issues concerning whether another site could be found, programming, areas to be served, and whether a waiver of section 73.610(A) would be warranted. *Black Hawk B/cing Co.*, 282.

MISREPRESENTATION

A request for additional time to construct (sec. 319) was denied where the applicant had misinformed the Commission as to the reasons for its request by not disclosing its intention to sell even if the intent arose after the application. *Z–B B/cing Co.*, 642.

MISCONDUCT

Where misconduct occurred in the operation of petitioners station, a motion to stay the effective date of its revocation order to permit assignment of its license was denied. *Carol Music, Inc.* (*WCLM*), 780.

MOBILE RADIO SERVICE

A petition to amend the rules providing alternate spectrum availability in Hawaii only of the 6525–6575 mc/s band from mobile to fixed services, because of potential interference to fixed domestic radio services, denied; however, rule waiver would be considered on a case-to-case basis. *Reallocate 6525–6575 Mc/s Band Hwa.*, 1.

MONITORS

A forfeiture in the amount of $500 was imposed for improper use of power, (sec. 73.57) use of a defective monitor, (73.56(a)) and failure to provide a first-class operator (73.93(b)). *Green Mountain Radio, Inc.*, 276.

MOOTNESS

Motions by an applicant for enlargement of issues, deletion of issues, and withdrawal and dismissal of application, were dismissed as moot. *Kansas State Network, Inc.*, 973.

MULTIPLE OWNERSHIP

A request for a multiple ownership (73.35) issue against one applicant, which would exceed the limit of stations if granted, was denied where the grant would be conditioned on disposal of a station, and requested issue concerning a net work applicant for extension of coverage, was denied since extension of service would not alter the diversification of ownership policy. *KWHK B/cing Co., Inc.*, 365.

MULTIPLE OWNERSHIP RULES

A construction permit was granted to one applicant in order to avoid violation of the multiple ownership rules, where both applicants were otherwise found to be qualified. *The Prattville B/cing Co.*, 567.

NETWORK, EXCLUSIVE AFFILIATION WITH

A concentration of control issue was added where applicant, licensee of four AM and FM stations in the area employed combination rates and may employ such rates for its proposed TV station. An issue was added concerning an alternate proposal if network affiliation could not be obtained. *Trend Radio, Inc.*, 974.

NETWORK OPERATION

A petition to enlarge issues concerning staff proposals was granted where applicant has amended the proposal from network to nonnetwork operation without a commensurate increase in staff. *Trend Radio, Inc.*, 920.

NIGHTTIME ALLOCATION

The objective of the clear channel report in referring to white area was nighttime service to the largest number of persons presently without service, rather than land area. *Flathead Valley B/cers*, 14.

NIGHTTIME SERVICE

The objective of the clear channel report in referring to white area was nighttime service to the largest number of persons presently without service, rather than land area. *Flathead Valley B/cers*, 14.

Application for change of frequency with increased power, granted where the change would provide more complete nighttime coverage, a portion of which now has no primary service and the remainder has but one. Waiver of sec. 73.24(B) granted, since the RSS limitation was increased. 99.4 percent coverage of the city applied for by a 25 mv/m signal is virtually complete compliance with sec. 73.188. *Charlottesville B/cing Corp.*, 140.

NONCOMMERCIAL ED TV BROADCAST STA, FINANCIAL ASSISTANCE

Sponsorship identification (sec. 317) based on public interest considerations was waived since sponsors are nonprofit organizations even though the station receives a portion of the contributions. *Kansas Assn. of Radio B/cers*, 267.

OFFICERS

In view of a State law which apparently precludes insurance company officers from holding stock in excess of 10 percent in a corporation such as applicant, a legal qualifications issue must be added. *City Index Corp.*, 342.

OPERATOR, ABSENCE OF

A forfeiture of $500 for violation of sections 73.265(B) (operation without a properly licensed operator), 73.284 (failure to keep a maintenance log) and 73.275(A)(1) (unauthorized use of transmitter) was ordered. *FM B/cing. Inc.*, 507.

OPERATOR REQUIREMENTS

A forfeiture in the amount of $1,000 was imposed for improper use of frequency (sec. 73.59) and failure to provide a first-class operator (sec. 73.93(c)). *William and Katherine Mende*, 274.

A forfeiture in the amount of $500 was imposed for improper use of power (sec. 73.57), use of a defective monitor (73.56(A)), and failure to provide a first-class operator (73.93(B)). *Green Mountain Radio, Inc.*, 276.

ORAL ARGUMENT, BEFORE FCC

Applications for assignments of licenses and transfers of control of American Broadcasting Cos., Inc., to ITT were designated for oral argument before the Commission, en banc. *American B/cing Cos.*, 709.

ORDERS

The Commissions order of June 22, 1965 as amended, file No. 1-A-CSG-L-65 is amended to include authority for ComSat to make available to the Canadian Overseas Telecommunications Corp. one additional unit of Andover Earth Station for public message voice service between Montreal, Canada and Rome, Italy. *ComSat Corp.*, 931.

ORDERS, REVIEW OF

A petition for review of an order denying reconsideration of an earlier order, held to have been properly filed within the rules (sec. 1.303) but was denied on the grounds that the examiner's order was not arbitrary. *WTCN TV, Inc.*, 917.

OVERLAP

Proposed measurements must be justified before an overlap issue will be added (sec. 73.37), and a petition alleging the ground conductivity is higher than shown on figure M-3 of the rules is denied since reliable measurements were not submitted. *Cosmopolitan Enterprises Inc.*, 265.

Petition for rehearing requesting dismissal of application for improved facilities, denied, where applicant proposed to dispose of its station which would be in violation of overlap rule (sec. 73.35). *KWHK B/cing Co., Inc.*, 598.

OVERLAP RULE

The extent of overlap is determined by using the prediction method (section 73.684) to determine contours, and the present disadvantage of overlap is outweighted by the gains of applicants proposal in which the two stations licensed to applicant were in fact satellite stations. *Eugene TV, Inc.*, 232.

Application for FM facility granted even though it violates overlap provisions of duopoly rule (sec. 73.240(a)(11) in the event it and applicants existing station operated under maximum power (secs. 73.211 and 73.221) because feasible to comply with duopoly rule by moving antennas of stations and would enhance efficiency of proposed station (307(b)). *New South B/cing Corp.*, 809.

Assignment of license for conversion to a satellite station, granted on the grounds that despite overlap of the grade B contours (sec. 73.636), both stations had been operating at a loss and as a satellite station would not compete with local station. The restrictions on a satellite apply only where the community appears able to support a full-scale operation. *Voice of the Caverns, Inc.*, 946.

OWNERSHIP

Where common ownership will not restrict future expension, the common ownership of the two facilities does not raise a public interest question which would require a hearing. *Fidelity B/cing Co., Inc.*, 218.

OWNERSHIP AND MANAGEMENT, INTEGRATION OF

The successful applicant was preferred in diversification of control of mass media and integration of ownership with management, while the competing applicant proposed a more efficient utilization of the frequency. *Charles Vanda*, 655.

OWNERSHIP COMMON

Where common ownership will not restrict future expansion, the common ownership of the two facilities does not raise a public interest question which would require a hearing. *Fidelity B/cing Co., Inc.*, 218.

PARTICIPATION BY NONPARTY

An applicant, whose application had been returned, was not entitled to intervene either as a matter of right (sec. 1.223(a)) or discretion (sec. 1.223(b)), since its requested intervention is primarily to press its private interests, but it is not precluded from making its evidence available to the Broadcast Bureau or participating as a nonparty (1.225). *Conn. Radio Foundation, Inc.*, 719.

PARTY IN INTEREST

Application designated for hearing on the issue of adequacy of revenue and burden of proof placed on the petitioner. Petitioner held to be party in interest because of competition (sec. 309(d)(1)). Need for new station need not be shown since there are no 307(b) on technical issues. *Rice Capital B/cing Co.*, 592.

PETITION TO DENY

Charges that applicant failed to carry out programming promises under program test authority were considered but rejected since grant was not by comparative hearing and licensee conceded its original plans were unrealistic. *Louden County B/cing Co.*, 188.

PETROLEUM, INDUSTRY

An interim basic petroleum and gas industry communications plan was approved. *Petroleum Industry Communications*, 703.

The petroleum and gas industry communications emergency plan was approved as the industry's interim basic plan for operation during emergency conditions. *Public Notice of Aug. 17, 1966*, 704.

PETROLEUM, RADIO SERVICE

The petroleum and gas industry communications emergency plan was approved as the industry's interim basic plan for operation during emergency conditions. *Public Notice of Aug. 17, 1966*, 704.

PETROLEUM, RADIO SERVICE, USE OF

An interim basic petroleum and gas industry communications plan was approved. *Petroleum Industry Communications*, 703.

PLANT ACQUISITION

An appeal from an allowance of an amendment specifying competing applicants physical plant and purchase of all its assets, was granted, and in view of a finding that none of the consideration was for reimbursement of expenses (sec. 311(C)) (not allowable because of unresolved issues), the petition for amendment, dismissal, and grant was granted. (Sec. 1.525.) *Brown Radio & Television Co.*, 852.

POWER, INCREASE OF

Application for change of frequency with increased power, granted where the change would provide more complete nighttime coverage, a portion of which now has no primary service and the remainder has but one. Waiver of sec. 73.24(b) granted, since the BSS limitation was increased 99.4 percent coverage of the city applied for by a 25-MV/M signal is virtually complete compliance with sec. 73.188. *Charlottesville B/cing Corp.*, 140.

As a matter of policy, the applications of class IV stations requesting daytime power increases (sec. 73.28), will be exempt from provisions of the policy statement on section 307(b) considerations for standard broadcast facilities involving suburban communities, and an application for such power increase is granted. *Big Chief B/cing Co., of Tulsa, Inc.*, 148.

An application to reduce power, increase antenna height, and change transmitter site to a point which would reduce the mileage separation to six miles less than required, was designated for hearing on issues concerning whether another site could be found, programming, areas to be served, and whether a waiver of section 73.610(a) would be warranted. *Black Hawk B/cing Co.*, 282.

An application for increase in power and a waiver of section 73.24(g) of the rules (blanketing) were granted where the applicant demonstrated that no blanketing or cross-modulation interference problems will occur. The examiner was held to have properly precluded improper cross-examination under sec. 1.243(f). *WHOO Radio, Inc.*, 437.

POWER OPERATING LIMITATIONS

A forfeiture in the amount of $500 was imposed for improper use of power, (sec. 73.57) use of a defective monitor, (73.56(a)) and failure to provide a first-class operator (73.93(b)). *Green Mountain Radio, Inc.*, 276.

PREFERENCE

A contention of eventual nonduplication of AM programming is not sufficient in a petition for reconsideration of an order granting only a slight preference to increase the preference or to reopen the record, and no matters will be considered in review upon which the Board has had no opportunity to pass. (Sec. 5(d)(5)). *Community B/cing Service, Inc.*, 379.

In a comparative hearing for increased facilities, the applicant who would

provide second and third primary services as opposed to a sixth service to urban areas by the other, was preferred (307(b)). *Palmetto B/city System, Inc.*, 894.

PROCEDURES

Assignment of the proceeding to a conference before the Review Board was denied, because it was not shown that such a conference might reasonably be expected to contribute to the prompt resolution of this proceeding. *Flower City TV Corp.*, 383.

Section 1.550, Rules of Practice and Procedure, is amended by requiring only a copy of a request for a new or modified call sign assignment to be mailed rather than a separate notice to the stations in question. *Call Sign Assignments*, 401.

PROGRAMMING

A request for an issue concerning whether a competing applicant has violated section 1.65 of the rules pertaining to program changes denied since it should be addressed to the examiner in the first instance. *Chicagoland TV Co.*, 492.

Although applicant would serve a substantial portion of the larger city, the presumption that it proposed to serve the larger city was rebutted by showing antenna location, first service need of the smaller community program proposals, advertising commitments, and local stockholders. *Clay B/cers, Inc.*, 982.

PROGRAMMING, DUPLICATION, AM–FM

A contention of eventual nonduplication of AM programming is not sufficient in a petition for reconsideration of an order granting only a slight preference to increase the preference or to reopen the record, and no matters will be considered in review upon which the board has had no opportunity to pass. (sec. 5(d)(5)). *Community B/cing Service, Inc.*, 379.

PROGRAMMING ISSUES

A first local transmission service application was granted and the dual city identification requirements of section 73.30(b) was waived. Where the cities were relatively small and were shown to have an identity of interests for programming, even though there was no showing that an unreasonable burden would be placed on the station if it were licensed to serve only one city. *Saul M. Miller et al.*, 150.

An application to reduce power, increase antenna height, and change transmitter site to a point which would reduce the mileage separation to six miles less than required, was designed for hearing on issues concerning whether another site could be found, programming, areas to be served, and whether a waiver of section 73.610(a) would be warranted. *Black Hawk B/cing Co.*, 282.

PROGRAMMING PLANNING

An issue concerning what efforts were made to ascertain programming needs and interests was designated but other issues were denied because the allegations were unsupported. *D. H. Overmeyer Comms. Co.*, 496.

PROGRAMMING PROPOSALS

Charges that applicant failed to carry out programming promises under program test authority were considered but rejected since grant was not by comparative hearing and licensee conceded its original plans were unrealistic. *Louden County B/cing Co.*, 188.

PROGRAMMING, TEST

Charges that applicant failed to carry out programming promises under program test authority were considered but rejected since grant was not by comparative hearing and licensee conceded its original plans were unrealistic. *Louden County B/cing Co.*, 188.

PROGRAMMING, UNIQUE SERVICE

Permission was granted under sec. 303g, on a one-year trial basis, for change in programming format to a classified ads and public service announcements only format, subject to filing requested reports. *The McLendon Pacific Corp.*, 722.

PROOF, BURDEN OF

Where an applicant has demonstrated reasonable assurance of the site availability, it will have met its burden of proof on this issue. *Milam & Lansman, a Partnership*, 610.

A motion seeking clarification of issues to shift the burden of proof to the party having knowledge of the facts was denied. The burden of proof and burden of proceeding was to remain on the party making the charges. Generally, the hearing examiner should first consider clarification of issues at prehearing conference (sec. 1.251(c)). *Royal B/cing Co., Inc.*, 863.

PUBLIC INTEREST

Stay of an order of revocation of license was denied where the original order had been issued more than two years previously and no overriding public interest considerations were present. *Carol Music, Inc.*, 836.

PUBLIC NOTICE

A committee was established to test the sharing of television channels by land mobile radio services as professionally and expeditiously as possible. *Frequency Sharing by TV & Other Ser.*, 543.

An interim basic petroleum and gas industry communications plan was approved. *Petroleum Industry Communications*, 703.

PUBLIC SERVICE, PROGRAMMING

Permission was granted under sec. 303g, on a one-year trial basis, for change in programming format to a classified ads and public service announcements only formal, subject to filing requested reports. *The McLendon Pacific Corp.*, 722.

PUBLICATION

A joint request for approval of agreement for reimbursement of expenses conditioned on withdrawal of one application and grant of another was held in abeyance for other persons to apply since one applicant would serve a larger, and different areas, and no showing was made of other available FM service to their respective areas. Publication under sec. 1.525(b)(2) required since 307(b) issue remains. *Lafayette B/cing Co., Inc.*, 778.

A petition to enlarge issues as to the basis for estimated revenues, construction and operating costs, and failure to advise (sec. 1.65) of a pending lawsuit granted. No basis had been shown for estimated revenue which was to be used for part of construction and operation. Requested issue concerning publication (sec. 1.580) denied the allegation of too much information in the notice being deminimis. *Royal B/cing Co., Inc.*, 857.

PUBLIC MESSAGE SERVICE

The Commission's order of June 22, 1965 as amended, file No. 1-A-CSG-L-65 is amended to include authority for ComSat to make available to the Canadian Overseas Telecommunications Corp. One additional unit of Andover Earth Station for public message voice service between Montreal, Canada and Rome, Italy. *ComSat Corp.*, 931.

QUALIFICATION

Upon withdrawal of competing applicant, application for FM station was granted where applicant was qualified in all respects (sec. 311(a)(2)). *Haddox Enterprises, Inc.*, 924.

RADIO TELEPHONE

To preserve the ITU principles of a compatible system, section 83.106 was not amended to allow radiotelephone stations to operate on more than one public correspondence channel without having a 156.3 and a 156.8 mc/s capability. *Ship Radiotelephone Stations*, 359.

Parts 83 and 85 of the Commission rules were amended to permit ship station licenses to substitute type accepted radiotelephone transmitters for radar units without the need for modification of ship station license. *Changes in Ship Station Equipment*, 404.

RATE

A proposal to increase rates on an interim basis with a specific hearing on the TWX service has been consolidated with petitioners other requests in a separate proceeding although the increase as now proposed cannot be found, on the basis of the evidence, to be just and reasonable. *Amer. Tel. & Tel.*, 545.

RATE COMBINATION

A concentration of control issue was added where applicant, licensee of four AM and FM stations in the area employed combination rates and may employ such rates for its proposed TV station. An issue was added concerning an alternate proposal if network affiliation could not be obtained. *Trend Radio, Inc.*, 974.

REBROADCASTS, PROHIBITED

Licensee of television station ordered to forfeit $1,000 for violations of rebroadcast provisions of the rules (sec. 73.655 and 325(a)) and for failure to properly maintain its station logs (sections 73.670, 73.669). *George G. T. Herwreich*, 913.

RECONSIDERATION

A petition for reconsideration of a designation order which requested deletion of a presunrise condition imposed on an applicant but not on the other applicant in a comparative hearing was granted. *Arthur A. Cirilli*, 184.

A contention of eventual nonduplication of AM programming is not sufficient in a petition for reconsideration of an order granting only a slight preference to increase the preference or to reopen the record, and no matters will be considered in review upon which the Board has had no opportunity to pass (Sec. 5(d)(5)). *Community B/cing Service, Inc.*, 379.

RECONSIDERATION, DENIAL

No basis was presented for reconsideration of decision revoking license, and legal error was not claimed, but a plea based on physical disability was addressed to the dicretion of the Commission, and the request was denied. *WMOZ, Inc.*, 369.

A new bank commitment was not newly discovered evidence in a petition for reconsideration where the applicant had failed to meet its financial burden either before or during the hearing and although the corrective amendment was accepted the record is not reopened since it is not newly discovered evidence which is preferred. *Associated TV Corp.*, 386.

Where substantially similar contentions were made concerning validity of rules concerning CATV (sec. 74.1107) in another case, a petition for reconsideration of a show cause order was denied. *Jackson TV Cable Co.*, 396.

A petition for reconsideration by CBS of an order (3FCC 2d 409) designating applications for hearing, denied, since no new facts have been advanced by CBS and its contentions may be presented at the hearing. *KWHK B/cing Co., Inc.*, 721.

Reconsideration of UHF assignments (sec. 73.606) removing channel 19 from Stockton to Modesto, Cal., substituting channel 31 in Stockton, and modifying the CO of station KLOC–TV to specify channel 19 in Modesto, was denied. No premature construction withing sec. 319(a) was found where the transmitter building had not been wired nor antenna foundations laid, nor was there a violation of Sec. 309(b). *UHF TV Channels*, 839.

A petition for reconsideration was denied, where the FM Table of Assignments was amended to specify St. Paul rather than Minneapolis for the applied for channel, and the application of the dismissing applicant was amended to the new city with no other change, it was not a new application (sec. 1.106), and reimbursement (sec. 311(c)) would be allowed. *Hennepin B/cing Assoc. Inc.*, 872.

RECONSIDERATION, PETITION FOR

A petition for reconsideration of a grant for microwave facilities to serve CATV system was (secs. 74.1107 and 74.1109) denied on the grounds of untimely filing (sec. 1.106(c)) it was filed several months after the application was filed. *New York-Penn Microwave Corp.*, 786.

A petition for reconsideration of order (3 FCC 2d 907) allowing in part reimbursement of expenses (sec. 1.525) which presented facts not previously relied on (sec. 1.106 (c)) but which did not relate to changed circumstance, was denied. *Richard O'Connor*, 827.

RELIEF

Temporary relief against CATV systems (secs. 74.1107, 74.1109) carrying signals of Los Angeles stations into the San Diego area was granted, and the case was designated for hearing. Jurisdiction to grant the temporary relief requested is provided in secs. 4 (i) and 303 (f) and (r) of the act, and is not limited by the provision of sec. 312. *Midwest TV, Inc.*, 612.

RENEWALS

The renewal of a license, over the opposition of Anti-Defamation League of B'nai B'rith charging the licensee with having permitted anti-Semite material and personal attacks on the ADL officers, was granted on the grounds that the right to a license renewal cannot be made dependent on judgments whether broadcasts were in themselves false and defamatory. *Anti-Def. League of B'nai B'rith*, 190.

Renewal application was granted despite opposition by anti-Defamation League when violations of Fairness Doctrine were isolated and licensee promised to comply in the future. *Anti-Defamation League*, 217.

Where petitioner does not raise a relevant factor for consideration in a renewal denial, the record will not be reopened or the order set aside. *WWIZ, Inc.*, 608.

REOPEN, RIGHT TO

Where petitioner does not raise a relevant factor for consideration in a renewal denial, the record will not be reopened or the order set aside. *WWIZ, Inc.*, 608.

REVENUES, ESTIMATE OF

A petition to enlarge issues as to the basis for estimated revenues, construction and operating costs, and failure to advise (sec. 1.65) of a pending lawsuit granted. No basis had been shown for estimated revenue which was to be used for part of construction and operation. Requested issue concerning publication (sec. 1.580) denied the allegation of too much information in the notice being deminimis. *Royal B/cing Co., Inc.*, 857.

REVOCATION

A petition for stay of an order terminating operations of a station was denied because there were numerous other stations serving the same area and applications have been filed for the vacated frequency. *WMOZ, Inc.*, 714.

Where misconduct occurred in the operation of petitioners station, a motion to stay the effective date of its revocation order to permit assignment of its license was denied. *Carol Music, Inc. (WCLM)*, 780.

Stay of an order of revocation of license was denied where the original order had been issued more than two years previously and no overriding public interest considerations were present. *Carol Music, Inc.*, 836.

Revocation of license was ordered for repeated violations of sections 95.41, 95.83, 95.91, 95.95, and 95.115 of the rules and a false statement of fact made in response to a communication from the Commission. *John W. Collins, Jr.*, 879.

RIGHT OF REFUSAL

Approval of an agreement to dismiss an application, payment of out-of-pocket expenses, and a right of first refusal for 10 years to transfer control of the license was granted. *McAlister B/cing Corp.*, 381.

RSS LIMITATION

Application for change of frequency with increased power, granted where the change would provide more complete night time coverage, a portion of which now has no primary service and the remainder has but one. Waiver of sec. 73.24(b) granted, since the RSS limitation was increased. 99.4 percent coverage of the city applied for by a 25-mv/m signal is virtually complete compliance with sec. 73.188. *Charlottesville B/cing Corp.*, 140.

RULE MAKING

As a result of court remand, questions concerning equal channel facilities of the networks and need for service were removed from hearing and placed in abeyance pending further order in the clear channel proceeding. *Hubbard B/cing, Inc.*, 606.

245-843—68——6

RULE MAKING, PROPOSED

To preserve the ITU principles of a compatible system, section 83.106 was not amended to allow radiotelephone stations to operate on more than one public correspondence channel without having a 156.3 and a 156.8 mc/s capability. ***Ship Radio-telephone Stations***, 359.

RULE VIOLATIONS

A forfeiture of $1,000 was ordered for willful and repeated violation of sections 73.47(b), 73.57(a), 17.38(c), and repeated failure to observe the provisions of section 73.39(d)(4) and 17.38(d) of the rules. ***High Fidelity Stations, Inc.***, 829.

Revocation of license was ordered for repeated violations of sections 95.41, 95.83, 95.91, 95.95, and 95.115 of the rules and a false statement of fact made in response to a communication from the Commission, ***John W. Collins, Jr.***, 879.

RULES, WAIVER OF

Good cause not demonstrated for waiver of rules to permit filing petition for reconsideration and petition for waiver of sections 1.106 and 1.115 denied. North Central Video, Inc. (KWEB), FCC 66-473 distinguished. ***Ottawa B/cing Corp.***, 264.

The evidentiary hearing requirements were waived (sec. 74.1107) because the total market to be served represents an insignificant percentage of the service of stations whose grade A and B contours encompass the area of the proposed CATV. ***Martin County Cable Co., Inc.***, 348.

The evidentiary hearing requirement for CATV was waived (sec. 74.1107) where the small city (8,880) was served by one shared-time station with a grade A signal and with three grade B signals, none of which were ABC affiliates nor UHF grade B signals. ***Coldwater Cablevision, Inc.***, 351.

Since there is presently substantial CATV penetration in the area, the evidentiary hearing requirements are waived (sec. 74.1107). ***Chenor Communications, Inc.***, 354.

Permission granted to substitute carriage of one educational station for another during the summer months (secs. 74.1107 and 1.3). ***Buckeye Cablevision, Inc.***, 798.

An application for increase in power and a waiver of section 73.24(g) of the rules (blanketing) were granted where the applicant demonstrated that no blanketing or cross-modulation interference problems will occur. The examiner was held to have properly precluded improper cross-examination under sec. 1.243(f). ***WHOO Radio, Inc.***, 437.

Two applications for FM construction permits were accepted for filing, although one applicant was dismissed less than one year previous (sec. 73.207) for failure to construct, but it would become eligible for filing before the 30-day statutory waiting period of other applicant (section 1.519 of the rules waived). ***Central Conn. B/cing Co.***, 650.

Section 87.403(b)(1) of the rules was waived to permit licensee to maintain a listening watch on 122.6 mc/s. ***City of Fort Lauderdale, Fla.***, 785.

A waiver of the evidentiary hearing requirement in section 74.1107(a) was granted where the communities to be served were small and a nearby city already had a CATV system. *United Transmission, Inc.*, 791.

Section 73.35 of the rules was waived to permit a licensee of an AM station to serve as a member of the board of regents of a college which holds a license of a station serving the same area. *Charles Smithgall*, 838.

A transfer of control granted where lack of financing was held to constitute an exception to the hearing requirements of section 1.597 of the rules (authorization held for less than 3 years). *TeleSanJuan, Inc.*, 865.

SAFETY AND SPECIAL RADIO SERVICES

An interim basic petroleum and gas industry communications plan was approved. *Petroleum Industry Communications*, 703.

SAFETY AND SPECIAL RAD SER BUREAU, AUTHORITY DELEGATED

Part 0 of the rules amended to delegate authority to waive filing of blanket applications in the safety and special radio services to the Chief, Safety and Special Radio Services Bureau. *Delegation of Authority*, 399.

SATELLITE STATION

The extent of overlap is determined by using the prediction method (section 73.684) to determine contours, and the present disadvantage of overlap is outweighed by the gains of applicants proposal in which the two stations licensed to applicant were in fact satellite stations. *Eugene TV, Inc.*, 232.

Assignment of license for conversion to a satellite station, granted on the grounds that despite overlap of the Grade B contours (sec. 73.636), both stations had been operating at a loss and as a satellite station would not compete with local station. The restrictions on a satellite apply only where the community appears able to support a full-scale operation. *Voice of the Caverans, Inc.*, 946.

SEPARATION REQUIREMENTS

The deletion of a channel and its assignment to a nearby smaller city was denied on the grounds that petitioner could apply for the requested channel under the 25-mile rule. *FM Table of Assignments*, 357.

A request to assign channel 16 to Martinsville was denied because of separation requirements, and the proceeding was terminated since petitioner indicated no interest in applying for channel 65 which could be assigned to Martinsville (sec. 73.606(b)). *TV Table of Assignments*, 805.

SERVICE AREA

In granting the removal of a directional condition to a UHF television licensee, it was held that the respondent licensee had failed to sustain its burden of proof under the impact issue, and, although the principal city of the licensee is a UHF island, about half of its population is served by the grade B signal of five VHF stations. *WHAS, Inc.*, 724.

A joint request for approval of agreement for reimbursement of expenses conditioned on withdrawal of one application and grant of another was held in abeyance for other persons to apply since one applicant would serve a larger, and different areas, and no showing was made of other available FM service to their respective areas. Publication under sec. 1.525(b)(2) required since 307(b) issue remains. *Lafayette B/cing Co., Inc.*, 778.

SERVICE, EXISTING

Existing FM 50 uv/m signals are not considered as constituting service where a grant is made on the basis of service to a white area. The third report (FCC 63–735.23 r.r. 1859) does not extend protection to any specified signal strength contour. *Nelson B/cing Co.*, 224.

SERVICE, MULTIPLICITY OF

Existing FM 50 uv/m signals are not considered as constituting service where a grant is made on the basis of service to a white area. The third report (FCC 63–735, 23 r.r. 1859) does not extend protection to any specified signal strength contour. *Nelson B/cing Co.*, 224.

SERVICE, NEED FOR

Application designated for hearing on the issue of adequacy of revenue and burden of proof placed on the petitioner. Petitioner held to be party in interest because of competition (sec. 309(d)(1)). Need for new station need not be shown since there are no 307(b) on technical issues. *Rice Capital B/cing Co.*, 592.

SERVICE, PRIMARY

In a comparative hearing for increased facilities, the applicant who would provide second and third primary services as opposed to a sixth service to urban areas by the other, was preferred (307(b)). *Palmetto B/cing System, Inc.*, 894.

SHARE-TIME

The parties were given a 10-day period in which to consent to an agreement after dismissal of assignment of broadcast hours application for share-time stations (sec. 73.78), since a hearing on the disagreement of the share-time licensees could result in a nullity. *WHAZ*, 186.

SHARE-TIME OPERATION

Where an amendment would improve the competitive position, delay the proceeding and good cause has not been shown (sec. 1.522(B)) a petition to amend from a shared-time operation to full time, when the shared-time applicant withdrew was denied. *Flower City TV Corp.*, 384.

Parts 87, 89, and 93 of the rules were amended to broaden the policy regarding sharing of private microwave facilities, unrestricted sharing will be permitted on frequencies above 10,000 mc/s, cross-service sharing below 10,000 mc/s will be limited in order to observe developments of cooperative systems on a cross-service basis. *Co-op Sharing of Oper Fixed Stations*, 406.

SHARE-TIME STATIONS

The parties were given a 10-day period in which to consent to an agreement after dismissal of assignment of broadcast hours application for share-time stations, (sec. 73.78) since a hearing on the disagreement of the share-time licensees could result in a nullity. *WHAZ*, 186.

SHIP STATION

Parts 83 and 85 of the Commission rules were amended to permit ship station licensees to substitute type accepted radiotelephone transmitters for radar units without the need for modification of ship station license. *Changes in Shop Station Equipment*, 404.

SHOW CAUSE, ORDER TO

Where substantially similar contentions were made concerning validity of rules concerning CATV (sec. 74.1107) in another case, a petition for reconsideration of a show cause order was denied. *Jackson TV Cable Co.*, 396.

An uncontested motion to amend an order to show cause by adding subsequent violations to the order issued by the Chief, Safety and Special Radio Services Bureau, was granted. *Raymond W. Gill*, 397.

A modification of a show cause order (sec. 74.1107) was granted so that the company may include its other operation in order to avoid a second proceeding against the latter operation. *Jackson TV Cable Co.*, 635.

A CATV operator who allegedly commenced operations subsequent to February 12, 1966, without having obtained approval, was ordered to show cause why it should not cease and desist (secs. 74.1105 and 74.1107). *Back Mountain Telecable, Inc.*, 988.

SIGNALS, PRIORITY OF

Existing FM 50 uv/m signals are not considered as constituting service where a grant is made on the basis of service to a white area. The third report (FCC 63–735, 23 R.R. 1859) does not extend protection to any specified signal strength contour. *Nelson B/cing Co.*, 224.

SITE AVAILABILITY

Two mutually exclusive applications for a standard broadcast construction permit were denied one on the grounds that it failed to sustain its burden of proof under the site-availability issue, and the other by reason of trafficking (sec. 1.597), failure to establish adequate character qualifications, and premature assumption of control of a broadcast station (sec. 310(B)). *Edina Corp.*, 36.

The failure to raise a substantial question concerning the applicants good faith was the ground for the denial of a request for an added issue concerning the availability of a site for a new television broadcast station. *Marbro B/cing Co., Inc.*, 290.

Where an applicant has demonstrated reasonable assurance of the site availability, it will have met its burden of proof on this issue. *Milam & Lansman, a Partnership*, 610.

SPACING REQUIREMENTS

A petition requesting assignment was denied on the grounds that spacing requirements will not be waived in the absence of extraordinary circumstances (sec. 73.207) and an intervening mountain is not one. *FM Table of Assignments*, 887.

SPECIAL TEMPORARY AUTHORIZATION

A request for STA was granted under section 309(f) since the authorization was an extension of the 60-day STA under section 309(c)(2)(g) of the act, granted on the basis of extraordinary circumstances. The extension under the latter section was limited to 60 days. *Lorac Service Corp.*, 877.

SPONSORS, IDENTIFICATION OF

Sponsorship identification (sec. 317) based on public interest considerations was waived since sponsors are nonprofit organizations even though the station receives a portion of the contributions. ***Kansas Assn of Radio B/cers***, 267.

STAFF PROPOSALS

A petition to enlarge issues concerning staff proposals was granted where applicant has amended the proposal from net work to nonnetwork operation without a commensurate increase in staff. ***Trend Radio, Inc.***, 920.

STANDARD BROADCAST STATIONS, CLASS II

A petition for modification of notice of proposed rulemaking for suspension of consideration of pending applications for class II–A stations pending proceeding in docket No. 16222 (sec. 73.150), denied, since the proposed notice provides that only applications filed on or after the effective date of the amended rule would be affected. ***Nebr. Rural Radio Assn.***, 262.

STATION

A station whose license had been revoked was permitted to continue to operate for an additional 90 days for consideration of applications for the frequency. ***WWIZ, Inc.***, 363.

STAY

A stay which would facilitate the orderly progress of the hearing was granted. ***Tinker, Inc.***, 370.

A petition for stay of an order terminating operations of a station was denied because there were numerous other stations serving the same area and applications have been filed for the vacated frequency. ***WMOZ, Inc.***, 714.

Where misconduct occurred in the operation of petitioners station, a motion to stay the effective date of its revocation order to permit assignment of its license was denied. ***Carol Music, Inc. (WCLM)***, 780.

Stay of an order of revocation of license was denied where the original order had been issued more than two years previously and no overriding public interest considerations were present. ***Carol Music, Inc.***, 836.

STOCK OWNERSHIP

In view of a State law which apparently precludes insurance company officers from holding stock in excess of 10 percent in a corporation such as applicant, a legal qualifications issue must be added. ***City Index Corp.***, 342.

Amendments to reflect changes in stockholders broadcast interests and in main studio location were allowed. ***TV San Francisco***, 971.

STOCKHOLDER

A letter by stockholders committing them to loan funds to applicant, if needed, was sufficient even though not submitted as an amendment and not until in

answer to petition requesting enlargement of issues, and no specific questions concerning estimates of operating costs were submitted by petitioner as required by sec. 1.229. *Cosmopolitan Enterprises, Inc.*, 161.

Although applicant would serve a substantial portion of the larger city, the presumption that it proposed to serve the larger city was rebutted by showing antenna location, first service need of the smaller community program proposals, advertising commitments, and local stockholders. *Clay B/cers, Inc.*, 932.

An applicant whose 30-percent stockholder with full-time integration held not to have met the local residence criteria for a participating owner where his residence was two years with limited civic participation. The applicant with partially integrated stockholders whose local residence is enhanced by participation in civic affairs was preferred. *Ocean County Radio B/cing Co.*, 953.

Amendments to reflect changes in stockholders broadcast interests and in main studio location were allowed. *TV San Francisvo*, 971.

STUDIO, MAIN

Where there is substantial competition in each business activity and where petitioner fails to show preferential treatment by the broadcast facilities to its other interests an economic dominance issue will not be added, and competing applications designated for hearing on financial and studio location (sec. 73.613) issues. *Kentucky Central TV, Inc.*, 227.

Amendments to reflect changes in stockholders broadcast interests and in main studio location were allowed. *TV San Francisco*, 971.

STUDIO SITE

A petition to amend application (in a comparative hearing) to change studio site was granted because the originally designated site was destroyed by fire and the amendment neither was opposed nor offered a comparative advantage. *TV San Francisco*, 972.

SUBURBAN ISSUE

A suburban issue was denied because, although applicants proposed 5 mv/m daytime contour penetrated a larger community, it would not penetrate a community of more than 50,000 population. A programing issue was held in abeyance pending action on a joint request for approval of agreement dismissing petitioners application. *James L. Hutchens*, 157.

SUBURBAN COMMUNITY 307(B) ISSUE

As a matter of policy, the applications of class IV stations requesting daytime power increases sec. 73.28 will be exempt from provisions of the policy statement on section 307(b) considerations for standard broadcast facilities involving suburban communities, and an application for such power increase is granted. *Big Chief B/cing Co. of Tulsa, Inc.*, 148.

An application for assignment and renewal of license and a new application for a construction permit for the same frequency were designated for hearing with the assignee designated as a party since the application for assignment of license preceded the construction permit application. Suburban community 307(b) issue not included since existing facilities are involved. *1400 Corp.*, 715.

Although applicant would serve a substantial portion of the larger city, the presumption that it proposed to serve the larger city was rebutted by showing

antenna location, first service need of the smaller community program proposals, advertising commitments, and local stockholders. ***Clay B/cers, Inc.***, 932.

In granting a petition for amendment (sec. 1.522(b)) and return to the processing line, it was held that a possible suburban community issue would not prohibit the requested relief since it is possible that the issue could be resolved on the processing line. ***Norristown B/cing Co., Inc.***, 937.

In the absence of newly discovered facts (sec. 1.229), the designated issues will not be modified. A designated suburban community issue (307(b)), where increase power and renewal of license were requested, will not be extended to include the present operation even though a portion of a nearby larger community is being served. ***Atlantic B/cing Co.***, 943.

SUNRISE

A petition for reconsideration of a designation order which requested deletion of a presunrise condition imposed on an applicant but not on the other applicant in a comparative hearing was granted. ***Arthur A. Cirilli***, 184.

SURVEY

An application for assignment of license was designated for hearing on issues concerning adequacy of survey of needs of the community and programming, upon petition by an existing licensee. ***City of Camden***, 646.

TABLE OF ASSIGNMENT, FM

An assignment of channel 270 to Gulfport, La., and its deletion from New Orleans was denied as not being in the public interest. ***FM Table of Assignments***, 6.

The deletion of a channel and its assignment to a nearby smaller city was denied on the grounds that petitioner could apply for the requested channel under the 25-mile rule. ***FM Table of Assignments***, 357.

A second FM assignment (sec. 73.202) was denied to Mount Carmel, Ill. (8594) on the grounds that the proposed assignment could preclude a future needed assignment in a nearby community which has no radio station. ***FM Table of Assignments***, 402.

A petition for reconsideration concerning an FM assignment (sec. 73.202) in Texas was granted but, two others for FM assignments in Rhode Island and Massachusetts were denied. ***FM Table of Assignments***, 521.

The table of assignments, section 73.202 of the Commission's rules, was amended to include numerous small town assignments. ***FM Table of Assignments***, 328.

A petition to reconsider and stay the order deleting channel 270 from Chicago and assigning it to Skokie, Ill., was denied (sec. 73.202). ***FM Allocations***, 707.

A second FM channel was assigned to Glen Falls, New York (sec. 73.202). ***FM Table of Assignments***, 799.

A petition for reconsideration was denied, where the FM Table of Assignments was amended to specify St. Paul rather than Minneapolis for the applied for channel, and the application of the dismissing applicant was amended to the new city with no other change, it was not a new application (sec. 1.106), and reimbursement (sec. 311(c)) would be allowed. ***Hennepin B/cing Assoc. Inc.***, 872.

A petition requesting assignment was denied on the grounds that spacing requirements will not be waived in the absence of extraordinary circumstances (sec. 73.207) and an intervening mountain is not one. *FM Table of Assignments*, 887.

TABLE OF ASSIGNMENT, TV

An outstanding license was modified by the specification of channel 23 in lieu of channel 49 over objections of a party which did not indicate it would apply if the change were not made. *TV Table of Assignments*, 533.

The Commission proposed on its own motion to substitute three commercial UHF channels at Topeka, Kans., for the two presently assigned because the area has sufficient size and need for them. The parties were given leave to amend their applications to conform to the ruling. *TV Table of Assignments*, 536.

Channel 16 was assigned to Somerset, Ky. (Sec. 73.606(b)). *TV Table of Assignments*, 801.

Channel 59 was assigned to Waynesville, N.C. (Sec. 73.606(b)). *TV Table of Assignments*, 803.

Request to assign channel 16 to Martinsville was denied because of separation requirements, and the proceeding was terminated since petitioner indicated no interest in applying for channel 65 which could be assigned to Martinsville (Sec. 73.606(B)). *TV Table of Assignments*, 805.

A petition to reserve a VHF channel for educational use in a city to which was assigned 3 VHF and one UHF channels, was denied, where the UHF channel is presently reserved for educational use. *TV Table of Assignments*, 889.

There being but one TV assignment for Bend, Oreg., and that reserved for noncommercial educational use, a UHF channel was assigned since petitioner proposed to construct. *TV Table of Assignments*, 927.

VHF channel 7 assigned (73.606) for the purpose of allowing a translator station to increase power (74.702(g)) over the objections of an existing VHF licensee at Dickinson, neither economic injury nor mileage separation (73.611(a)(4)) violations having been shown. *TV table of Assignments*, 885.

TABLE OF ASSIGNMENTS, UHF

Reconsideration of UHF assignments (Sec. 73.606) removing channel 19 from Stockton to Modesto, Cal., substituting channel 31 in Stockton, and modifying the co of station KLOC–TV to specify channel 19 in Modesto, was denied. No premature construction within Sec. 319(a) was found where the transmitter building had not been wired nor antenna foundations laid, nor was there a violation of sec. 309(b). *UHF TV Channels*, 839.

TARIFF

A petition by ITT to withdraw the tariff revision at issue in its proposal for timeturn service was granted. *ITT World Comm.*, 929.

TARIFF, FILING AND POSTING

Since A.T. & T. serves as a common carrier for the CATV systems which are interstate (sec. (202(b)), they should file a tariff (sec. 208(a)). *Com. Car. Tariffs for CATV Systems*, 257.

TARIFF REGULATIONS

A petition for reconsideration (sec. 1.106) of the Commission's memorandum opinion and order of July 22, 1966, in docket 15011 was denied on the grounds that the evidence of record supports the conclusion that TWX earnings should

be adjusted upward and that the Commission did not prescribe rates in violation of the act. *Amer. Tel. & Tel.*, 891.

TECHNICAL RULES

The application for renewal of license was denied on the grounds that applicant failed to sustain the burden of proof as to its financial qualifications, violated technical rules (secs. 73.60, 73.40(b), 73.114), failed to submit financial reports, failed to publish (sec. 1.594), and failed to have a first class radio-telephone operator on duty at all times (sec. 73.93(a)). *The Kent-Sussex B/cing Co.*, 169.

TELECOMMUNICATIONS

Public notice issued announcing that telecommunications channels or services may be obtained directly from ComSat only in those instances where appropriate authority has been issued upon a finding that there are unique or exceptional circumstances warranting such authorizations. *ComSat-Authorized Users*, 12.

In order for noncommon carrier concerns to obtain satellite telecommunications services directly from the Communications Satellite Corporation, the concerns and ComSat must set forth specific information indicated by the Commission, and ComSat may be authorized to provide such services only in unique and exceptional circumstances. *Authorized Entities and Users-ComSat*, 421.

TELEPHONE COMPANY, SERVICE

Petition for reconsideration was denied on the grounds that the previous decision denying a request to consider the jurisdictional cost separations issue in phase 1 of the A.T. & T. hearings on changes would require modification of existing orders. *Amer. Tel. & Tel.*, 253.

TELEPHONY

The frequency 2400 KC/S (coast and ship) was made available for public ship-shore use for those employing telephony in Baltimore, Md., area for continuous hours of service by amending parts 81 and 83 of the Commission's rules. *Ship-Shore Freq. for Balt. Md., area*, 325.

TELEVISION

In granting the removal of a directional condition to a UHF television licensee, it was held that the respondent licensee had failed to sustain its burden of proof under the impact issue, and, although the principal city of the licensee is a UHF island, about half of its population is served by the grade B signal of five VHF stations. *WHAS, Inc.*, 724.

A request for a condition that grantee of pending UHF application be permitted to use antenna towers of applicants for relocation of antenna sites in the instant proceeding, under sec. 73.635, denied, since there is no allegation that tall tower applicants will not comply. *WTCN TV, Inc.*, 773.

TIME, EXTENSION OF

An extension of time was denied where, after seven previous extensions and a reinstatement of the permit, the applicant sought to maintain his permit for the purpose of assigning it to others. (sec. 319(b)). *Telemusic Co.*, 221.

TIMELINESS

A petition to enlarge issues, filed late, was denied because good cause had not been shown. *Southington B/cers*, 907.

TRAFFICKING

Two mutually exclusive applications for a standard broadcast construction permit were denied one on the grounds that it failed to sustain its burden of proof under the site-availability issue, and the other by reason of trafficking (sec. 1.597), failure to establish adequate character qualifications, and premature assumption of control of a broadcast station (sec. 310(b)). *Edina Corp.*, 36.

TRANSFER OF CONTROL

Approval of an agreement to dismiss an application, payment of out-of-pocket expenses, and a right of first refusal for 10 years to transfer control of the license was granted. *McAlister B/cing Corp.*, 381.

Applications for asignments of licenses and transfers of control of American Broadcasting Cos., Inc., to ITT were designated for oral argument before the Commission, en banc. *American B/cing Cos.*, 709.

A transfer of control granted where lack of financing was held to constitute an exception to the hearing requirements of section 1.597 of the rules (authorization held for less than 3 years). *TeleSanJuan, Inc.*, 865.

TRANSLATOR, UHF

Allegations by a CATV operator in the same community that applications for translator cps were filed for the purpose of coercing petitioner to purchase or lease certain property, were sufficiently serious to warrant a hearing. Sec. 1.45 waived permitting applicant to respond late, and its answer accepted even though not conforming to sec. 309(d) (supporting affidavit). *McCulloch County Translator Co-Op*, 392.

TRANSLATOR, VHF

VHF channel 7 assigned (73.606) for the purpose of allowing a translator station to increase power (74.702(g)) over the objections of an existing VHF licensee at Dickinson, neither economic injury nor milage separation (73.611 (a)(4)) violations having been shown. *TV Table of Assignments*, 885.

TRANSMITTER, OPERATOR REQUIREMENTS

The application for renewal of license was denied on the grounds that applicant failed to sustain the burden of proof as to its financial qualifications, violated technical rules (secs. 73.60, 73.40(b), 73.114), failed to submit financial reports, failed to publish (sec. 1.594), and failed to have a first-class radiotelephone operator on duty at all times (sec. 73.93(a)). *The Kent-Sussex B/cing Co.*, 169.

TRANSMITTER, SITE

An agreement for dismissal of one of two competing applicants and retention of the other in hearing status, upon payment of a portion of out-of-pocket expenses was approved along with an amendment (sec. 1.522 (b)) which would permit substitution of original transmitter site (sec. 73.188(a)) by retained applicant. *Wilksboro B/cing Co.*, 164.

An application to reduce power, increase antenna height, and change transmitter site to a point which would reduce the mileage separation to six miles less than required, was designated for hearing on issues concerning whether an-

other site could be found. programming, areas to be served, and whether a waiver of section 73.610(a) would be warranted. *Black Hawk B/cing Co.*, 282.

TWX

A proposal to increase rates on an interim basis with a specific hearing on the TWX service has been consolidated with petitioners other requests, in a separate proceeding although the increase as now proposed cannot be found, on the basis of the evidence, to be just and reasonable. *Amer. Tel. & Tel.*, 545.

A petition for reconsideration (sec. 1.106) of the Commission's memorandum opinion and order of July 22, 1966, in Docket 15011 was denied on the grounds that the evidence of record supports the conclusion that TWX earnings should be adjusted upward and that the Commission did not prescribe rates in violation of the act. *Amer. Tel & Tel.*, 891.

UHF IMPACT

In granting the removal of a directional condition to a UHF television licensee, it was held that the respondent licensee had failed to sustain its burden of proof under the impact issue, and, although the principal city of the licensee is a UHF island, about half of its population is served by the grade B signal of five VHF stations. *WHAS, Inc.*, 724.

VIOLATIONS

An uncontested motion to amend an order to show cause by adding subsequent violations to the order issued by the Chief, Safety and Special Radio Services Bureau, was granted. *Raymond W. Gill*, 397.

VIOLATIONS, FACTOR IN APPLICATIONS

Renewal application was granted despite opposition by Anti-Defamation League when violations of Fairness Doctrine were isolated and licensee promised to comply in the future. *Anti-Defamation League*, 217.

WAIVER

Sponsorship identification (sec. 317) based on public interest considerations was waived since sponsors are nonprofit organizations even though the station receives a portion of the contributions. *Kansas Assn of Radio B/cing*, 267.

Although the Commission may consider promises of compliance (sec. 1.91(f)), it is not precluded from taking action notwithstanding applicants promises. Neither evidentiary hearing or waiver of rules under sec. 74.1109 were requested. *Booth American Co.*, 509.

WHITE AREA

An application for a first AM station granted on the grounds that interference areas presently suffer interference, and a first local outlet and a nighttime service to a white area would be provided. The Commission previously waived sections 73.24(b)(1) and 73.37, and applied standards in 73.182(v), resulting in grant. *B & K B/cing Co.*, 902.

The objective of the clear channel report in referring to white area was nighttime service to the largest number of persons presently without service, rather than land area. *Flathead Valley B/cers*, 14.

Application for change of frequency with increased power, granted where the change would provide more complete nighttime coverage, a portion of which now has no primary service and the remainder has but one. Waiver of sec. 73.24 (b) granted, since the RSS limitation was increased. 99.4 percent coverage of

the city applied for by a 25 mv/m signal is virtually complete compliance with sec. 73.188. *Charlottesville B/cing Corp.*, 140.

Existing FM uv/m signals are not considered as constituting service where a grant is made on the basis of service to a white area. The third report (FCC 63–735, 23 R.R. 1859) does not extend protection to any specified signal strength contour. *Nelson B/cing Co.*, 224.

A larger city with two AM stations received a 307(b) preference for TV over the smaller city with no broadcast station even though the latter would serve a larger white area, since it proposed little locally oriented programming, has a relatively small population, and aural service is not a substitute for a local TV outlet. *Charles Vanda*, 655.

WITNESS

The examiner has the authority to require disclosure of exhibits and the names of witnesses in advance since he has authority to control the course and conduct of a hearing, and on that basis a petition for review of Review Board's order is granted. *Tinker, Inc.*, 372.

DIGEST BY STATUTORY AND RULE PROVISIONS

STATUTES

Communications Act of 1934, as amended

Section	*United States Code*	
4(i)	47 U.S.C. 154(i)	Temporary relief against CATV systems (secs. 74.1107, 74.1109) carrying signals of Los Angeles stations into the San Diego area was granted, and the case was designated for hearing. Jurisdiction to grant the temporary relief requested is provided in secs. 4(i) and 303 (f) and (r) of the act, and is not limited by the provision of sec. 312. *Midwest TV, Inc.*, 612.
5(d)	47 U.S.C. 155(d)	A contention of eventual nonduplication of AM programming is not sufficient in a petition for reconsideration of an order granting only a slight preference to increase the preference or to reopen the record, and no matters will be considered in review upon which the Board has had no opportunity to pass (sec. 5(d)(5)). *Community B/cing Service, Inc.*, 379.
202(b)	47 U.S.C. 202(b)	Since A.T. & T. serves as a common carrier for the CATV systems which are interstate (sec. 202(b)), they should file a tariff (sec. 203(a)). *Com. Car. Tariffs for CATV Systems*, 257.
203(a)	47 U.S.C. 203(a)	Since A.T. & T. serves as a common carrier for the CATV systems which are interstate (sec. 202(b)), they should file a tariff (sec. 203(a)). *Com. Car Tariffs for CATV Systems*, 257.
303	47 U.S.C. 303	Temporary relief against CATV systems (secs. 74.1107, 74.1109) carrying signals of Los Angeles stations into the San Diego area was granted, and the case was designated for hearing. Jurisdiction to grant the temporary relief requested is provided in secs. 4(i) and 303 (f) and (r) of the act, and is not limited by the provision of sec. 312. *Midwest TV, Inc.*, 612.
303(c)	47 U.S.C. 303(c)	The frequency 2400 kc/s (coast and ship) was made available for public ship-shore use for those employing telephony in Baltimore, Md., area for continuous hours of service by amending parts 81 and 83 of the Commission's rules *Ship-Shore Freq. for Balt., Md., Area*, 325.

Section	*United States Code*	
303(g)	47 U.S.C. 303 (g)	Permission was granted under sec. 303g, on a one-year trial basis, for change in programming format to a classified ads and public service announcements only format, subject to filing requested reports. *The McLendon Pacific Corp.*, 722.
303(r)	47 U.S.C. 303(r)	Temporary relief against CATV systems (secs. 74.1107, 74.1109) carrying signals of Los Angeles stations into the San Diego area was granted, and the case was designated for hearing. Jurisdiction to grant the temporary relief requested is provided in secs. 4(i) and 303 (f) and (r) of the act, and is not limited by the provision of sec. 312. *Midwest TV, Inc.*, 612.
307(b)	47 U.S.C. 307(b)	As a matter of policy, the applications of class IV stations requesting daytime power increases (sec. 73.28) will be exempt from provisions of the policy statement on section 307(b) considerations for standard broadcast facilities involving suburban communities, and an application for such power increase is granted. *Big Chief B/cing Co. of Tulsa, Inc.*, 148.
		A suburban issue was denied because, although applicants proposed 5 mv/m daytime contour penetrated a larger community, it would not penetrate a community of more than 50,000 population. A programing issue was held in abeyance pending action on a joint request for approval of agreement dismissing petitioners application. *James L. Hutchens*, 157.
		Application designated for hearing on the issue of adequacy of revenue and burden of proof placed on the petitioner. Petitioner held to be party in interest because of competition (sec. 309(d)(1)). Need for new station need not be shown since there are no 307(b) on technical issues. *Rice Capital B/cing Co.* 592.
		Applications for a new class 11-A facility on 1030 kc and a petition for denial and various petitions favoring and opposing these two were designated for a consolidating proceeding on issues concerning areas and populations, financial, protection to clear channel station, air hazard, and city coverage (sec. 73.188). *Harriscope, Inc.*, 600.
		A larger city with two AM stations received a 307(b) preference for TV over the smaller city with no broadcast station even though the latter would serve a larger white area, since it proposed little locally oriented programming, has a relatively small population, and aural service is not a substitute for a local TV outlet. *Charles Vanda*, 655.

Section	United States Code	
		An application for assignment and renewal of license and a new application for a construction permit for the same frequency were designated for hearing with the assignee designated as a party since the application for assignment of license preceded the construction permit application. Suburban community 307(b) issue not included since existing facilities are involved. *1400 Corp. (KBMI)*, 715.
		A reimbursement of expenses agreement was approved over the objections of the Broadcast Bureau on the grounds that the Bureau had made an insufficient showing to challenge the sworn statements submitted. *Central B/cing Corp.*, 776.
		A joint request for approval of agreement for reimbursement of expenses conditioned on withdrawal of one application and grant of another was held in abeyance for other persons to apply since one applicant would serve a larger, and different areas, and no showing was made of other available FM service to their respective areas. Publication under sec. 1.525(b)(2) required since 307(b) issue remains. *Lafayette B/cing Co., Inc.*, 778.
		Application for FM facility granted even though it violates overlap provisions of duopoly rule (sec. 73.240(a)(11), in the event it and applicant's existing station operated under maximum power (secs. 73.211 and 73.221), because feasible to comply with duopoly rule by moving antennas of stations and would enhance efficiency of proposed station (307(b)). *New South B/cing Corp.*, 809.
		In a comparative hearing for increased facilities, the applicant who would provide second and third primary services as opposed to a sixth service to urban areas by the other, was preferred (307(b)). *Palmetto B/cing System, Inc.*, 894.
		In the absence of newly discovered facts (sec. 1.229), the designated issues will not be modified. A designated suburban community issue (307(b)), where increase power and renewal of license were requested, will not be extended to include the present operation even though a portion of a nearby larger community is being served. *Atlantic B/cing Co.*, 943.
309(a)	47 U.S.C. 309(a)	Two mutually exclusive applications for a standard broadcast construction permit were denied one on the grounds that it failed to sustain its burden of proof under the site-availability issue, and the other by reason of trafficking (sec. 1.597), failure to establish adequate character qualifications, and premature assumption of control of a broadcast station (sec. 310(b). *Edina Corp.*, 36.

245-848—68——7

Section	*United States Code*	
309(b)	47 U.S.C. 309(b)	Reconsideration of UHF assignments (sec. 73.606) removing channel 19 from Stockton to Modesto, Cal., substituting channel 31 in Stockton, and modifying the co of station KLOC–TV to specify channel 19 in Modesto, was denied. No premature construction within sec. 319(a) was found where the transmitter building had not been wired nor antenna foundations laid, nor was there a violation of sec. 309(b). *UHF TV Channels*, 839.
309(c)	47 U.S.C. 309(c)	A request for sta was granted under section 309(f) since the authorization was an extension of the 60-day sta under section 309(c)(2)(g) of the act, granted on the basis of extraordinary circumstances. The extension under the latter section was limited to 60 days. *Lorac Service Corp.*, 877.
309(d)	47 U.S.C. 309(d)	Allegations by a CATV operator in the same community that applications for translator CPS were filed for the purpose of coercing petitioner to purchase or lease certain property were sufficiently serious to warrant a hearing. Sec. 1.45 waived permitting applicant to respond late, and its answer accepted even though not conforming to Sec. 309(d) (supporting affidavit). *McCulloch County Translator Co-Op*, 392.
		Application designated for hearing on the issue of adequacy of revenue and burden of proof placed on the petitioner. Petitioner held to be party in interest because of competition (Sec. 309(d)(1). Need for new station need not be shown since there are no 307(b) on technical issues. *Rice Capital B/cing Co.*, 592.
309(e)	47 U.S.C. 309(e)	Applications for assignments of licenses and transfers of control of American Broadcasting Cos., Inc., to ITT were designated for oral argument before the Commission en banc. *American B/cing Cos.*, 709.
310(b)	47 U.S.C. 310(b)	Two mutually exclusive applications for a standard broadcast construction permit were denied one on the grounds that it failed to sustain its burden of proof under the site-availability issue, and the other by reason of trafficking (Sec. 1.597), failure to establish adequate character qualifications, and premature assumption of control of a broadcast station (Sec. 310(b)). *Edina Corp.*, 36.
		A denial of request for additional time to construct followed by an order reconsidering that action (Sec. 319(b)) and granting an application to assign (Sec. 310(b)) was affirmed over objections by prospective applicant who was held not to have standing since the original CP was outstanding when prospective applicant filed his application. *Conn. Radio Foundation, Inc.*, 389.

Section	*United States Code*	
311	47 U.S.C. 311	The withdrawal of one application and dismissal of another upon the partial reimbursement of expenses requested by a joint agreement, granted (secs. 311, 1.525). *The Corinth B/cing Co., Inc.*, 278.
311(a)	47 U.S.C. 311(a)	Upon withdrawal of competing applicant, application for FM station was granted where applicant was qualified in all respects (sec. 311(a)(2). *Haddox Enterprises, Inc.*, 924.
311(c)	47 U.S.C. 311(c)	A reimbursement of expenses (sec. 311(c)) was approved over objections by the Broadcast Bureau which alleged that the withdrawing applicant was the better one. *WDIX, Inc.* 653.
		A joint agreement for reimbursement of expenses upon withdrawal of one applicant and grant of another was approved. *Heath-Reasoner B/cers*, 850.
		An appeal from an allowance of an amendment specifying competing applicants physical plant and purchase of all its assets, was granted, and in view of a finding that none of the consideration was for reimbursement of expenses (sec. 311(c)) (not allowable because of unresolved issues), the petition for amendment, dismissal, and grant was granted (sec. 1.525). *Brown Radio & Television Co.*, 852.
		An agreement to withdraw with reimbursement (sec. 311(c)(3)) which was filed after the five-day required period (sec. 1.525) was accepted. The financial issue as to the remaining applicant was examined and the application granted. *Keith L. Reising*, 868.
		A petition for reconsideration was denied, where the FM Table of Assignments was amended to specify St. Paul rather than Minneapolis for the applied for channel, and the application of the dismissing applicant was amended to the new city with no other change, it was not a new application (sec. 1.106), and reimbursement (sec. 311(C)) would be allowed. *Hennepin B/cing Assoc., Inc., 872.*
312	47 U.S.C. 312	Temporary relief against CATV systems (secs. 74.1107, 74.1109) carrying signals of Los Angeles stations into the San Diego Area was granted, and the case was designated for hearing. Jurisdiction to grant the temporary relief requested is provided in secs. 4(I) and 303 (f) and (r) of the act, and is not limited by the provision of sec. 312. *Midwest TV, Inc., 612.*
312(b)	47 U.S.C. 312(b)	A CATV system (sec. 74.1101(a)) has been ordered to cease and desist its operations pending notice to TV stations in accordance with sec. 74.1105 because distant-signals were extended beyond their grade B contours without obtaining necessary approval (sec. 74.1107). *Telesystems Corp.*, 628.

Section	United States Code	
		A CATV system serving two communities was held to be deemed a separate system for each, and was held to have been operating in violation of section 74.1107(a) of the rules as to extending the signals of various stations beyond their grade b contours without having obtained the necessary approval. A cease and desist order was issued. *Jackson TV Cable Co.*, 979.
317	47 U.S.C. 317	Sponsorship identification (sec. 317) based on public interest considerations was waived since sponsors are nonprofit organizations even though the station receives a portion of the contributions. *Kansas Assn. of Radio B/cers*, 267.
319	47 U.S.C. 319	A request for additional time to construct (sec. 319) was denied where the applicant had misinformed the Commission as to the reasons for its request by not disclosing its intention to sell even if the intent arose after the application. *Z–B B/cing Co.* 642.
319(a)	47 U.S.C. 319(a)	Reconsideration of UHF assignments (sec. 73.606) removing channel 19 from Stockton to Modesto, Cal., substituting channel 31 in Stockton, and modifying the co of station KLOC–TV to specify channel 19 in Modesto, was denied. No premature construction within sec. 319(a) was found where the transmitter building had not been wired nor antenna foundations laid, nor was there a violation of sec. 309(b). *UHF TV Channels*, 839.
319(b)	47 U.S.C. 319(b)	An extension of time was denied where after seven previous extensions and a reinstatement of the permit, the applicant sought to maintain his permit for the purpose of assigning it to others (sec. 319(b)). *Telemusic Co.*, 221.
		A denial of request for additional time to construct followed by an order reconsidering that action (sec. 319(b)) and granting an application to assign (sec. 310(b)) was affirmed over objections by prospective applicant who was held not to have standing since the original CP was outstanding when prospective applicant filed his application. *Conn. Radio Foundation, Inc.*, 389.
		SATELLITE ACT
102	47 U.S.C. 701	In order for non-common-carrier concerns to obtain satellite telecommunications services directly from the Communications Satellite Corporation. The concerns and ComSat must set forth specific information indicated by the Commission, and ComSat may be authorized to provide such services only in unique and exceptional circumstances. *Authorized Entities and Users—ComSat*, 421.

Section	*United States Code*	
201(c)	47 U.S.C. 721(c)	ComSat was required to obtain appropriate approval for furnishing any services or facilities via the six synchronous communications satellites which they were granted authority to construct (sec. 721(c)(9)). *ComSat Corp.*, 8. In order for non-common-carrier concerns to obtain satellite telecommunications services directly from the Communications Satellite Corporation. The concerns and ComSat must set forth specific information indicated by the Commission, and ComSat may be authorized to provide such services only in unique and exceptional circumstances. *Authorized Entities and Users—ComSat*, 421.
401	47 U.S.C. 741	In order for non-common-carrier concerns to obtain satellite telecommunications services directly from the Communications Satellite Corporation, the concerns and ComSat must set forth specific information indicated by the Commission, and ComSat may be authorized to provide such services only in unique and exceptional circumstances. *Authorized Entities and Users—ComSat*, 421.
405	47 U.S.C. 745	Reconsideration of UHF assignments (sec. 73.606) removing channel 19 from Stockton to Modesto, Cal., substituting channel 31 in Stockton, and modifying the co of station KLOC–TV to specify channel 19 in Modesto, was denied. No premature construction within sec. 319(a) was found where the transmitter building had not been wired nor antenna foundations laid, nor was there a violation of sec. 309(b). *UHF TV Channels*, 839.

RULES AND REGULATIONS

Federal Communications Commission

Section:	
0	Part 0 of the rules amended to delegate authority to waive filing of blanket applications in the safety and special radio services to the Chief, Safety and Special Radio Services Bureau. *Delegation of Authority*, 399.
1.3	Permission granted to substitute carriage of one educational station for another during the summer months (secs. 74.1107 and 1.3). *Buckeye Cablevision, Inc.*, 798.
1.45	Allegations by a CATV operator in the same community that applications for translator cps were filed for the purpose of coercing petitioner to purchase or lease certain property, were sufficiently serious to warrant a hearing. Sec. 1.45 waived permitting applicant to respond late, and its answer accepted even though not conforming to sec. 309(d) (supporting affidavit). *McCulloch County Translator Co-Op*, 392.

Rules and Regulations—Continued

Section:	
1.65	The bare assertion that an applicant had available funds is insufficient to deny an enlargement of issues with respect to finances. A reliance on ownership reports of acquisition of a station during pendency of a comparative hearing for a new station does not satisfy section 1.65 and an application amendment is required. *Gordon Sherman*, 337.
	A request for an issue concerning whether a competing applicant has violated section 165 of the rules pertaining to program changes denied since it should be addressed to the examiner in the first instance. *Chicagoland TV Co.*, 492.
	A petition to enlarge issues as to the basis for estimated revenues, construction and operating costs, and failure to advise (sec. 1.65) of a pending lawsuit granted. No basis had been shown for estimated revenue which was to be used for part of construction and operation. Requested issue concerning publication (sec. 1.580) denied the allegation of too much information in the notice being deminimis. *Royal B/cing Co., Inc.*, 857.
1.91(e)	Although the Commission may consider promises of compliance (sec. 1.91(e)), it is not precluded from taking action not withstanding applicants promises. Neither evidentiary hearing or waiver of rules under sec. 74.1109 were requested. *Booth American Co.*, 509.
1.106	Good cause not demonstrated for waiver of rules to permit filing petition for reconsideration and petition for waiver of sections 1.106 and 1.115 denied. North Central Video, Inc. (KWEB), FCC 66–473 distinguished. *Ottawa B/cing Corp.*, 264.
	A petition for reconsideration was denied, where the FM Table of Assignments was amended to specify St. Paul rather than Minneapolis for the applied for channel, and the application of the dismissing applicant was amended to the new city with no other change, it was not a new application (sec. 1.106), and reimbursement (sec. 311(c)) would be allowed. *Hennepin B/cing Assoc. Inc.*, 872.
	A petition for reconsideration (sec. 1.106) of the Commissions memorandum opinion and order of July 22, 1966, in docket 15011 was denied on the grounds that the evidence of record supports the conclusion that TWX earnings should be adjusted upward and that the Commissions did not prescribe rates in violation of the act. *Amer. Tel. & Tel.*, 891.
1.106(c)	A petition for reconsideration of a grant for microwave facilities to serve CATV system was (secs. 74.1107 and 74.1109) denied on the grounds of untimely filing (sec. 1.106(c). It was filed several months after the application was filed. *New York-Penn Microwave Corp.*, 786.
	A petition for reconsideration of order (8 FCC 2d 907), allowing in part reimbursement of expenses (sec. 1.525) which presented facts not previously relied on (sec. 1.106-

Section:

(c)), but which did not relate to changed circumstance, was denied. *Richard O'Connor*, 827.

1.115 Good cause not demonstrated for waiver of rules to permit filing petition for reconsideration and petition for waiver of sections 1.106 and 1.115 denied. North Central Video, Inc. (KWEB), FCO 66-478 distinguished. *Ottawa B/cing Corp.*, 264.

1.223(a) An applicant, whose application had been returned, was not entitled to intervene either as a matter of right (sec. 1.223(a)) or discretion (sec. 1.223(b)), since its requested intervention is primarily to press its private interests, but it is not precluded from making its evidence available to the broadcast bureau or participating as a nonparty (1.225). *Conn. Radio Foundation, Inc.*, 719.

1.223(b) An applicant, whose application had been returned, was not entitled to intervene either as a matter of right (sec. 1.223(a)) or discretion (sec. 1.223(b)), since it requested intervention is primarily to press its private interests, but it is not precluded from making its evidence available to the Broadcast Bureau or participating as a nonparty (1.225). *Conn. Radio Foundation, Inc.*, 719.

1.225 An applicant, whose application had been returned, was not entitled to intervene either as a matter of right (sec. 1.223(a)) or discretion (sec. 1.223(b)), since its requested intervention is primarily to pres its private interests, but it is not precluded from making its evidence available to the Broadcast Bureau or participating as a nonparty (1.225). *Conn. Radio Foundation, Inc.*, 719.

1.227(a) An amendment, proposing a directional antenna and reduced power by one applicant which eliminated the necessity for a consolidated hearing, was properly granted since section 1.571(j)(1) encourages amendments which remove potential conflicts. An applicant may amend as a matter of right (sec. 1.522) and sec. 1.227(a)(2) does not require consolidation the moment conflict appears. *Mansfield B/cing Co.*, 154.

1.229 A letter by stockholders committing them to loan funds to applicant, if needed, was sufficient even though not submited as an amendment and not until in answer to petition requesting enlargement of issues, and no specific questions concerning estimates of operating costs were submitted by petitioner as required by sec. 1.229. *Cosmopolitan Enterprises, Inc.*, 161.

Where sufficient funds are available and only a portion of anticipated revenues would be required to finance proposals, a financial issue will not be added. Petition denied for lack of specificity (sec. 1.229). *Gordon Sherman*, 344.

1.229(c) Enlargement of issues will not be granted concerning the status of the competing applicant's general manager, where the petition lacks supporting data (sec. 1.229(c)),

Rules and Regulations—Continued

Section:	
	and is founded upon assumptions, speculations and surmise. *Ocean County Radio B/cing Co.*, 335.
	An affidavit by a person having actual knowledge of the facts alleged must support a petition to enlarge issues (sec. 1.229(c)). *Cosmopolitan Enterprises, Inc.*, 637.
1.243(f)	An application for increase in power and a waiver of section 73.24(g) of the rules (blanketing) were granted where the applicant demonstrated that no blanketing or cross-modulation interference problems will occur. The examiner was held to have properly precluded improper cross-examination under sec. 1.243(f). *WHOO Radio, Inc.*, 437.
1.251(c)	A motion seeking clarification of issues to shift the burden of proof to the party having knowledge of the facts was denied. The burden of proof and burden of proceeding was to remain on the party making the charges. Generally, the hearing examiner should first consider clarification of issues at prehearing conference (sec. 1.251(c)). *Royal B/cing Co., Inc.*, 863.
1.303	A petition for review of an order denying reconsideration of an earlier order, held to have been properly filed within the rules (sec. 1.303), but was denied on the grounds that the examiner's order was not arbitrary. *WTON TV, Inc.*, 917.
1.519	Two applications for FM construction permits were accepted for filing, although one applicant was dismissed less than one year previous (sec. 73.207) for failure to construct, but it would become eligible for filing before the 30-day statutory waiting period of other applicant. Section 1.519 of the rules waived. *Central Conn. B/cing Co.*, 650.
1.522	An amendment, proposing a directional antenna and reduced power by one applicant which eliminated the necessity for a consolidated hearing, was properly granted since section 1.571(j)(1) encourages amendments which remove potential conflicts. An applicant may amend as a matter of right (sec. 1.522) and sec. 1.227(a)(2) does not require consolidation the moment conflict appears. *Mansfield B/cing Co.*, 154.
1.522(b)	An agreement for dismissal of one of two competing applicants and retention of the other in hearing status, upon payment of a portion of out-of-pocket expenses was approved along with an amendment (sec. 1.522(b)) which would permit substitution of original transmitter site (sec. 73.188(a)) by retained applicant. *Wilkesboro B/cing Co.*, 164.
	Where an amendment would improve the competitive position, delay the proceeding and good cause has not been shown (sec. 1.522(b)) a petition to amend from a shared time operation to full time, when the shared-time applicant withdrew was denied. *Flower City TV Corp.*, 384.

Section:

In granting a petition for amendment (sec. 1.522(b)) and return to the processing line, it was held that a possible suburban community issue would not prohibit the requested relief since it is possible that the issue could be resolved on the processing line. *Norristown B/cing Co., Inc.*, 987.

1.525 The withdrawal of one application and dismissal of another upon the partial reimbursement of expenses requested by a joint agreement, granted (secs. 311, 1.525). *The Corinth B/cing Co., Inc.*, 278.

The dismissal of one application and the granting of the other requested by a joint petition which provided for reimbursement expenses, granted. Waiver of 5-day provision of sec. 1.525 granted. *Hennepin B/cing Associates, Inc.*, 279.

A joint request for approval of agreement (sec. 1.525) withdrawing one application granting another, and reimbursement of expenses, was granted. *Semo B/cing Co.*, 826.

A petition for reconsideration of order (3 FCC 2d 907) allowing in part reimbursement of expenses (sec. 1.525) which presented facts not previously relied on (sec. 1.106(c)), but which did not relate to change circumstance, was denied. *Richard O'Connor*, 827.

An appeal from an allowance of an amendment specifying competing applicants physical plant and purchase of all its assets, was granted, and in view of a finding that none of the consideration was for reimbursement of expenses (sec. 311(c)) (not allowable because of unresolved issues), the petition for amendment, dismissal, and grant was granted (sec. 1.525). *Brown Radio & Televison Co.*, 852.

An agreement to withdraw with reimbursement (sec. 311 (c)(3)) which was filed after the five-day required period (sec. 1.525) was accepted. The financial issue as to the remaining applicant was examined and the application granted. *Keith L. Reising*, 868.

A joint petition for approval of agreement for the dismissal of one application and grant of another was found to be in the public interest (sec. 1.525). *City Indexx Corp.*, 876.

An agreement for reimbursement of expenses, upon condition that applicant who will receive reimbursement will either dismiss or amend to a different frequency, was granted (sec. 1.525), the amendment accepted, and amended applications returned to the processing line (secs. 1.564(b) and 1.571(i)) and other application granted. *Abacoa Radio Corp.*, 940.

1.525(b) A request for reimbursement of expenses and withdrawal of application was denied where it was indeterminable from the submitted material whether there would be any

Rules and Regulations—Continued

Section:	
	underserved areas with either applicants service contours (sec. 1.525(b)(1)), *James L. Hutchens*, 700.
	A reimbursement of expenses agreement was approved over the objections of the Broadcast Bureau on the grounds that the Bureau had made an insufficient showing to challenge the sworn statements submitted. *Central B/cing Corp.*, 776.
	A joint request for approval of agreement for reimbursement of expenses conditioned on withdrawal of one application and grant of another was held in abeyance for other persons to apply since one applicant would serve a larger, and different areas, and no showing was made of other available FM service to their respective areas. Publication under sec. 1.525(b)(2) required since 307(b) issue remains. *Lafayette B/cing Co., Inc.*, 778.
1.550(c)	Section 1.550, rules of practice and procedure, is amended by requiring only a copy of a request for a new or modified call sign assignment to be mailed rather than a separate notice to the stations in question. *Call Sign Assignments*, 401.
1.564(b)	An agreement for reimbursement of expenses, upon condition that applicant who will receive reimbursement will either dismiss or amend to a different frequency, was granted (sec. 1.525), the amendment accepted, and amended applications returned to the processing line (secs. 1.564(b) and 1.571(i)) and other application granted. *Abacoa Radio Corp.*, 940.
1.570(c)	Two mutually exclusive applications for a standard broadcast construction permit were denied one on the grounds that it failed to sustain its burden of proof under the site-availablity issue, and the other by reason of trafficking (sec. 1.597), failure to establish adequate character qualifications, and premature assumption of control of a broadcast station (sec. 310(b)). *Edina Corp.*, 36.
1.571(i)	An agreement for reimbursement of expenses, upon condition that applicant who will receive reimbursement will either dismiss or amend to a different frequency, was granted (sec. 1.525), the amendment accepted, and amended applications returned to the processing line (secs. 1.564(b) and 1.571(i)) and other application granted. *Abacoa Radio Corp.*, 940.
1.571(j)	An amendment, proposing a directional antenna and reduced power by one applicant which eliminated the necessity for a consolidated hearing, was properly granted since section 1.571(j)(1) encourages amendments which remove potential conflicts. An applicant may amend as a matter of right (sec. 1.522) and sec. 1.227(a)(2) does not require consolidation the moment conflict appears. *Mansfield B/cing Co.*, 154.

Section:

1.580 A petition to enlarge issues as to the basis for estimated revenues, construction and operating costs, and failure to advise (sec. 1.65) of a pending lawsuit granted. No basis had been shown for estimated revenue which was to be used for part of construction and operation. Requested issue concerning publication (sec. 1.580) denied the allegation of too much information in the notice being deminimis. *Royal B/cing Co., Inc.*, 857.

1.594 The application for renewal of license was denied on the grounds that applicant failed to sustain the burden of proof as to its financial qualifications, violated technical rules (secs. 73.60, 73.40(b), 73.114), failed to submit financial reports, failed to publish (sec. 1.594), and failed to have a first-class radio-telephone operator on duty at all times (sec. 73.93(a)). *The Kent-Sussex B/cing Co.*, 169.

Upon withdrawal of competing applicant, application for FM station was granted where applicant was qualified in all respects (sec. 311(a)(2)). *Haddox Enterprises, Inc.*, 924.

1.597 A transfer of control granted where lack of financing was held to constitute an exception to the hearing requirements of section 1.597 of the rules (authorization held for less than 3 years). *TeleSanJuan, Inc.*, 865.

1.597(b) Two mutually exclusive applications for a standard broadcast construction permit were denied one on the grounds that it failed to sustain its burden of proof under the site-availability issue, and the other by reason of trafficking (sec. 1.597), failure to establish adequate character qualifications, and premature assumption of control of a broadcast station (sec. 310(b)). *Edina Corp.*, 36.

1.611 The licensee was ordered to forfeit $150 for willful and repeated failures to comply with section 1.611, financial reports, and failure to reply to notice (sec. 1.621(b)). *William Blizzard, Jr.*, 268.

The licensee was ordered to forfeit $150 for willful and repeated failures to comply with section 1.611, financial reports, and failure to reply to notice (sec. 1.621(b)). *Montana B/cing Co.*, 270.

The licensee was ordered to forfeit $150 for willful and repeated failures to comply with section 1.611, financial reports, and failure to reply to notice (sec. 1.621(b)). *Radio 940*, 272.

Licensee was fined $150 for willful and repeated failure to file annual financial reports (sec. 1.611). *Powell County B/cing Co.*, 866.

1.621(b) The licensee was ordered to forfeit $150 for willful and repeated failures to comply with section 1.611, financial reports, and failure to reply to notice (sec. 1.621(b)). *William Blizzard, Jr.*, 268.

Rules and Regulations—Continued

Section:	
	The licensee was ordered to forfeit $150 for willful and repeated failures to comply with section 1.611, financial reports, and failure to reply to notice (sec. 1.621(b)). *Montana B/cing Co.*, 270.
	The licensee was ordered to forfeit $150 for willful and repeated failures to comply with section 1.611, financial reports, and failure to reply to notice (sec. 1.621(b)). *Radio 940*, 272.
1.229	In the absence of newly discovered facts (sec. 1.229), the designated issues will not be modified. A designated suburban community issue (37(b)), where increase power and renewal of license were requested, will not be extended to include the present operation even though a portion of a nearby larger community is being served. *Atlantic B/cing Co.*, 943.
17.38(c)	A forfeiture of $1,000 was ordered for willful and repeated violation of sections 73.47(b), 73.57(a), 17.38(c), and repeated failure to observe the provisions of sections 73.39(d)(4) and 17.38(d) of the rules. *High Fidelity Stations, Inc.*, 829.
17.38(d)	A forfeiture of $1,000 was ordered for willful and repeated violation of sections 73.47(b), 73.57(a), 17.38(c), and repeated failure to observe the provisions of sections 73.39(d)(4) and 17.38(d) of the rules. *High Fidelity Stations, Inc.*, 829.
21	Part 21 of the rules amended to conform with action taken in docket Nos. 14712 and 14729 (27 F.R. 12372 and 28 F.R. 7476). *Dom. Pub. Radio Ser. Frequencies*, 539.
25.156	Subpart B of part 25 of the rules was amended specifying that parties making procurement in the space segment of a ComSat system shall not include foreign persons or Companies. *Comm. Sat. Procurement Reg.*, 251.
73.24(b)	Application for change of frequency with increased power, granted where the change would provide more complete night-time coverage, a portion of which now has no primary service and the remainder has but one. Waiver of sec. 73.24(b) granted, since the RSS limitation was increased. 99.4 percent coverage of the city applied for by a 25 mv/m signal is virtually complete compliance with sec. 73.188. *Charlottesville B/cing Corp.*, 140.
	Petition to dismiss application for authority to change antenna to increase radiation in null area filed during AM freeze denied because applicant entitled to comparative hearing. Designated issues concerned service area and population, transmitter site, mou. Interference (sec. 73.28(d)), and local transmission service (secs. 73.30, 73.188(b), 73.31, 73.24(b). *Woodward B/cing Co.*, 45.7.
	An application for a first AM station granted on the grounds that interference areas presently suffer interference, and a first local outlet and a nighttime service to a white

Section:

area would be provided. The Commission previously waived sections 73.24(b)(1) and 73.37, and applied standards in 73.182(v), resulting in grant. *B & K B/cing Co.*, 902.

73.24(g) An application for increase in power and a waiver of section 73.24(g) of the rules (blanketing) were granted where the applicant demonstrated that no blanketing or cross-modulation interference problems will occur. The examiner was held to have properly precluded improper cross-examination under sec. 1.243(f). *WHOO Radio, Inc.*, 437.

73.28 As a matter of policy, the applications of class IV stations requesting daytime power increases (sec. 73.28), will be exempt from provisions of the policy statement on section 307(b) considerations for standard broadcast facilities involving suburban communities, and an application for such power increase is granted. *Big Chief B/cing Co. of Tulsa, Inc.*, 148.

73.28(d) Petition to dismiss application for authority to change antenna to increase radiation in null area filed during AM freeze denied because applicant entitled to comparative hearing. Designated issues concerned service area and population, transmitter site, mou. interference (sec. 73.28(d)) and local transmission service (secs. 73.30, 73.188(b)), 73.31, 73.24(b). *Woodward B/cing Co.*, 457.

73.30 Petition to dismiss application for authority to change antenna to increase radiation in null area filed during AM freeze denied because applicant entitled to comparative hearing. Designated issues concerned service area and population, transmitter site, mou. interference (sec. 73.28(d)) and local transmission service (secs. 73.30, 73.188(b)), 73.31, 73.24(b). *Woodward B/cing Co.*, 457.

73.30(b) A first local transmission service application was granted and the dual city identification requirements of section 73.30(b) was waived, where the cities were relatively small and were shown to have an identity of interests for programming, even though there was no showing that an unreasonable burden would be placed on the station if it were licensed to serve only one city. *Saul M. Miller et al.*, 150.

73.31 Petition to dismiss application for authority to change antenna to increase radiation in null area filed during AM freeze denied because applicant entitled to comparative hearing. Designated issues concerned service area and population, transmitter site, mou. interference (sec. 73.28(d)) and local transmission service (secs. 73.30, 73.188(b)), 73.31, 73.24(b). *Woodward B/cing Co.*, 457.

73.35 A request for a multiple ownership (73.35), issue against one applicant, which would exceed the limit of stations if granted, was denied where the grant would be conditioned on disposal of a station, and requested issue concerning a network applicant for extension of coverage,

Rules and Regulations—Continued

Section:	
	was denied since extension of service would not alter the diversification of ownership policy. *KWHK B/cing Co., Inc.*, 365.
	Petition for rehearing requesting dismissal of application for improved facilities, denied, where applicant proposed to dispose of its station which would be in violation of overlap rule (sec. 73.35). *KWHK B/cing Co., Inc.*, 598.
	Section 73.35 of the rules was waived to permit a licensee of an AM station to serve as a member of the board of regents of a college which holds a license of a station serving the same area. *Charles Smithgall*, 838.
73.37	Proposed measurements must be justified before an overlap issue will be added (sec. 73.37), and a petition alleging the ground conductivity is higher than shown on figure M–3 of the rules is denied since reliable measurements were not submitted. *Cosmopolitan Enterprises Inc.*, 265.
73.37(a)	An application for a first AM station granted on the grounds that interference areas presently suffer interference, and a first local outlet and a nighttime service to a white area would be provided. The Commission previously waived sections 73.24(b)(1) and 73.37, and applied standards in 73.182(v), resulting in grant. *B & K B/cing Co.*, 902.
73.39(d)	A forfeiture of $1,000 was ordered for willful and repeated violation of sections 73.47(b), 73.57(a), 17.38(c), and repeated failure to observe the provisions of sections 73.39(d)(4) and 17.38(d) of the rules. *High Fidelity Stations, Inc.*, 829.
73.40	A renewal of license was granted replacing the 1962 short-term renewal; however, the licensee was required to forfeit $7,500 for violations concerning primarily power output (sec. 73.40), operating logs (sec. 73.93 and 73.57), log entries (sec. 73.111). *United B/cing Co., Inc.*, 293.
73.40(b)	The application for renewal of license was denied on the grounds that applicant failed to sustain the burden of proof as to its financial qualifications, violated technical rules (secs. 73.60, 73.40(b), 73.114), failed to submit financial reports, failed to publish (sec. 1.594), and failed to have a first-class radio-telephone operator on duty at all times (sec. 73.93(a)). *The Kent-Sussex B/cing Co.*, 169.
73.47(b)	A forfeiture of $1,000 was ordered for willful and repeated violation of sections 73.47(b), 73.57(a), 17.38(c), and repeated failure to observe the provisions of sections 73.39(d)(4) and 17.38(d) of the rules. *High Fidelity Stations, Inc.*, 829.
73.56(a)	A forfeiture in the amount of $500 was imposed for improper use of power (sec. 73.57), use of a defective monitor, (73.56(a) and failure to provide a first-class operator (73.93(b)), *Green Mountain Radio, Inc.*, 276.

Section:

73.57 A forfeiture in the amount of $500 was imposed for improper use of power, (sec. 73.57) use of a defective monitor (73.56(a)), and failure to provide a first-class operator (73.93(b)), *Green Mountain Radio, Inc.*, 276.

A renewal of license was granted replacing the 1962 short-term renewal; however, the licensee was required to forfeit $7,500 for violations concerning primarily power output (sec. 73.40), operating logs (sec. 73.93 and 73.57), log entries (sec. 73.111). *United B/cing Co., Inc.*, 293.

73.57(a) A forfeiture of $1,000 was ordered for willful and repeated violation of sections 73.47(b), 73.57(a), 17.38(c), and repeated failure to observe the provisions of sections 73.39(d)(4) and 17.38(d) of the rules. *High Fidelity Stations, Inc.*, 829.

73.59 A forfeiture in the amount of $1,000 was imposed for improper use of frequency (sec. 73.59) and failure to provide a first-class operator (sec. 73.93(c)). *William and Katherine Mende*, 274.

73.60 The application for renewal of license was denied on the grounds that applicant failed to sustain the burden of proof as to its financial qualifications, violated technical rules (secs. 73.60, 73.40(b), 73.114), failed to submit financial reports, failed to publish (sec 1.594), and failed to have a first-class radio-telephone operator on duty at all times (sec. 73.93(A)). *The Kent-Sussex B/cing Co.*, 169.

73.78 The parties were given a 10-day period in which to consent to an agreement after dismissal of assignment of broadcast hours application for share-time stations (sec. 73.78), since a hearing on the disagreement of the share-time licensees could result in a nullity. *WHAZ*, 186.

73.93 A renewal of license was granted replacing the 1962 short-term renewal; however, the licensee was required to forfeit $7,500 for violations concerning primarily power output (sec. 73.40), operating logs (sec. 73.93 and 73.57), log entries (sec. 73.111). *United B/cing Co., Inc.*, 293.

73.93(a) The application for renewal of license was denied on the grounds that applicant failed to sustain the burden of proof as to its financial qualifications, violated technical rules (secs. 73.60, 73.40(b), 73.114), failed to submit financial reports, failed to publish (sec. 1.594), and failed to have a first-class radio-telephone operator on duty at all times (sec. 73.93(a)). *The Kent-Sussex B/cing Co.*, 169.

73.93(b) A forfeiture in the amount of $500 was imposed for improper use of power (sec. 73.57), use of a defective monitor (73.56(a)), and failure to provide a first-class operator (73.93(b)). *Green Mountain Radio, Inc.*, 276.

73.93(c) A forefiture in the amount of $1,000 was imposed for improper use of frequency (sec. 73.59) and failure to pro-

Rules and Regulations—Continued

Section:	
	vide a first-class operator (sec. 73.93(c)). ***William and Katherine Mende.***, 274.
73.111	A renewal of license was granted replacing the 1962 short-term renewal; however, the licensee was required to forfeit $7,500 for violations concerning primarily power output (sec. 73.40), operating logs (sec. 73.93 and 73.57), log entries (sec. 73.111). ***United B/cing Co., Inc.***, 293.
	Upon remand for further hearing on issues involving violations of secs. 73.111 and 73.112, an application for a construction permit was denied because of prior conduct in the falsification of logs after competing applicant, receiving grant in initial decision, withdrew his application. ***The Prattville B/cing Co.***, 555.
73.112	Upon remand for further hearing on issues involving violations of secs. 73.111 and 73.112, an application for a construction permit was denied because of prior conduct in the falsification of logs after competing applicant, receiving grant in initial decision, withdrew his application. ***The Prattville B/cing Co.***, 555.
73.114	The application for renewal of license was denied on the grounds that applicant failed to sustain the burden of proof as to its financial qualifications, violated technical rules (secs. 73.60, 73.40(b), 73.114), faild to submit financial reports, failed to publish (sec. 1.594), and failed to have a first-class radio-telephone operator on duty at all times (sec. 73.93(a)). ***The Kent-Sussex B/cing Co.***, 169.
	The licensee was relieved of liability for log maintenance violations (sec. 73.114) when it was shown that the required information was being logged in a combined transmitter and maintenance log. ***Arcadia-Punta Gorda B/cing. Co. Inc.***, 834.
73.150	A petition for modification of notice of proposed rulemaking for suspension of consideration of pending applications for class II–A stations pending proceeding in docket No. 16222 (sec. 73.150), denied, since the proposed notice provides that only applications filed on or after the effective date of the amended rule would be affected. ***Nebr. Rural Radio Assn.***, 262.
73.182(v)	An application for a first AM station granted on the grounds that interference areas presently suffer interference, and a first local outlet and a nighttime service to a white area would be provided. The Commission previously waived sections 73.24(b)(1) and 73.37, and applied standards in 73.182(v), resulting in grant. ***B & K B/cing Co.***, 902.
73.188	Application for change of frequency with increased power, granted where the change would provide more complete nighttime coverage, a portion of which now has no primary service and the remainder has but one. Waiver of

Section:	
	sec. 73.24(b) granted, since the RSS limitation was increased, 99.4 percent coverage of the city applied for by a 25 mv/m signal is virtually complete compliance with sec. 73.188. *Charlottesville B/cing Corp.*, 140.
	Applications for a new class 11–A facility on 1030 KC and a petition for denial and various petitions favoring and opposing these two were designated for a consolidating proceedings on issues concerning areas and populations, financial, protection to clear channel station, air hazard, and city coverage (sec. 73.188). *Harriscope, Inc.*, 600.
73.188(a)	An agreement for dismissal of one of two competing applicants and retention of the other in hearing status, upon payment of a portion of out-of-pocket expenses was approved along with an amendment (sec. 1.522(b)), which would permit substitution of original transmitter site (sec. 73.188(a)) by retained applicant. *Wilkesboro B/cing Co.*, 164.
73.188(b)	Petition to dismiss application for authority to change antenna to increase radiation in null area filed during AM freeze denied because applicant entitled to comparative hearing. Designated issues concerned service area and population, transmitter site, mou. interference (sec. 73.28(d)), and local transmission service (secs. 73.30, 73.188(b), 73.31, 73.24(b)). *Woodward B/cing Co.*, 457.
73-202	An assignment of channel 270 to Gulfport, La., and its deletion from New Orleans was denied as not being in the public interest. *FM Table of Assignments*, 6.
	The deletion of a channel and its assignment to a nearby smaller city was denied on the grounds that petitioner could apply for the requested channel under the 25-mile rule. *FM Table of Assignments*, 357.
	A second FM assignment (sec. 73.202) was denied to Mount Carmel, Ill. (8594), on the grounds that the proposed assignment could preclude a future needed assignment in a nearby community which has no radio station. *FM Table of Assignments*, 402.
	A petition for reconsideration concerning an FM assignment (sec. 73.202) in Texas was granted but, two others for FM Assignments in Rhode Island and Massachusetts were denied. *FM Table of Assignments*, 521.
	The Table of Assignments, section 73.202 of the Commissions's rules, was amended to include numerous small town assignments. *FM Table of Assignments*, 528.
	A petition to reconsider and stay the order deleting channel 270 from Chicago and assigning it to Skokie, Ill., was denied (sec. 73.202). *FM Allocations*, 707.
	A second FM channel was assigned to Glen Falls, New York (sec. 73.202). *FM Table of Assignments*, 799.
73.203(b)	The deletion of a channel and its assignment to a nearby smaller city was denied on the grounds that petitioner

245-843—68——8

Rules and Regulations—Continued

Section:	
	could apply for the requested channel under the 25-mile rule. *FM Table of Assignments*, 357.
73.207	Two applications for FM construction permits were accepted for filing, although one applicant was dismissed less than one year previous (sec. 73.207) for failure to construct, but it would become eligible for filing before the 30-day statutory waiting period of other applicant. Section 1.519 of the rules waived. *Central Conn. B/cing Co.*, 650.
	A petition requesting assignment was denied on the grounds that spacing requirements will not be waived in the absence of extraordinary circumstances (sec. 73.207) and an intervening mountain is not one. *FM Table of Assignments*, 887.
73.211	Application for FM facility granted even though it violates overlap provisions of duopoly rule (sec. 73.240(a)-(11)) in the event it and applicant's existing station operated under maximum power (secs. 73.211 and 73.221), because feasible to comply with duopoly rule by moving antennas of stations and would enhance efficiency of proposed station (307(b)). *New South B/cing Corp.*, 809.
73.221	Application for FM facility granted even though it violates overlap provisions of duopoly rule (sec. 73.240(a)-(11)) in the event it and applicant's existing station operated under maximum power (secs. 73.211 and 73.221), because feasible to comply with duopoly rule by moving antennas of stations and would enhance efficiency of proposed station (307(b)). *New South B/cing Corp.*, 809.
73.240(a)	Application for FM facility granted even though it violates overlap provisions of duopoly rule (sec. 73.240(a)-(11)) in the event it and applicant's existing station operated under maximum power (secs. 73.211 and 73.-221), because feasible to comply with duopoly rule by moving antennas of stations and would enhance efficiency of proposed station (307(b)). *New South B/cing Corp.*, 809.
73.265(b)	A forfeiture of $500 for violation of sections 73.265(b) (operation without a properly licensed operator), 73.284 (failure to keep a maintenance log), and 73.275(a)(1) (unauthorized use of transmitter), was ordered. *FM B/cing, Inc.*, 507.
73.275(a)	A forfeiture of $500 for violation of sections 73.265(b) (operation without a properly licensed operator), 73.284 (failure to keep a maintenance log), and 73.275(a)(1) (unauthorized use of transmitter), was ordered. *FM B/cing, Inc.*, 507.
73.284	A forfeiture of $500 for violation of sections 73.265(b) (operation without a properly licensed operator), 73.284 (failure to keep a maintenance log), and 73.275(a)(1) (unauthorized use of transmitter), was ordered. *FM B/cing, Inc.*, 507.

Section:

73.606 An outstanding license was modified by the specification of channel 23 in lieu of channel 49 over objections of a party which did not indicate it would apply if the change were not made. *TV Table of Assignments*, 533.

Reconsideration of UHF assignments (sec. 73.606) removing channel 19 from Stockton to Modesto, Cal., substituting channel 31 in Stockton, and modifying the co of station KLOC–TV to specify channel 19 in Modesto, was denied. No premature construction within sec. 319(a) was found where the transmitter building had not been wired nor antenna foundations laid, nor was there a violation of sec. 309(b). *UHF TV Channels*, 839.

VHF channel 7 assigned (73.606) for the purpose of allowing a translator station to increase power (74.702(g)), over the objections of an existing VHF licensee at Dickinson, neither economic injury nor mileage separation (73.611(a)(4)) violations having been shown. *TV Table of Assignments*, 885.

A petition to reserve a VHF channel for educational use in a city to which was assigned 3 VHF and one UHF channels, was denied, where the UHF channel is presently reserved for educational use. *TV Table of Assignments*, 889.

73.606(b) The Commission proposed on its own motion to substitute three commercial UHF channels at Topeka, Kans., for the two presently assigned because the area has sufficient size and need for them. The parties were given leave to amend their applications to conform to the ruling. *TV Table of Assignments*, 536.

Channel 16 was assigned to Somerset, Ky. (sec. 73.606(b)). *TV Table of Assignments*, 801.

Channel 59 was assigned to Waynesville, N.C. (sec. 73.606(b)). *TV Table of Assignments*, 803.

A request to assign channel 16 to Martinsville was denied because of separation requirements, and the proceeding was terminated since petitioner indicated no interest in applying for channel 65 which could be assigned to Martinsville (sec. 73.606(b)). *TV Table of Assignments*, 805.

There being but one TV assignment for Bend, Oreg., and that reserved for noncommercial educational use, a UHF channel was assigned since petitioner proposed to construct. *TV Table of Assignments*, 927.

73.610 An application to reduce power, increase antenna height, and change transmitter site to a point which would reduce the mileage separation to six miles less than required, was designated for hearing on issues concerning whether another site could be found, programming, areas to be served, and whether a waiver of section 73.610(a) would be warranted. *Black Hawk B/cing Co.*, 282.

Rules and Regulations—Continued

Section:	
73.611(a)	VHF channel 7 assigned (73.606) for the purpose of allowing a translator station to increase power (74.702(g)) over the objections of an existing VHF licensee at Dickinson, neither economic injury nor mileage separation (73.611(a)(4)) violations having been shown. *TV Table of Assignments*, 885.
73.613	Where there is substantial competition in each business activity and where petitioner fails to show preferential treatment by the broadcast facilities to its other interests an economic dominance issue will not be added, and competing applications designated for hearing on financial and studio location (sec. 73.613) issues. *Kentucky Central TV, Inc.*, 227.
73.636	The extent of overlap is determined by using the prediction method (section 73.684) to determine contours, and the present disadvantage of overlap is outweighed by the gains of applicant's proposal in which the two stations licensed to applicant were in fact satellite stations. *Eugene TV, Inc.*, 232.
73.636(a)	Assignment of license for conversion to a satellite station, granted on th grounds that despite overlap of the grade B contours (sec. 73.636), both stations had been operating at a loss and as a satellite station would not compete with local station. The restrictions on a satellite apply only where the community appears able to support a full-scale operation. *Voice of the Caverns, Inc.*, 946.
73.655	Licensee of television station ordered to forfeit $1,000 for violations of rebroadcast provisions of the rules (sec. 73.655 and 325(a)), and for failure to properly maintain its station logs (sections 73.670, 73.669). *George G. T. Hernreich*, 913.
73.669	Licensee of television station ordered to forfeit $1,000 for violations of rebroadcast provisions of the rules (sec. 73.655 and 325(a)), and fr failure to properly maintain its station logs (sections 73.670, 73.669). *George G. T. Hernreich*, 913.
73.670	Licensee of television station ordered to forfeit $1,000 for violations of rebroadcast provisions of the rules (sec. 73.655 and 325(a)), and for failure to properly maintain its station logs (sections 73.670, 73.669). *George G. T. Hernreich*, 913.
73.684	The extent of overlap is determined by using the prediction method (section 73.684) to determine contours, and the present disadvantage of overlap is outweighed by the gains of applicant's proposal in which the two stations licensed to applicant were in fact satellite stations. *Eugene TV, Inc.*, 232.
74.702(g)	VHF channel 7 assigned (73.606) for the purpose of allowing a translator station to increase power (74.702(g)) over the objections of an existing VHF licensee at Dickin-

Section:

son, neither economic injury nor mileage separation (73.611(a)(4)) violations having been shown. *TV Table of Assignments*, 885.

74.1101(a) A cease-and-desist order was issued for the violation of section 74.1107 of its rules concerning extension of service beyond the grade B contours of certain stations by a CATV system (sec. 74.1101(a)). *Booth American Co.*, 509.

A CATV system (sec. 74.1101(a)) has been ordered to cease and desist its operations pending notice to TV stations in accordance with sec. 74.1105 because distant signals were extended beyond their grade B contours without obtaining necessary approval (sec. 74.1107). *Telesystems Corp.*, 628.

A CATV system serving two communities was held to be deemed a separate system for each, and was held to have been operating in violation of section 74.1107(a) of the rules as to extending the signals of various stations beyond their grade B contours without having obtained the necessary approval. A cease-and-desist order was issued. *Jackson TV Cable Co.*, 979.

74.1105 A CATV system (sec. 74.1101(a)) has been ordered to cease and desist its operations pending notice to TV stations in accordance with sec. 74.1105 because distant signals were extended beyond their grade B contours without obtaining necessary approval (sec. 74.1107). *Telesystems Corp.*, 628.

The carriage and program exclusivity rules with regard to CATV systems are adequate protection to a licensee of an existing TV station, so his petition to deny an application for microwave service to CATV systems was denied. *Valley Cable TV Corp.*, 685.

A CATV operator who allegedly commenced operations subsequent to February 12, 1966, without having obtained approval, was ordered to show cause why it should not cease and desist (secs. 74.1105 and 74.1107). *Back Mountain Telecable, Inc.*, 988.

74.1107 A CATV system, which began to carry the signals of stations beyond their grade B contours subsequent to February 15, 1966, was directed to show cause why it should not cease and desist from further operation in violation of section 74.1107. *Jackson TV Cable Co.*, 246.

A CATV system (sec. 74.1107) which began operations prior to 2/15/65 located within grade B service contours but served unincorporated areas extending slightly beyond the contours of several stations, held not to be inviolation of section 74.1107(a), but was ordered to cease and desist from supplying the signal of a station whose grade B contour did not reach the CATV system. *Mission Cable TV, Inc.*, 236.

Rules and Regulations—Continued

Section:

The evidentiary hearing requirements were waived (sec. 74.1107), because the total market to be served represents an insignificant percentage of the service of stations whose grade A and B contours encompass the area of the proposed CATV. *Martin County Cable Co., Inc.*, 348.

Since there is presently substantial CATV penetration in the area, the evidentiary hearing requirement are waived (sec. 74.1107). *Chenor Communications, Inc.*, 354.

Where substantially similar contentions were made concerning validity of rules concerning CATV (sec. 74.1107) in another case, a petition for reconsideration of a show-cause order was denied. *Jackson TV Cable Co.*, 396.

A cease-and-desist order was issued for the violation of section 74.1107 of its rules concerning extension of service beyond the grade B contours of certain stations by a CATV system (sec. 74.1101(a)). *Booth American Co.*, 509.

Temporary relief against CATV systems (secs. 74.1107, 74.1109) carrying signals of Los Angeles stations into the San Diego area was granted, and the case was designated for hearing. Jurisdiction to grant the temporary relief requested is provided in secs. 4(i) and 303 (f) and (r) of the act, and is not limited by the provision of sec. 312. *Midwest TV, Inc.*, 612.

A CATV system (sec. 74.1101(a)) has been ordered to cease and desist its operations pending notice to TV stations in accordance with sec. 74.1105 because distant signals were extended beyond their grade B contuors without obtaining necessary approval (sec. 74.1107). *Telesystems Corp.*, 628.

A modification of a show-cause order (sec. 74.1107) was granted so that the company may include its other operation in order to avoid a second proceeding against the latter operation. *Jackson TV Cable Co.*, 635.

The carriage and program exclusivity rules with regard to CATV systems are adequate protection to a licensee of an existing TV station, so his petition to deny an application for microwave service to CATV systems was denied. *Valley Cable TV Corp.*, 685.

A petition for reconsideration of a grant for microwave facilities to serve CATV system was (secs. 74.1107 and 74.1109) denied on the grounds of untimely filing (sec. 1.106(c)). It was filed several months after the application was filed. *New York-Penn Microwave Corp.*, 786.

Permission granted to substitute carriage of one educational station for another during the summer months (secs. 74.1107 and 1.3). *Buckeye Cablevision, Inc.*, 798.

A CATV system serving two communities was held to be deemed a separate system for each, and was held to have been operating in violation of section 74.1107(a) of the rules as to extending the signals of various stations be-

Section:

yond their grade B contours without having obtained the necessary approval. A cease-and-desist order was issued. *Jackson TV Cable Co.*, 979.

A CATV operator who allegedly commenced operations subsequent to February 12, 1966, without having obtained approval, was ordered to show cause why it should not cease and desist (secs. 74.1105 and 74.1107). *Back Mountain Telecable, Inc.*, 988.

74.1107(a) The evidentiary hearing requirement for CATV was waived (sec. 74.1107) where the small city (8,880) was served by one shared-time station with a grade A signal and with three grade B signals, none of which were ABC affiliates nor UHF grade B signals. *Coldwater Cablevision, Inc.*, 351.

A waiver of the evidentiary hearing requirement in section 74.1107(a) was granted where the communities to be served were small and a nearby city already had a CATV system. *United Transmission, Inc.*, 791.

A CATV system serving two communities was held to be deemed a separate system for each, and was held to have been operating in violation of section 74.1107(a) of the rules as to extending the signals of various stations beyond their grade B contours without having obtained the necessary approval. A cease-and-desist order was issued. *Jackson TV Cable Co.*, 979.

74.1109 Although the commission may consider promises of compliance (sec. 1.91(e)), it is not precluded from taking action not withstanding applicants promises. Neither evidentiary hearing or waiver of rules under sec. 74.1109 were requested. *Booth American Co.*, 509.

Temporary relief against CATV systems (secs. 74.1107, 74.1109) carrying signals of Los Angeles stations into the San Diego area was granted, and the case was designated for hearing. Jurisdiction to grant the temporary relief requested is provided in secs. 4(i) and 303 (f) and (r) of the act, and is not limited by the provision of sec. 312. *Midwest TV, Inc.*, 612.

A petition for reconsideration of a grant for microwave facilities to serve CATV system was (secs. 74.1107 and 74.1109) denied on the grounds of untimely filing (sec. 1.106(c). It was filed several months after the application was filed. *New York-Penn Microwave Corp.*, 786.

76.635 A request for a condition that grantee of pending UHF application be permitted to use antenna towers of applicants for relocation of antenna sites in the instant proceeding, under sec. 73.635, denied, since there is no allegation that tall tower applicants will not comply. *WTCN TV, Inc.*, 773.

81 The frequency 2400 kc/s (coast and ship) was made available for public ship-shore use for those employing tele-

Rules and Regulations—Continued

Section:	
	phony in Baltimore, Md., area for continuous hours of service by amending parts 81 and 83 of the Commission's rules. *Ship-Shore Freq. for Balt., Md., Area*, 325.
83	The frequency 2400 kc/s (coast and ship) was made available for public ship-shore use for those employing telephony in Baltimore, Md., area for continuous hours of service by amending parts 81 and 83 of the Commission's rules. *Ship-Shore Freq. for Balt., Md., area*, 325.
	Parts 83 and 85 of the Commission rules were amended to permit ship station licensees to substitute type accepted radiotelephone transmitters for radar units without the need for modification of ship station license. *Changes in Shop Station Equipment*, 404.
83.106	To preserve the ITU principles of a compatible system, section 83.106 was not amended to allow radiotelephone stations to operate on more than one public correspondence channel without having a 156.3 and 156.8 mc/s capability. *Ship Radiotelephone Stations*, 359.
83.106(b)	Part 83 of the rules was amended to permit use of low-power transmissions without compling with the multichannel requirement by marine utility stations. *Marine Utility Station Frequencies*, 327.
85	Parts 83 and 85 of the Commission rules were amended to permit ship station licensees to substitute type accepted radiotelephone transmitters for radar units without the need for modification of ship station license. *Changes in Shop Station Equipment*, 404.
87.251	Two applications for aeronautical advisory stations (sec. 87.251) to serve the Key West International Airport were designated for hearing. *Key West Aero*, 783.
87.403(b)	Section 87.403(b)(1) of the rules was waived to permit licensee to maintain a listening watch on 122.6 mc/s. *City of Fort Lauderdale, Fla.*, 785.
87.467	Parts 87, 89, and 93 of the rules were amended to broaden the policy regarding sharing of private microwave facilities, unrestricted sharing will be permitted on frequencies above 10,000 mc/s, cross-service sharing below 10,000 mc/s will be limited in order to observe developments of cooperative systems on a cross-service basis. *Co-Op Sharing of Oper Fixed Stations*, 406.
89.13	Secs. 89.13, 91.6 and 93.4 are modified only for the purpose of deleting therefrom provisions concerning sharing of fixed radio stations. Annual statements not required for sharing by governmental agencies nor for free-of-charge services, but are required for governmental and nongovernmental sharing. *Co-Op Sharing of Oper Fixed Stations*, 406.

Section:

89.14 Parts 87, 89, and 93 of the rules were amended to broaden the policy regarding sharing of private microwave facilities, unrestricted sharing will be permitted on frequencies above 10,000 mc/s, cross-service sharing below 10,000 mc/s will be limited in order to observe developments of cooperative systems on a cross-service basis. *Co-Op Sharing of Oper Fixed Stations*, 406.

91 An interim basic petroleum and gas industry communications plan was approved. *Petroleum Industry Communications*, 703.

91.6 Secs. 89.13, 91.6 and 93.4 are modified only for the purpose of deleting therefrom provisions concerning sharing of fixed radio stations. Annual statements not required for sharing by governmental agencies nor for free-of-charge services, but are required for governmental and nongovernmental sharing. *Co-Op Sharing of Oper Fixed Stations*, 406.

91.7 Parts 87, 89, and 93 of the rules were amended to broaden the policy regarding sharing of private microwave facilities, unrestricted sharing will be permitted on frequencies above 10,000 mc/s, cross-service sharing below 10,000 mc/s will be limited in order to observe developments of cooperative systems on a cross-service basis, *Co-Op Sharing of Oper Fixed Stations*, 406.

91.351 The rules of the Commission (sec. 91.351) were amended governing eligibility in the forest products radio service to include log haulers and persons who have dual eligibility in the forest products and manufacturers radio service. *Forest Products Radio Service*, 807.

91.504(a) A petition to amend sec. 91.504(a) to make the frequency 43.04 mc/s available for general use in limited areas was denied because it is an itinerant frequency, and although it is not crowded at present, some licensees may move into the area where petitioner operates. *Use of 43.04 mc/s Sp. Ind. Radio Ser*, 705.

91.561 The carriage and program exclusivity rules with regard to CATV systems are adequate protection to a licensee of an existing TV station, so his petition to deny an application for microwave service to CATV systems was denied. *Valley Cable TV Corp.*, 685.

93.4 Secs. 89.13, 91.6 and 93.4 are modified only for the purpose of deleting therefrom provisions concerning sharing of fixed radio stations. Annual statements not required for sharing by governmental agencies nor for free-of-charge services, but are required for governmental and nongovernmental sharing. *Co-Op Sharing of Oper Fixed Stations*, 406.

Rules and Regulations—Continued

Section:	
95.41	Revocation of License was ordered for repeated violations of sections 95.41, 95.83, 95.91, 95.95, and 95.115 of the rules and a false statement of fact made in response to a communication from the Commission. *John W. Collins, Jr.*, 879.
95.45	A citizens radio service license was revoked for operating beyond permissible frequency tolerance (sec. 95.45), failure to identify by call sign (sec. 95.95(c)), and operation as a hobby (sec. 95.83(a)(1)). *E. B. Christopher*, 689.
95.83	Revocation of license was ordered for repeated violations of sections 95.41, 95.83, 95.91, 95.95, and 95.115 of the rules and a false statement of fact made in response to a communication from the Commission. *John W. Collins, Jr.*, 879.
95.83(a)	A citizens radio service license was revoked for operating beyond permissible frequency tolerance (sec. 95.45), failure to identify by call sign (sec. 95.95(c)), and operation as a hobby (sec. 95.83(a)(1)). *E. B. Christopher*, 689.
95.83(b)	Revocation of license was ordered for repeated violations of sections 95.41, 95.83, 95.91, 95.95, and 95.115 of the rules and a false statement of fact made in response to a communication from the Commission. *John W. Collins, Jr.*, 879.
95.91	Revocation of license was ordered for repeated violations of sections 95.41, 95.83, 95.91, 95.95, and 95.115 of the rules and a false statement of fact made in response to a communication from the Commission. *John W. Collins, Jr.*, 879.
95.95	Revocation of license was ordered for repeated violations of sections 95.41, 95.83, 95.91, 95.95, and 95.115 of the rules and a false statement of fact made in response to a communication from the Commission. *John W. Collins, Jr.*, 879.
95.95(c)	A citizens radio service license was revoked for operating beyond permissible frequency tolerance (sec. 95.45), failure to identify by call sign (sec. 95.95(c)), and operation as a hobby (sec. 95.83(a)(1)). *E. B. Christopher*, 689.
95.115	Revocation of license was ordered for repeated violations of sections 95.41, 95.83, 95.91, 95.95, and 95.115 of the rules and a false statement of fact made in response to a communication from the Commission. *John W. Collins, Jr.*, 879.