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FEDERAL COMMUNICATIONS COMMISSION

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F.C.C. 73-1167

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
TARIFF APPLICATION NO. 930 OF AMERICAN TELEPHONE AND TELEGRAPH CO. TO FILE "HI-LO" REVISIONS IN PRIVATE LINE TARIFFS

ORDER

(Adopted November 14, 1973; Released November 16, 1973)

BY THE COMMISSION:

1. We have before us an "Application for Review and for Special Relief" filed by American Telephone and Telegraph Company (AT&T) on May 11, 1973 seeking permission to file substantial revisions in AT&T's interstate private line tariffs. These proposed revisions would establish so-called "Hi-Lo" rates for voice grade private line services which would be based upon an abandonment by AT&T of the historical practice of utilizing nationwide cost and rate averaging and establishing, in lieu thereof, a pricing structure whereby generally reduced rates would apply on the carrier's high-density routes and generally higher rates would apply on low-density routes.

2. We take notice of the recent decision in the United States Court of Appeals for the *Second Circuit*, in *AT&T* v. *FCC*, No. 73-1806, October 19, 1973 (unreported) which holds, in effect, that we lack the authority to impose the prior permission requirement under which AT&T's application herein was filed. Consistent with this court decision, which we consider precedentally binding upon us,[1] we shall dismiss as moot AT&T's tariff application and its request for review and special relief. This will enable AT&T, if it chooses to do so, forthwith to file its "Hi-Lo" tariffs, subject to the requirements of our rules, with particular reference to the notice required by section 61.58 and the data and information required by Section 61.38 and subject to further appropriate action by us under applicable provisions of the Act.

3. Accordingly, IT IS ORDERED, That AT&T's Tariff application and its Application for Review and for Special Relief ARE DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[1] Unless reversed or modified upon further review.

F.C.C. 73-1146

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of FORMULATION OF POLICIES RELATING TO THE BROADCAST RENEWAL APPLICANT, STEMMING FROM THE COMPARATIVE HEARING PROCESS.	Docket No. 19154

ORDER EXTENDING TIME FOR FILING COMMENTS AND REPLY COMMENTS

(Adopted October 31, 1973; Released November 6, 1973)

BY THE COMMISSION:

1. On October 9, 1973, the Commission released a Second Further Notice of Inquiry in the above-entitled proceeding. Publication was made in the Federal Register on October 12, 1973, 38 Fed. Reg. 28325. Comment and reply comment dates are presently November 12 and November 28, 1973, respectively. A questionnaire to be completed by all commercial television stations was issued by the Commission at the same time as the Notice and the date designated for completion of this questionnaire was November 19, 1973.

2. On October 26, 1973, the firm of Koteen and Burt (K & B) filed a "Motion for Extension of Time in Which to File Comments" stating that the Commission's Notice stresses that while it has received broad general comments concerning the concept of establishing quantitative program standards, it has received few comments on the substantial pragmatic problems relating to implementation of a quantitative standard principle. K & B contends that the questionnaire and supplement to it ask for substantial amounts of data, much of which is not now available. It further states that the data which will be obtained from the completed questionnaires relate directly to pragmatic problems on which the Notice requests comments. It therefore requests that the time for filing comments be extended until after the completed questionnaires are returned, the full results made available to all interested persons, and those persons afforded an appropriate period in which to analyze fully the facts and their impact on pragmatic problems attendant to quantitative standards and prepare comments based on that analysis. K & B further suggests that the Commission make the results of the questionnaire study available in both computer printout and computer punch card form so that interested persons can most efficiently analyze those results.

3. On October 30, 1973, the American Broadcasting Companies, Inc. (ABC) filed a "Motion to Temporarily Defer Further Action or, in the Alternative, to Extend Time For Filing Comments" in the above-entitled proceeding. ABC states that this proceeding is closely linked to parallel developments on Congress which may affect the license

renewal process. It further avers that present reports seem to indicate that the nature and timing of further Congressional action on license renewal legislation in both the House and Senate is most uncertain. ABC points out that in light of this overall uncertainty and recognizing that some specific Congressional action has been initiated, it believes it is important that further deliberations here be temporarily deferred until the direction Congress will take in this area becomes more clear. ABC states that if the Commission does not see fit to temporarily defer this proceeding in order to reassess parallel developments, general principles of fairness and orderly procedure dictate that the period for comments by interested parties should be extended at least until the results of an on-going television industry inquiry are made available.

4. We are of the view that this proceeding should continue to go forward and that action herein should not be deferred pending further Congressional action, and the request of ABC for such deferral will therefore be denied.

5. However, there appears to be merit to the suggestions of K & B and ABC that the date for filing comments be extended to give interested parties an opportunity to examine the questionnaire results prior to making their submission of comments. Thus we shall extend the date for filing comments to December 19, 1973. In so doing, we should emphasize the importance of licensees submitting the completed questionnaire as soon as possible, and certainly no later than November 19, 1973. We are not prepared at this time to respond to the K & B request that the results of the questionnaire study be made available in both computer printout and punch card form. This request will be reevaluated after the statistics generated by the questionnaire have been tabulated.

6. In view of the foregoing, IT IS ORDERED, that the dates for filing comments and reply comments in this proceeding ARE EXTENDED to and including December 19, 1973, and January 7, 1974, respectively.

7. IT IS FURTHER ORDERED, That the aforementioned motions filed by K & B and by ABC ARE GRANTED to the extent that they are consistent with the foregoing, and in other respects ARE DENIED.

8. This action is taken pursuant to authority found in Sections 4(i), 4(d)(1) and 303(r) of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1165

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re
THE CHESAPEAKE & POTOMAC TELEPHONE CO.
Licensee of One-Way Signaling Station
KGC590 in Washington, D.C.

MEMORANDUM OPINION AND ORDER

(Adopted November 14, 1973; Released November 16, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. By Memorandum Opinion and Order released April 4, 1969, (17 FCC 2d 12), the Commission granted authorization to the Chesapeake and Potomac Telephone Co. (C&P) to construct a one-way signaling (paging) station on the frequency 152.84, and limited the number of receivers it could serve to 3,388.[1] The background of this decision, set out in greater detail in the cited Memorandum Opinion and Order, was that C&P had been offering a signaling service on a frequency reassigned for use in the Business Radio Service. C&P then, at Commission direction, applied for the "guardband" frequency 152.84 MHz.[2] At that time, mutually exclusive guardband applications had also been filed by non-wireline common carriers (generally known as RCCs) and so a comparative hearing seemed probably among these applicants. In these circumstances, the Commission was concerned that C&P would gain a competitive advantage over the RCCs, by offering service while the RCCs were engaged in a hearing, a situation the Commission was trying to avoid under the "headstart doctrine" (this doctrine was set out most fully in *Mobile Radio Communications, Inc.*, 29 FCC 2d 62 (1971) at page 64; but was modified in *FWS Radio et al.*, 40 FCC 2d 680 (1973)). However, the Commission also recognized that C&P had already been offering paging under a developmental authorization, and it did not appear to be in the public interest to deprive the subscribers of a service that had been in operation for seven years. Accordingly, it was decided to grant C&P's guardband application, but to limit the system to the same number of receivers that the company had been serving prior to converting from developmental to regular operation.

2. As indicated above, the "headstart doctrine" has been modified by the Commission, and we decided (*FWS Radio et al.*, *supra*, at page

[1] By Commission letter of July 15, 1969, C&P was allowed to add more subscribers if they qualified within Category 1 (Public Safety and Health) of Sec. 21.512 of the Commission's Rules.

[2] See *Guardband Decision*, 12 FCC 2d 841 (1968), *reconsideration denied* 14 FCC 2d 269 (1968). Aff'd sub nom. *Radio Relay Corp.* v *F.C.C.* 409 F. 2d 322 (2d Cir. 1969).

682)[3] to adopt the position of the Court of Appeals in the *Radio Relay* case (footnote 2, *supra*) i.e., that the headstart danger evaporates when the RCCs are already offering a paging service. That is the situation here, since all three competitive RCCs are already offering paging. Thus, we do not see any reason why C&P should continue to be limited to its 1969 receiver total.

3. In addition, by letter of June 18, 1973, we were informed that the RCCs involved had reached an agreement in principle to share the additional frequencies they had applied for. Therefore, it does not seem that any comparative hearing will be required between these applicants, or that they will be delayed from offering service much longer. Although this consideration is irrelevant to our decision, we mention it to indicate that we do not think that removal of the C&P restriction will result in uneven competition.

4. Accordingly, IT IS ORDERED that the limit of 3,388 receivers on Chesapeake and Potomac Telephone Co. Station KGC590 is REMOVED.

5. IT IS FURTHER ORDERED, that the authorization of Station KGC590 is conditioned in that, "The grantee shall offer to make available to the non-wireline common carrier for one-way signaling purposes the same dial access interconnection facilities as those utilized by the wireline common carriers in the community; further that the charges for such interconnection and all other facilities of the wireline company used by the non-wireline carriers in the one-way signaling service on frequencies 152.24 and 158.70 MHz, shall be identical with those costs used by the wireline company on frequencies 152.84 and 158.10 MHz in computing its own charges over the same distances when it offers a competitive service, or where distances are different, the same per mile basis; and finally, if a wireline carrier offers or purports to offer any free or reduced rate service in connection with its one-way signaling service, it shall provide the identical service so offered or purported to be offered to customers of any competing non-wireline carrier at the same reduced rate or free of charge."

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[3] An appeal from this decision has been taken to the Court of Appeals, District of Columbia Circuit (*Ram Broadcasting of Texas* v. *F.C.C.*, No. 73-2010), but it does not challenge the modification with respect to telephone companies.

F.C.C. 73-1148

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re: COMMISSION ON CABLE TELEVISION OF THE STATE OF NEW YORK Petition for Special Relief in the Albany-Schenectady-Troy Market	CSR-342

MEMORANDUM OPINION AND ORDER

(Adopted: October 30, 1973; Released: November 9, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT; COMMISSIONER REID ISSUING A SEPARATE STATEMENT.

1. On April 12, 1973, the Commission on Cable Television of the State of New York (CCT) filed a "Petition of the Commission on Cable Television of the State of New York for Special Relief" (CSR-342) in which it asks that cable television systems serving the "Capital District" [1] of the State of New York be permitted to carry the signals of one or more New York City independent VHF stations notwithstanding Section 76.61(b)(2) of the Commission's Rules [2] or the *Colonie* [3] case in view of the community of interest which allegedly exists between the Capital District and the City of New York. In its petition, CCT describes its creation to oversee municipal regulation of cable television in New York State and "to represent the interests of the people of the state before the Federal Communications Commission . . ." [4] and then states its general agreement with our prohibition of leapfrogging. But CCT does not agree with application of this policy in the Capital District since it claims that a stated purpose of

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[1] CCT describes this district as the communities within the Commission's definition of the Albany-Schenectady-Troy television market.

[2] Section 76.61(b)(2) of the Rules provides that,

"(i) For the first and second additional signals, if any, a cable television system may carry the signals of any independent television station: *Provided, however,* That if signals of stations in the first 25 major television markets (see § 76.51(a)) are carried pursuant to the subparagraph, such signals shall be taken from one or both of the two closest such markets, where such signals are available. If a third additional signal may be carried, a system shall carry the signal of any independent UHF television station located within 200 air miles of the reference point for the community of the system (see § 76.53), or, if there is no such station, either the signal of any independent VHF television station located within 200 air miles of the reference point for the community of the system, or the signal of any independent UHF television station.

NOTE.—It is not contemplated that waiver of the provisions of this subparagraph will be granted.

(ii) Whenever, pursuant to Subpart F of this part, a cable television system is required to delete a television program on a signal carried pursuant to paragraph (b)(2)(i) or (c) of this section, or a program on such a signal is primarily of local interest to the distant community (e.g., a local news or public affairs program), such system may, consistent with the program exclusivity rules of Subpart F of this part, substitute a program from any other television broadcast station. A program substituted may be carried to its completion, and the cable system need not return to its regularly carried signal until it can do so without interrupting a program already in progress."

[3] *Capital District Better TV, Inc.*, 39 FCC 2d 13 (1973); *accord, Saratoga Cable TV Co., Inc.*, 39 FCC 2d 611 (1973).

[4] *Executive Law*, Art. 28, Section 815(6), (1972).

the anti-leapfrog rule is to assure the carriage of stations which because of their closer location—"usually in the same region and often in the same state"—would supply "some programming that is more likely to be of interest in the cable community".[5] Thus, CCT argues that prohibiting importation of New York City independents in the Capital District errs in requiring substitution of out-of-state programs of little interest for in-state programs of substantial interest.

2. In support of its threshold argument of "community of interests," CCT produces a potpourri of data: New York City newspapers are widely distributed in the area; New York City banks and stores have branches in the area; the New York City Ballet performs in the area each July; New York sports teams are widely followed in the area; there are almost 190,000 monthly telephone calls between the District and New York City; and there is heavy transport by road and air between the areas. In contrast to this, CCT claims there is "virtually no evidence" of commercial, cultural or recreational ties between the Capital District and either the Boston-Cambridge-Worcester market or the Hartford-New Haven-New Britain-Waterbury market. Thus, CCT avers that few Boston or Connecticut newspapers are distributed in the District; that telephone toll calls to Boston average less than one-third the number to New York City, while traffic to the Connecticut communities is less than one-tenth that between the District and New York City; that the vehicular traffic is measurably less with Boston and Connecticut, and, in general, that the scheduled transportation services are appreciably fewer. Finally, CCT argues that Albany is a "government town" preoccupied with affairs of government and politics. As a result, it is argued, news and public affairs programs from New York City would be of major interest to residents of the District.

3. Notwithstanding the claimed community of interest between the Capital District and New York City, CCT indicates that the working of at least two provisions of the Commission's rules[6] prevents systems in the District from selecting New York City signals as their first two distant signals. Further, CCT characterizes the *Colonie* decision as apparently resulting from absence of data to illustrate the community of interest between Capital District and New York City, and concern with possible impact on local broadcasters which could result from importation of New York City signals. In addition, CCT suggests possible error in the present regulatory scheme when it uses the same listing of major markets both for purposes of "top 100" markets within the meaning of Section 76.51 of the Rules, and the "top 25" markets for purposes of the anti-leapfrog rules [however, no basis for a substitute listing is suggested by CCT].

4. Finally, CCT argues that even if the Commission is unwilling to allow importation of two independent signals from New York City, there is ample reason to permit importation of at least one such signal. This result could be accomplished by partial waiver of the rules, or—possibly—by the following construction of the rules suggested by CCT. The last sentence of Section 76.61(b)(2) (which applies here

[5] Par. 92, *Cable Television Report and Order*, 36 FCC 2d 143, 179 (1972).
[6] Section 76.61(b)(2) of the Rules (see footnote 2, above), and Section 76.51 of the Rules (which defines the markets).

since a third distant signal may be imported by a market cable television system) provides that "(i)f a third additional signal may be carried, a system shall carry the signal of any independent UHF television station located within 200 air miles of the reference point for the community of the system. . . ." CCT argues that in *Colonie* the Commission seems to have construed this provision to mean that if a third signal is imported, *that* signal shall be a UHF from within 200 miles. Thus, in *Colonie*, the Commission required that the *third* signal be UHF despite the fact that the first two were UHF. CCT argues that this result does not flow from the literal language of the rule; moreover, it is argued, the result is open to questions since the policy objective of achieving some UHF carriage had already been attained, and the third (VHF) signal would be both in-state and within the 200 mile limit. Finally, CCT believes that the Commission's decision in *Colonie* rests in part on the implication that a cable television proponent has the burden of proof to overcome the possibility of adverse economic impact on broadcast stations, and urges that this is a misallocation of the burden (CCT suggests that such impact should be accepted "within tolerable 'public interest' limits").

5. On May 29, 1973, Albany Television, Inc.,[7] licensee of Television Broadcast Station WTEN, Albany, New York, filed an "Opposition of Albany Television, Inc., to Petition for Special Relief filed by the Commission on Cable Television of the State of New York" directed against grant of any of CCT's requests for relief. Albany describes CCT's technical arguments as follows: first, that the Boston-Cambridge-Worcester market is closer to the Capital District only because of Worcester's inclusion in the market, and the fact that the Commission measures the distance between that market and the Capital District from Worcester. Second, that Hartford, New Haven, New Britain, Waterbury need not be considered a "top 25" market for purposes of the anti-leapfrogging rule, and should not be so considered. Albany argues, first, that CCT distorts the basic purpose of the anti-leapfrog rule (ensuring that the benefits of extended cable carriage are shared among independent stations in different markets) by elevating a secondary purpose (provision of programming of greater local interest), and claims in effect that CCT cites Par. 92, *Cable Television Report and Order*, *id.*, in misleading fashion. Albany contrasts the Commission's differing treatment of leapfrogging of network [8] and independent [9] to support this point, and argues further that it resulted from the effort to establish "go-no-go" rules. Albany recognizes that the Commission conceded on reconsideration that it might grant waivers "in unusual circumstance," Par. 25, *Reconsideration of Cable Television Report and Order*, 36 F.C.C. 2d 326, 335–336 (1972), but contends that the Commission has done so only once, and then in circumstances which would not support CCT's position, citing *Western TV Cable Corporation*, 39 F.C.C. 2d 624 (1973). Albany has also sub-

[7] On May 10, 1973, Albany had filed an unopposed request for a two week extension of time in which to respond to CCT's petition.

[8] Section 76.61(b)(1) of the Rules, which deals with the leapfrogging of network-affiliated stations, explicitly authorizes the carriage of "the nearest [missing] full network stations, or the nearest in-State full network stations."

[9] Section 76.61(b)(2) of the Rules, quoted in footnote 2 above, explicitly states that waivers are not contemplated, and no provision is made for different treatment of in-state signals.

mitted an engineering showing to establish that it is not in fact true that the Capital District is closer to New York City than Boston. Albany further observes that implicit in CCT's argument is a theory that New York City and Boston are the "true" reference points, but that this approach is contrary to the Commission's approach which is to proceed by markets rather than to proceed from individual stations or cities within a market. Finally, Albany argues that this Commission's adoption of the market concept was clearly inconsistent with the whole "community of interest" argument.

6. Albany argues, second, that acceptance of CCT's argument would work a major *de facto* amendment of the rules. Albany submits a number of engineering showings to establish: that if CCT's reasoning were to be applied there would be three other major markets (Buffalo, Syracuse, Rochester) in New York State, as well as three minor markets (Plattsburgh, Watertown, Elmira), where similar waivers could be requested; that presumably the same reasoning would be applicable in other states; and that there are at least ten additional markets in at least portions of which waiver could be called for on an "in-state" basis or with a "state capital" argument.[10] Albany argues, third, that although the Capital District may have stronger ties with New York City than it does with Hartford or Boston, it does not have such a unique connection as to warrant waiver on this basis. To establish the point, Albany selected Springfield, Massachusetts, as an analog to Albany *vis-a-vis* Boston and New York, and shows that the Springfield data is comparable to that generated for the Capital District by CCT. From this, Albany concludes that such data really serves to describe the extent to which New York dominates the entire region rather than to prove the existence of an unusual "community of interest." And to the extent the anti-leapfrog rule is intended to avoid comparable dominance of television markets, Albany argues that CCT's entire argument begs the issue. In order to argue that there would be interest in Boston programs in the Capital District, Albany provides a comparative analysis of the demographic characteristics of the areas. Further, facts similar to those advanced by CCT for New York City are shown also to exist for Boston. For example, the Boston Symphony spends eight weeks and gives 24 concerts at Tanglewood, and expends approximately $4,000 a year to advertise the concerts in the Albany "Times-Union." Albany concludes that the foregoing information serves to demonstrate the vagueness of the "community of interest" concept.

7. Albany argues, fourth, that CCT has failed to attempt any showing of the extent to which the New York City VHF independents whose carriage has been proposed (WOR–TV and WPIX) in fact supply programming that might be of greater local interest because of its New York City orientation. Albany submits a study of available materials concerning WOR–TV and WPIX, and concludes that neither station undertakes to serve any area which is geographically adjacent to the Capital District. Further, although Albany concedes

[10] Albany takes separate issue with this argument both because of its impact elsewhere, and because of its applicability here. Thus, Albany points out that CCT has defined its "Capital District" to include several areas which census data indicates have relatively little connection with state government.

that there would be some variety in the available news and public affairs programs, it argues that both stations attempt, in part, to serve the interests of audiences in Connecticut and New Jersey so that programs for these areas could hardly have special interest for the Capital District. A further point, according to Albany, is that grant of the requested waiver might still not assure Capital District viewers of the local news and public affairs programs from New York City if cable operators should elect to delete them as matters of purely local interest in accordance with the provisions of Section 76.61(b)(2)(ii) of the Rules (quoted in footnote 2, above). Albany then considers the availability of sports programming, and, after a review of the sports programs which would be available to cable subscribers in the absence of the New York City signals, concludes that with the New York City signals there would be more New York City sports programming than would otherwise be available, but argues that the difference in amount would not be enough to justify the requested waiver. Finally, Albany argues that cable systems in the area could in any event carry a limited amount of New York City programming during periods when programs are deleted from the Hartford and Boston independents pursuant to Section 76.61(b)(2)(ii) of the Rules.

8. Finally, Albany takes issue with CCT's suggestion that Section 76.61(b)(2) of the Rules can be read to allow carriage of a VHF station as the third independent under the rule. In essence, Albany claims, CCT argues that the Commission created a UHF "one-of-three" rule rather than establishing UHF as a third priority, since its construction of the rules is that carriage of a UHF as the first or second independent discharges the cable system's obligation to select an independent UHF. Albany responds to CCT with a review of the rule's evolution and history to establish that the Commission intended to give priority to carriage of independent UHF signals as the third signal even when the first two independent signals on the cable system were UHF.

9. On May 29, 1973, Sonderling Broadcasting Corporation, licensee of Station WAST–TV, Albany, New York, filed an "Opposition to the Petition of the Commission on Cable Television of the State of New York for Special Relief." In its opposition, Sonderling indicates that it has been a party in virtually every proceeding for waiver or special relief in the Albany-Schenectady-Troy market (ARB–34): that it endorses and adopts the arguments made in opposition to CCT's petition by Albany Television; that one of the principal contentions in favor of special relief is the greater interest of area viewers in programs from New York City rather than Boston or Hartford; that to support this type of argument, Capitol Cablevision Systems, Inc.,[11] has received nearly 7,000 public statements which indicates the signatory's opinion that he feels "strong community ties with New York City"; and that too much weight should not be attached to these statements since both Capitol and the local press actively solicited expressions of public opinion, and conducted a "one-sided and less than impartial campaign to obtain the public responses" (which Sonderling describes in some detail).

[11] An applicant for Certificates of Compliance in several places within the Capital District (see Attachment A).

10. On July 2, 1973, CCT filed a "Reply" directed against the oppositions of Albany Television and Sonderling. CCT argues that its petition was principally directed to the Commission's view in *Colonie* that the applicant had "neither supported [their] allegations factually nor otherwise persuaded us of the great public interest in providing New York City programs to Albany," and that the objecting stations have not now denied that there is, in fact, such a community of interest; that to the extent the Commission operates on the basis of markets, it is reasonable to propose special relief for the whole Capital District; that Albany Television's position has not been supported by any independent broadcaster in either the Boston-Cambridge-Worcester market or the Hartford-New Haven-New Britain-Waterbury market [12] which both indicates a willingness by these stations to be leapfrogged, and a basis for distinction in future cases; that the policy of limiting the choices for cable carriage of distant independent signals could be inconsistent with the Commission's stated basic objective "to get cable moving so that the public may receive its benefits"; and that there is nothing in the *Cable Television Report and Order* to support the argument that the policy of attempting to provide cable viewers with local in-state programming "likely to be of interest in the cable community" is merely secondary. CCT concedes the accuracy of Albany Television's argument that cable operators might delete news and public affairs programs pursuant to Section 76.61(b)(2)(ii) of the Rules, and urges that this possibility be avoided by appropriate condition. As to the argument that local stations provide at least adequate coverage of New York City matters, CCT argues that the limited number of over-the-air stations is unable fully to satisfy the significant demands of all viewers. Finally, CCT repeats its argument that Section 76.61(b)(2)(i) of the Rules can be read to allow carriage of at least one VHF independent, and again points to the fact that none of the potentially affected UHF operators have objected.

11. On July 13, 1973, Albany Television filed a "Response to New Matter in Reply Pleading." Albany argues that on the present record, the Commission can hardly find an absence of objection by leapfrogged stations; that acceptance of CCT's reasoning would transform Section 76.61(b)(2) of the Rules into a private and waivable right, but that the rule does not confer such a private right; and that the rule is intended to avoid concentration of the benefits of cable carriage in a few stations in the largest markets, but that where (as here) there are four independent stations in the two closest "top 25" markets, the rule does not dictate choice of any particular independent station; that an objecting station would not be guaranteed coverage even if successful; and that CCT's proposed inference from lack of objection is therefore baseless. Further, Albany also argues that it would be unreasonable to waive the rules simply because a few stations fail to object. In this regard, Albany contends that the policy departure implicit in a waiver here would be of such general applicability as to make prior rulemaking the only appropriate procedure, citing Cf. *Banzhaf* v. *FCC*, 405 F. 2d 1082, 1104 (D.C. Cir. 1968), *cert. den.* 396 U.S. 842 (1969).

[12] CCT acknowledges that Faith Center, permittee of Station WHCT-TV, Channel 18, Hartford, Connecticut, has asked for carriage by cable television systems in the Albany-Schenectady-Troy market.

Similarly, Albany argues that acceptance of CCT's proposed reading of the "UHF priority" rule (to allow carriage of a VHF in this case) is a matter appropriate for general rulemaking.

12. On August 3, 1973, Kaiser-Globe Broadcasting Corporation, licensee of Station WKBG–TV, Channel 56, Cambridge, Massachusetts, filed a letter in apparent response to CCT's "Reply." Kaiser indicates that it did not receive CCT's earlier pleading [since it did not respond to the earlier pleading, Section 76.7(e) of the Rules [13] did not require that it be served] and therefore did not know of CCT's argument; that it does not wish its silence to be interpreted as support for CCT's position; that it believes cable carriage is important to the success of independent UHFs; that it hopes the Commission will adhere to its top 25 market policy; that it had not commented before because it does not have a right to be carried [in the Capital District]; and that, by the same token, its failure to object to CCT's argument for allowing carriage of a VHF independent notwithstanding the UHF priority rule did not indicate its agreement with CCT's position. Indeed, Kaiser believes CCT's proposed interpretation of the UHF priority rule would undercut the cable carriage of UHF stations in favor of VHF stations operating in larger markets.

13. On August 9, 1973, New Boston Television, Inc., licensee of Station WSBK–TV, Channel 38, Boston, Massachusetts, filed a letter in response to CCT's "Reply." New Boston indicates that its decision not to file was a business decision, and that it does not agree that its failure to object could show its agreement with the proposal. Second, New Boston objects to any proposal which could allow cable systems to leapfrog the Boston-Cambridge-Worcester market. New Boston argues that the new cable television rules subject major market independence to significantly greater competition in return for a fair chance to obtain extended audience coverage via cable television carriage, and that the Commission has granted numerous Certificate of Compliance applications to carry New York signals into major communities throughout the Boston area. Thus, New Boston argues that it would be most inequitable for the Commission also to deny them their share of the benefits—an opportunity for carriage in the Albany-Schenectady-Troy market.

14. On August 13, 1973, CCT filed a "Reply of the Commission on Cable Television to Kaiser-Globe Broadcasting [sic] Corporation Letter Dated August 3, 1973" in which it objects to any consideration being given the Kaiser-Globe letter on the ground that it was not timely filed.[14] In essence, CCT argues that Kaiser was on notice of its petition; that Kaiser chose not to respond; that CCT was therefore entitled to argue the inferences which resulted from the failure to object; and that Kaiser and Albany Television "sandbagged" CCT with their claim of

[13] Section 76.7(e) of the Rules provides that,

"The petitioner may file a reply to the comments or oppositions within twenty (20) days after their submission, which shall be served on all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied on. For good cause shown, the Commission may specify a shorter time for the filing of reply comments."

[14] Aside from its general contention that Kaiser should have responded to its petition in timely fashion if at all, CCT observes that Kaiser's letter is dated July 23, 1973, but was apparently not filed or mailed until August 3. CCT contends that if the letter was filed prior to the date it was mailed, it should be rejected for want of adequate service.

a "new argument" when CCT pleaded its inference. On August 15, 1973, CCT filed a letter in which it states that it relies on the same reasoning insofar as New Boston is concerned as it did with respect to the Kaiser letter.

15. On February 13, 1973, the Albany County Legislature created a "Committee on Cable Television" to investigate the Commission's refusal to permit importation of New York City signals into the Capital District. The Committee conducted three public hearings on the subject, and finally on May 14, 1973, adopted a "Report of Committee on Cable Television" which, in effect, supports CCT's factual allegations. On May 18, 1973, Joseph Harris, Chairman of the "Committee on Cable Television," forwarded a copy of the Report to the Commission. Unfortunately, however, there is no indication that a copy of the Report was served on the parties to the present proceeding. Nor—for that matter—is it clear that the standards of the Committee (a legislative body) are equateable with the Standards of this Commission. As a result and in view of our general disposition of this matter, we will place no reliance on the Albany County Legislature's deliberations in this matter.

16. This case has caused us considerable concern since it appears likely that rigid application of our rules could only serve to deprive viewers in the Capital District of programs from the largest city in the state, which would probably be of greater interest and value to them than programs originating on stations from the Boston and/or Hartford markets.[15] In the past, we have been concerned with the "in-state" problem,[16] and we recently found such a consideration to be of significant weight under our present cable rules and policies. See *Madison County Cablevision*, FCC 73-934, ____ FCC 2d ____ (Adopted September 6, 1973). Upon consideration of the allegations of the parties in this case, we are persuaded that grant of the requested relief is warranted.[17] Even though, in adopting our cable rules, we expressed particular concern that, in the absence of leapfrogging restrictions, a limited number of stations from the largest markets like New York would be carried to the exclusion of all other stations (see 36 FCC 2d

[15] It is appropriate to note that neither of the cases recently decided in this area (footnote 3 above) squarely dealt with this problem since in both cases the applicants sought waiver to allow carriage of a fourth distant signal (rather than the permissible limit of three), and the applicability of the anti-leapfrog rule was treated only in this context.

[16] The Commission under earlier cable programs followed a policy of giving weight to carriage of in-state signals as a basis for waiver of its then-existent anti-leapfrog rule. For example, in *Mohican TV Cable Corporation*, 22 FCC 2d 686 (1969), the Commission waived its anti-leapfrog rule to allow carriage *inter alia* of three New York City independent stations (WOR-TV, WPIX, WNEW-TV) on three cable television systems located within the Albany-Schenectady-Troy market, but more than 35 miles from the main post office in any community with an operating television station. The Commission tightened its anti-leapfrog rule in the *Cable Television Report and Order*, but even there recognized the existence of policy considerations favoring carriage of in-state signals. Thus, in Par. 92, *Cable Television Report and Order*, 36 FCC 2d 143, 179 (1972), the Commission stated, "There is the additional consideration that carriage of closer stations, because they are usually in the same region and *often in the same state*, supplies some *programming that is more likely to be of interest in the cable community* (emphasis added)." And in Par. 25, *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, 335 (1972), the Commission indicated that while it did not intend to grant waivers of the anti-leapfrog rule because of microwave savings, it was "not unmindful of the need for relief in unusual circumstances, *Sun Cable T-V*, 27 FCC 2d 261 (1971), and will respond accordingly, See *United States* v. *Storer Broadcasting Co.*, 351 U.S. 1972."

[17] With respect to this situation, we are of the view that our present action is dispositive of leapfrog issues in the Capital District. Accordingly, we will not deal with such objections in the certificating process. Similar objections filed to later filed certificate applications will be treated the same way. Compare *Memorandum Opinion and Order in Docket No. 19417*, FCC 72-646, 36 FCC 2d 136.

at 179), we are faced here with a persuasive request to permit Capital District cable systems to carry signals from the largest city in New York, which would appear to be of much greater interest and value to Capital District viewers than signals from the two closest television markets—Boston and Hartford.

17. Moreover, as noted above, we have permitted the carriage of New York City independent signals on cable systems located within the Albany-Schenectady-Troy market (although more than 35 miles from the main post office in any community with an operating television station), and we note the existing carriage of these independent signals in many upstate New York communities. To deprive carriage of these same signals by Capital District systems through the imposition of leapfrogging restrictions seems unreasonable, especially in light of CCT's extensive showing that state capital viewers have a substantial interest in New York City affairs. Nevertheless, we are mindful that our present cable rules do not contain an exemption from leapfrogging prohibitions for in-state signal carriage and that a generally-applicable waiver here might be construed as a major policy departure that should be accomplished through the rule making process. In this regard, we want to stress that our decision to grant special relief for Capital District cable systems is based on the special circumstances of this case and should not be construed as an intention to waive leapfrogging restrictions in all situations involving in-state signal carriage. Our approach here has been to make an *ad hoc* determination about the desirability of providing New York City signals to the Capital District, which includes the seat of state government, in light of CCT's showing. It may be that after consideration of similar requests in the future, we may want to consider amendment of our leapfrogging rules to accommodate the carriage of in-state signals in some or all situations. However, in the meantime, we intend to adhere to the policy determinations of 1972 to the effect that leapfrogging restrictions are necessary to insure a more even distribution of cable carriage benefits. As a result, proponents of waiver of our leapfrogging policies will be expected to show the existence of "unusual circumstances" which would justify a departure from our rules. Since we are persuaded by CCT's showing of the need for special relief for Capital District cable systems, we will permit the carriage of two New York City independent signals by affected systems. However, we will condition our general waiver here by requiring that all cable systems in the Capital District refrain from deleting news and public affairs programs of the New York City stations pursuant to the provisions of Section 76.61(b)(2)(ii) since we have been persuaded by CCT that such programs would be of substantial interest to residents of the Capital District.

In view of the foregoing, the Commission finds that grant of special relief as described above would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition of the Commission on Cable Television of the State of New York" (CSR–342) filed April 12, 1973, IS GRANTED to the extent indicated above.

IT IS FURTHER ORDERED, That cable television operators will be allowed upon proper authorization, and subject to the condition

stated in par. 17 above, to carry WOR–TV and WPIX in the Capital District.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

SEPARATE STATEMENT OF COMMISSIONER CHARLOTTE T. REID

I concur in the result reached by the majority in this matter, but I cannot agree with the means by which it was reached. For that reason I believe it necessary to expand upon my decision.

Today we have concluded that it would be in the public interest for the Cable television systems in the Albany-Schenectady-Troy television market, herein after referred to as the "Capital District" to be allowed to import as their distant signals, two independent VHF stations from New York City rather than carrying the two UHF stations from the Boston and Cambridge television markets, as required by Section 76.61(b) (2) of the Commission's Rules.

While I agree that this is probably in the public interest, based upon the facts of this case alone, we do by this action take a significant step towards a change of our leapfrogging rules.

First, we change significantly that part of the "Consensus Agreement" which relates to leapfrogging. That part says:

A. For each of the first [independent] two signals imported, no restriction on point or origin, except that if it is taken from the top 25 markets it must be from one of the two closest such markets. . . .

B. For the third signal, the UHF priority, as set forth in the FCC's letter of August 5, 1971, p. 16.

In this instance, the Boston-Cambridge Television market is the closest of the top 25 markets and therefore would be the *proper* market for the two independent stations to be imported by the cable systems in the Albany-Schenectady-Troy television market.

Again, both in the new Rules, which were adopted in February of 1972, and the decision on the Petitions for Reconsideration, adopted in July of 1972, we adopted the leapfrogging rule as contained in the "Consensus Agreement" and then explained our rationale for the adoption of such rules in paragraphs 25 and 26, 36 FCC 2d 195–196.

25. Our treatment of the leapfrogging question is based on the following factors: First, we thought it desirable to move away from the limits of our 1968 proposal because it did not provide enough flexibility with requests for waiver filed pursuant to our interim processing procedures. Second, we were concerned that permitting the greatest possible choice could lead to the selection of stations from only a few of the largest markets, thereby foreclosing any benefit of cable carriage to many stations. We believe that the Consensus Agreement provides a sound resolution of these two considerations. The implementation of the leapfrogging restriction in *all* markets is necessary to insure that the benefits of carriage are more evenly distributed. . . . The rule adopted strikes the appropriate balance, and we reassert that we do not contemplate its waiver. We do not intend to return to the process whereby waiver is requested in case after case because of microwave savings; to do so would undermine the leapfrogging rule. But we are not unmindful of the need for relief in unusual circumstances, *Sun Cable T–V, 27 FCC 2d 261 (1971)*, and will respond accordingly. See *United States v. Storer Broadcasting Co., 351 U.S. 192.*

26. . . . we have changed our leapfrogging rule from the formulation in our Letter of Intent. The UHF priority is now third rather than first. We believe that in most situations the provision of syndicated programming protection more

than offsets this change. And we expect that there will be significant carriage of UHF stations under the first two priorities. . . .

The reason that I make reference to these specific paragraphs is to point out the majority's position at the time of the adoption of both the Rules and the decision on reconsideration.

I have always said that we should remain flexible in our considerations so as to insure our being able to adopt to the needs of the public interest. Perhaps we should, in the very near future take another look at the leapfrogging rules—to see if they are relevant to the conditions existing. That would be a better approach, in my judgment, rather than changing them by the ad hoc method.

Should the result of our decision today be adverse to the continued existence of over-the-air broadcasters in the markets affected I would look very favorably upon a different decision than that reached today. But the only evidence before us now has convinced me that, at least for the time being, such a waiver does appear to be in the public interest.

F.C.C. 73-1131

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Application of CONTINENTAL TELEPHONE CORP. For Issuance of Tax Certificate for Sale of Stock in Warner Communications Inc., Pursuant to Section 64.601 of the Rules	File No. CCTAX-3-73

MEMORANDUM OPINION, ORDER AND CERTIFICATE

(Adopted October 31, 1973; Released November 5, 1973)

BY THE COMMISSION: CHAIRMAN BURCH DISSENTING AND ISSUING A STATEMENT IN WHICH COMMISSIONERS REID AND HOOKS JOIN.

1. Before us is an application requesting the issuance of a tax certificate, pursuant to § 1071 of the Internal Revenue Code, filed by Continental Telephone Corporation (Continental) on June 4, 1973 for sale of 250,000 shares of stock in Warner Communications Incorporated during the period August 9, 1972 through August 17, 1972, inclusive.

2. Prior to November 30, 1971, Continental furnished substantially all of its CATV service, both inside and outside of its telephone service area through a wholly-owned subsidiary, Continental Transmission Corporation. On November 30, 1971, Continental signed an agreement with Kinney Services, Inc. under which agreement all of the shares of Continental Transmission Corporation would be exchanged by Continental for not less than 500,000 and not more than 600,000 shares of stock in Kinney Services, Incorporated. At that time, Continental Transmission Corporation owned and operated 60 CATV systems, of which 38 were within Continental's telephone service area and 22 were outside. At the closing of the agreement on December 31, 1971, Continental received 600,000 shares of Kinney stock, representing 3.1% of the then-issued and outstanding Kinney shares. On February 13, 1972, Kinney changed its name, as part of a reorganization, to Warner Communications, Incorporated, and Continental's Kinney shares became Warner shares. On that date, these shares represented 2.9% of the then-issued and outstanding shares of Warner stock.

3. In Docket 18509, we adopted Section 64.601 of the Commission's Rules which, among other things, prohibits telephone common carriers subject to the Communications Act of 1934, as amended, from engaging in the furnishing of cable television service to the viewing public within their telephone service areas, either directly or indirectly through an affiliated company, and which requires divestiture on or before March 16, 1974 where necessary to eliminate such existing proscribed cross-relationships.[1] As we have previously noted in con-

[1] *Section 214 Certificates*, 22 FCC 2d 746 (1970); affirmed *General Telephone Co. of the Southwest* v. *U.S.*, 449 F. 2d 846 (1971).

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nection with adoption of other cable television cross-ownership rules, such divestitures may be effected without immediate payment of capital gains tax if the "involuntary conversion" provisions of the Internal Revenue Code are applicable.[2]

4. Section 1071(a) of the Internal Revenue Code provides in pertinent part that:

> If the sale of exchange of property (including stock in a corporation) is certified by the Federal Communications Commission to be necessary or appropriate to effectuate a change in policy of, or the adoption of a new policy by, the Commission with respect to the ownership and control of radio broadcasting stations, such sale or exchange shall, if the taxpayer so elects, be treated as an involuntary conversion of such property within the meaning of Section 1033 * * * (26 U.S.C. 1071).

The term "radio broadcast stations" refers not only to AM, FM and TV broadcast stations, but also to cable television systems and television broadcast networks, both of which provide a mass communications service ancillary to broadcasting and hence are subject to Commission regulation.[3]

5. Divestiture of the 38 CATV systems located within Continental's telephone service area was necessary or appropriate to effectuate the change in policy by the Commission represented by new Section 64.601 of the Rules. We have previously found that a divestiture of either the telephone or cable television operations of a telephone common carrier through its subsidiary in the same communities in compliance with the requirements of new Sections 63.56 or 64.601 [4] is clearly "necessary or appropriate to effectuate a change in policy of, or the adoption of a new policy" by the Commission with respect to the direct or indirect furnishing of cable television service to the viewing public by a telephone company, within its telephone service area.[5] Thus, that proportionate part of the consideration received for sale of Warner stock that is traceable to the divestiture of the 38 CATV systems located within Continental's telephone service area is clearly entitled to a § 1071 tax certificate.

6. Continental is requesting that the remaining proportionate part of the consideration received for sale of Warner stock that is traceable to the sale of the remaining 22 CATV systems located outside of Continental's telephone service area also receive a § 1071 tax certificate, arguing that such sale also was necessary or appropriate to effectuate Commission policy.

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[2] *CATV*, 23 FCC 2d 816, 822 (1970).

[3] *Cosmos Cablevision Corp.*, 33 FCC 2d 293, 295 (1972), *Viacom International Inc.*, 38 FCC 2d 541 (1972).

[4] Section 64.601 of the Commission's Rules provides in pertinent part that:

> (a) No telephone common carrier subject in whole or in part to the Communications Act of 1934, as amended, shall directly or indirectly through an affiliate owned or controlled by or under common control with said telephone communications common carrier, engage in the furnishing of CATV service to the viewing public in its telephone service area.

with Note 1 of same providing a definition of "control" and "affiliation":

> NOTE 1: (a) As used above, the terms "control" and "affiliation" bar any financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier and the customer, except only the carrier-user relationship.

and Note 2 further defining "control" and "affiliation":

> NOTE 2: In applying the provisions of paragraph (a) of this section to the stockholders of a corporation which has more than 50 stockholders:
>
> (a) Only those stockholders need be considered who . . . directly or indirectly own 1 percent or more of the outstanding voting stock . . ."

[5] *In the Matter of the Application of Mid-Texas Communication Systems, Inc.*, 39 FCC 2d 175 (1973).

7. Sale of the 22 CATV systems located outside of Continental's telephone operating area was, in and of itself, neither necessary nor appropriate. An item of inquiry in the Report and Order in Docket 18509 was: "Should the Commission prohibit telephone company ownership affiliation with CATVs, or alternatively, what conditions might be imposed on certificates granted in affiliation cases to further the public interest objectives of the act?" [6] Positions and comments addressed to this issue were reported from the telephone industry, independent CATV operators, the National Businessmen's Council, Americans for Democratic Action, and the Justice Department. These comments covered the spectrum of requiring total telephone company divestiture of CATV operations (independent CATV operators) to giving telephone companies equal opportunity to supply total communication services (National Businessmen's Council). The Commission ruled directly on this issue by taking the mid-way position expressed by Section 64.601 of the Rules and advocated by the Justice Department. The *new policy thus adopted* pertained solely to divestiture of cross-owned systems within the same community, and in no manner required or even suggested that it would be desirable that telephone companies totally divest themselves of CATV operations. Broad Commission desires to reduce concentration of media control were not in issue here. The adopted *policy* was clearly enunciated in the Rule.[7]

8. Continental argues that the Commission's fundamental policy of avoidance of undue concentration of control of communications media made the sale of the 22 non-telephone area CATV system appropriate to effectuate this broad Commission policy, given the express requirement of partial divestiture mandated by Section 64.601. The statutory standard of § 1071 of the Internal Revenue Code is that the divestiture must be necessary or appropriate to effectuate a *change* in the *policy* of, or *adoption* of a *new policy* by the Commission.[8] The Commission has been concerned with undue concentration of media control since the 1940s, as indicated by the Chain Broadcasting regulations, duopoly regulations, and multiple ownership regulations, all in the broadcasting field. This concern has been manifested through the years by the adoption of *policies* to implement corrective measures, and when such policies have had the effect of causing divestitures, tax certificates have been issued accordingly. Since 1958, the statute has required that such policies be either newly-adopted or changed. However, at no time has

[6] *Section 214 Certificates*, 21 FCC 2d 307, 309 (1970).

[7] The Commission ruled on this issue by saying:

> 46. The entry by a telephone company, directly or through an affiliate, into the retailing aspects of CATV services in the community within which it furnishes communications services can lead to undesirable consequences . . . Accordingly, the actions we are taking herein are designed to prevent, as much as possible, any such abuse. (*Id.*, 324)

and:

> 49. In view of the foregoing, it shall be our *policy to bar all telephone common carriers from furnishing CATV service to the viewing public in their operating territory* except when, for good cause shown, a waiver of this policy is granted. (Emphasis supplied) (*Id.*, 325)

Supporting this conclusion is the Commission's statement in the reconsideration Opinion in the Docket, *Section 214 Certificates*, 22 FCC 2d 746, 751:

> It is clear from the discussion in the report and the wording of Section 64.601 that the provisions apply to any CATV service whether provided by channel service, pole attachments, conduit space or other rental arrangements which is offered to the viewing public either directly by a telephone company or indirectly through an affiliated or related CATV system *in the affiliated telephone company's telephone service area* . . . (Emphasis supplied)

[8] Jefferson Standard Broadcasting Co. v. F.C.C., 305 F. Supp. 744 (D.C.N.C., 1969).

a tax certificate been issued prior to the adoption of a policy. Thus, in the broadcast area, where a new policy was adopted relative to multiple ownership of combinations of AM, FM and TV stations in the same market, and where present owners of such proscribed combinations were exempted from the application of the new rules, tax certificates have been granted to cover sales by the "grandfathered" owners if such sales were made, albeit not under compulsion, pursuant to the *new policies*. There, affirmative action by a party that served to bring him into compliance with an express policy of the Commission was held appropriate to effectuate the Commission's policies. In the instant case, there was *no* Commission policy limiting telephone company ownership of CATV systems outside of its operating area.[9]

9. Continental argues that sound business considerations dictated the sale of the 22 non-telephone area CATV systems as necessary or appropriate to effectuate the sale of the 38 telephone area CATV systems. In support of this argument, Continental indicated that potential purchasers were interested in acquiring all of Continental's CATV systems, or such large groups thereof that the remainder would have been unmarketable; that continued operation of the systems outside of the telephone service area would have been unprofitable, as well as more costly and less efficient; that Continental's telephone area CATV systems were generally small and widely dispersed over a large geographic area, and thus from a practical standpoint Continental could not prudently have retained these systems, as losses would have increased due to a loss of efficiencies previously achieved by their operation as part of a larger enterprise; that retention of CATV systems in non-telephone service areas would severely limit Continental's ability to expand its telephone service in those areas; and that had Continental theoretically been able to sell its telephone-area CATV systems alone, it would have suffered financial hardship both by receiving a lower price for its telephone area systems, and by receiving a lower price for the non-telephone area systems.

10. While there is a general Commission policy of avoiding "undue hardship" [10] in the regulation of CATV, no specific showing of hardship was made by Continental. Continental presented no data supporting its assumption that by selling only the telephone area CATV systems it would have received a lower price for those systems; in fact, Continental has presented no evidence indicating that it attempted to sell only the telephone area systems. In its supplemental pleading, Continental made the point that some of its CATV locations were profitable and others were not, and that "Prospective purchasers were not interested in buying unprofitable or low profit CATV systems unless they could also acquire Continental's profitable systems." The pleading goes on to say that the 38 CATV systems within Continental's telephone service area "earned, as a group, $274,648 in 1971.

[9] Therefore, the Commission's Declaratory Ruling of July 16, 1970 (FCC 70–774) and its ruling on RKO General's tax certificate request of March 21, 1973 (Report No. 11385) are inapplicable.

[10] In its reconsideration Report and Order, *Section 214 Certificates*, 22 FCC 2d 746, 750 (1970), in the context of the ambiguous position of telephone companies relative to improving facilities during the pendency of the four year grace period allowed them for divestiture of proscribed cross-ownership, the Commission said:

> Here, as in other areas of CATV regulation, we will endeavor to administer our rules in such a way as to avoid inequitable situations or undue hardship to the public and to the industries involved.

This represents average earnings of $7227 per system." [11] The 22 non-telephone area systems earned, as a group, $183,466 which represents average earnings of $8339 per system. These figures are, roughly, comparable. More to the point, however, are the combined figures representing *what was actually sold* to Kinney; the overall 1971 profit figures were $458,114 which represents average earnings of $7636 per system. The fact that the ultimate sale was made clearly illustrates that the market was willing to consummate a sale based on an average earning figure that was within 5% of the earning figure for the telephone area systems and was about 9% *lower* than the earning figure for the remaining non-telephone area systems. Thus, doubt is cast on Continental's contention that the non-telephone area systems would have had to have been included to either (a) make the sale of the 38 telephone-area CATV systems possible at all, or (b) to leave the remaining 22 non-telephone area CATV systems marketable. What Continental has indicated is that "No qualified potential purchaser was interested in acquiring either Continental's telephone-area or its non-telephone area systems without Danville",[12] a highly profitable CATV system that itself had 1971 profits almost as high as the other 59 Continental CATV systems. Danville, Illinois was outside of Continental's telephone operating area and there was no direct requirement that Continental divest itself of it. Granted, that various more attractive packages could have been made up for sale of combinations of the systems, the ultimate package that was sold was of profitability within about 5% of that of the telephone area systems alone.[13] Also, Continental's statement indicates that it could have sold the 38 telephone-area systems by including Danville. The foregoing analysis is supportive of our conviction that to rationally reflect the necessity or appropriateness of selling the 22 non-telephone area CATV systems in order to effectuate the sale of the 38 telephone area systems, a strong factual showing must be required indicating that determined attempts had been made to effectuate the required sale alone. Such a showing was not made here.[14] Also, Continental's argument that retention of the non-telephone area systems would have been a hardship due to the

[11] Supplemental pleading, p. 4.

[12] *Id.*, 5.

[13] The profitability figures may also be stated in terms of profits per CATV subscriber. Again, the telephone area per subscriber profits are within about 6% of the per subscriber profits for the package that was sold. The profit figures may be summarized as follows. Continental states that it had approximately 70,000 total CATV subscribers of which 62% were within its telephone operating area. Therefore, 43,400 subscribers were within the telephone operating area. The reported profits of telephone area CATV operations in 1971 were $274,648 and the reported profits of the non-telephone area CATV operations were $183,466. Thus, the following chart may be calculated:

	Telephone area	Outside area	Package
1971 Profit	$274,648	$183,466	$458,114
No. of Systems	38	22	60
No. of Subscribers	43,400	26,600	70,000
Profit/subscriber	6.32	$6.89	$6.54
Percentage of the 60 system package profit/subscriber	96.64%	105.35%	100%
Profit/system	$7,228	$8,339	$7,635
Percentage of the 60 system package profit/system	94.66%	109.22%	100%

[14] We have considered Continental's submission of October 22, 1973 and our conclusions herein remain unchanged.

loss of efficiencies previously achieved by their operation as part of a larger enterprise is of doubtful validity. Such systems would have remained a part of Continental itself which is certainly a larger enterprise. Also, due to their own geographic fragmentation, over nine states, it is not clear that these CATV operations had achieved any particular efficiency when they were operated as part of a larger CATV enterprise.[15]

11. Retention of a CATV system outside of its telephone service operating area would not preclude Continental from subsequently rendering telephone service in the area of the CATV system. All that the Rule requires is that a choice be made as to which service would be rendered in that area. Continental would indeed have to dispose of its CATV system in order to render telephone service in such an area, but this would merely be one of the business considerations that would influence the decision as to whether or not it should render such telephone service. Thus, the argument that this alleged future limitation on Continental's principal business—its telephone business—made the sale of all of the non-telephone area CATV systems necessary or appropriate to effectuate the sale of the 38 telephone area CATV systems is unacceptable.

12. Finally, Continental raises the precedent established by *Cosmos Cablevision Corp.*,[16] 33 F.C.C. 2d 393, in support of its request. Cosmos Cablevision was a wholly-owned subsidiary of a television broadcast station, which operated four CATV systems, three within that station's grade-B predicted contour and one *a few miles* outside the grade-B contour. Pursuant to analogous cross-ownership divestiture rules for broadcast-CATV operations, Cosmos divested itself of the four CATV systems, for which sale the Commission issued a tax certificate, based on a finding that the outside system was essentially operated as an extension of one of the in-area systems, that "even if served by separate head-ends, the [in-area] Florence system and the [out-of-area] Marion system essentially constituted a single operational entity; that operation of the Florence-Marion facility as a single entity is in the public interest; and that sale of the Florence cable television system . . . necessitated the sale of the Marion system as well."[17] This conclusion was based on a strong factual showing of a total commonality of management, office and technical personnel, record-keeping, and sales offices between the Florence and Marion system. It was also based on the small size of the Marion system (358 subscribers, relative to the Florence system's 2,800 subscribers).[17]

13. The Cosmos facts are readily distinguished from the facts of Continental's application. Continental has shown no identity of, or

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[15] Note that the non-telephone area operation in Danville, Illinois, which was the single highest profit CATV system in Continental's entire operation, making about 3½ times the per subscriber profit, in 1971, of the per subscriber profits for the entire sold package, was geographically located approximately 135 miles from the regional management headquarters in DeKalb, Illinois and about 80 miles, according to Continental's fourth exhibit in its submitted supplemental pleading, from the nearest Continental telephone operating company, near Terre Haute, Indiana. There was presumably less economy from telephone-CATV operational integration in Danville than in the 38 telephone area systems, yet its profits were apparently far higher.

[16] *Cosmos Cablevision Corp.*, 33 FCC 2d 293, 295 (1972).

[17] *Id.*, Footnote 3 on page 294.

commonality of either its personnel in allied CATV and telephone operations, nor of any two allied CATV systems thereby constituting a "single operational entity". Continental claimed broad, general operational efficiencies available by operation of the entire 60 system CATV package, but did not show that any of the non-telephone area systems were operated with any telephone area CATV systems so as to "essentially constitute a single operational entity" and that sale of any telephone area CATV system thereby, because of such operation, necessitated sale of any non-telephone area system. Nor, unlike the facts of Cosmos, were the non-telephone area CATV systems, overall, very much smaller than the telephone area systems. The 38 telephone area CATV systems served 43,400 subscribers, or 1142 subscribers per system. The 22 non-telephone area systems served 26,600 subscribers, or 1209 subscribers per system, which is about 6% *more* than the telephone area figure.[18]

14. Accordingly, we are granting a tax certificate for that proportionate part of the consideration received for sale of the 250,000 shares of Warner Communications Incorporated stock as could be traced to the sale of the 38 telephone-area CATV systems. Therefore, IT IS ORDERED, That the application File Number CCTAX–3–73 of Continental Telephone Corporation is hereby GRANTED IN PART and DENIED IN PART, and that the Tax Certificate appended hereto be issued to Continental Telephone Corporation.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

CERTIFICATE ISSUED BY THE FEDERAL COMMUNICATIONS COMMISSION PURSUANT TO SECTION 1071 OF THE INTERNAL REVENUE CODE (26 U.S.C. 1071)

Continental Telephone Corporation has reported to the Commission the sale, over the period August 9, 1972 through August 17, 1972 of 250,000 shares of stock of Warner Communications, Inc., which sale was partially to effectuate compliance with new Section 64.601 of the Commission's Rules with respect to the furnishing of CATV service to the viewing public within its telephone service area by a telephone common carrier subject in whole or in part to the Communications Act of 1934 as amended, directly or indirectly through an affiliate owned or controlled or under common control with said carrier.

This stock represented part of the purchase consideration received for sale of 60 CATV systems formerly owned by a Continental Telephone Corporation subsidiary, Continental Transmission Corporation, of which divestiture of 38 of said CATV systems was necessary or appropriate to effectuate the new policy adopted in Section 64.601 of the Commission's Rules, and divestiture of 22 of said CATV systems,

[18] Continental's sale of the 22 non-telephone are CATV systems was completed in December, 1970, and the Cosmos Cablevision tax decision, was adopted January 26, 1972 and released February 1, 1972, thus Continental cannot claim that it relied upon this decision.

enumerated below,[1] was not necessary or appropriate to effectuate the new policy adopted in Section 64.601 of the Commission's Rules.

Accordingly, it is hereby CERTIFIED that such portion of such sale as was allocable to the divestiture of the 38 CATV systems within Continental's telephone service operating area was necessary or appropriate to effectuate the Commission's new rules and policy prohibiting a telephone common carrier from the direct or indirect furnishing of cable television service to the viewing public within its telephone service area, and in particular to effectuate compliance with the provisions of Sections 63.56 and 64.601 of the Commission's Rules, adopted April 22, 1970 and released April 24, 1970 in Docket 18509, 22 FCC 2d 746.

This certificate is issued pursuant to the provisions of Section 1071 of the Internal Revenue Code (26 U.S.C. 1071)

In Witness whereof, I have hereunto set my hand and seal this 31st day of October, 1973.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

DISSENTING STATEMENT BY CHAIRMAN BURCH IN WHICH COMMISSIONERS REID AND HOOKS JOIN

At its best, the regulatory craft consists in the formulation of rules and policies of general application—and applied, moreover, with rationality, predictability, and even-handed neutrality. At worst, these rules and policies become an excuse for capricious Commission intervention into normal business practices and the substitution of its judgment for that of the boardroom and the marketplace. The denial of Continental's application for a tax certificate *covering the totality of its cable system divestiture* is a clear case, in my view, of the latter. It is anchored neither to statute nor precedent.

Over the years, this Commission has made a number of changes in its rules relating to cross-media ownership of communications facilities in the same or neighboring areas. As such rules have been tightened, there has been a continuing necessity for the disposition of interests that were lawfully acquired but later ran afoul these policy modifications. And a frequent consequence of property dispositions thus triggered—by the Commission, not by the property owner—is an unanticipated and unsought tax liability.

The problem is nothing new. Indeed, Section 112(m) of the Internal Revenue Code of 1939—forerunner to Section 1071 which is here at issue—was added in the Revenue Act of 1943 for this very reason. Of particular relevance is the fact that when the U.S. Senate reported out Section 112(m), it was to be operative only for sales "required" by the Commission. 89 *Cong. Rec.* 10957. But by the time it cleared Con-

[1] The twenty-two CATV systems located outside Continental's telephone service areas were, with the operating company in parentheses: Metter, Georgia (CNCI), Elberton, Georgia (CNCI), Cedartown, Georgia (CNCI), Claxton, Georgia (CNCI), Marks/Lambert, Miss. (CNCI), Cedartown, Georgia (CNCI), Claxton, Georgia (CNCI), Marks / (CNCI), Louisville, Miss. (CNCI), Yazoo City, Miss. (CNCI), Houston, Miss. (CNCI), Reston, Va. (CNCI), Denison, Iowa (CNCI), Sac City, Iowa (CNCI), West Point, Nebr. (CNCI), Marshfield, Wisc. (CNCI), Merrill, Wisc. (CNCI), Danville, Ill. (Danville Transmission), Avalon, N.J. (N.J. Transmission), Sea Isle City, N.J. (N.J. Transmission), Stone Harbor, N.J. (N.J. Transmission), Fergus, Minn. (Fergus Cablevision).
N.B. CNCI is Continental National Cable, Inc.

ference Committee, the standard had been modified to reach transactions "necessary *or appropriate* to effectuate the policy of the Commission with respect to the ownership and control of radio broadcasting stations" and was enacted in this form. 90 *Cong. Rec.* 2013, 2050, emphasis added. Thus, legislative history supports the proposition that Congress really meant something by its addition of the words "or appropriate"—and what it meant might very logically have embraced the fact situation before us here.

For its own part, the Commission determined (as stated in its 1953 Annual Report) ". . . that the language of Section 112(m) . . . include[s] . . . voluntary sales. . . ." By 1956, the Commission decided that this view was subject to abuse and modified its standard to provide that tax certificates would be issued only in cases where

> the facility which was disposed of must have been lawful under the Commission's rules and policies when acquired, but have been disposed of because of a change in Commission policy or rules which made retention of the facility inconsistent with such policy or rules. (*Public Notice of September 26, 1956.* FCC 56-919, 14 FCC 2d 827.)

Congress, in effect, ratified this modification in the 1958 Technical Amendments Act (Public Law 85-866, Title I, Section 48(a), 72 Stat. 1642). Section 1071 was rewritten to provide that it applied only in the case of "a change in a policy of, or the adoption of a new policy by, the Commission". This is the legislative background of Section 1071. I read it as providing considerable latitude to the Commission in granting tax certificates as a result of its own policy changes, both in cases of "necessity" (which the present one is not) and of "appropriateness" (which is really the issue before us).

The only Commission decision under Section 1071 that has been reviewed in court was *Jefferson Standard Broadcasting Company*, 14 F.C.C. 2d 823 (1968). In this case a divided Commission refused to grant a tax certificate where a television multiple owner disposed of one of two television stations with overlapping contours after the Commission had modified its duopoly standard (Section 76.636(a)(1) of the Rules) to ban creation of such interests in the future or, of more immediate application, to prevent the improvement of existing facilities. This decision was reversed in *Jefferson Standard Broadcasting Company* v. *Federal Communications Commission*, 305 F. Supp. 744 (D.C.N.C. 1969) which the Commission majority now imply cites (in footnote 8) without discussion. As I read this case, it supports my view that the certificate should have been issued here. Further, as I believe also applies in the case before us, the court found error in the Commission's failure to establish the fact before ruling. (The court noted that "the Commission confesses a second erroneous view of law: that it has no duty to find facts about things its members don't already know personally and that the Commission's certificate is to be based upon a subjective rather than an objective standard".) This is the judicial background of Section 1071. Again, I read it as providing considerable latitude to the Commission in granting tax certificates as a result of its own policy changes.

The thrust of the majority opinion serves largely to obscure the simple issue before the Commission in this case. Continental operated 60 cable television systems (38 in its telephone service areas, 22 outside)

before a Commission rule change barred such cross-ownership. As a direct result of this rule change, Continental was required to divest itself of at least 38 of its cable systems—all 60 of which, according to its brief, "constituted a single operational entity" under a unified technical and administrative team. (The quotation is drawn from a previous Commission ruling, *Media General*, 33 FCC 2d at 295, in which a tax certificate was issued to cover a total divestiture.) The company decided instead to quit the cable television business altogether. It seems to me that this is the sort of business judgment that rational entrepreneurs may and do make. Faced with the fact that it could no longer maintain a major position in the cable industry, management elected to redeploy its assets to areas of greater potential return.

There is simply no doubt that the proximate cause of this decision was the Commission's rule change, and I am satisfied that the action taken was "appropriate" within the meaning and intent of Section 1071. Furthermore, the Commission had before it all the information it could have wanted and, indeed, all the information it had specifically *requested* as to the rationale of Continental's decision to divest fully. Following the Commission's initial discussion of the matter, Continental was asked by our staff to supplement its original request. In response, it supplied the following uncontested affidavit (which I take leave to quote in its entirety, if only because the majority has responded to the affidavit by consigning it to footnote 14, without discussion):

EXHIBIT A TO AFFIDAVIT OF FRANK M. DRENDEL

1. I, Frank M. Drendel, am President of Comm/Scope Company, a wholly-owned subsidiary of Continental Telephone Corporation. During 1970–71, I was Vice-President of Continental Transmission Corporation, the subsidiary which owned Continental's CATV systems.

2. Subsequent to the Federal Communications Commission's Final Report and Order in Docket 18509, Continental's representatives conducted discussions or negotiations concerning the sale of Continental's CATV systems with numerous cable television companies. These companies included the following: American Television and Communications; Cypress Communications; General Instrument Company; Cablecom General; Cox Cable Communications; Telecommunications, Inc.; Donaldson, Lufkin and Jenrette; Television Communications; LVO Cable Company; Great Western Enterprises; Cofer Company; and C–A Cablevision, Inc.

3. Three of these companies expressed an interest in purchasing Continental's "southwest" systems in Arkansas and Texas. These companies were: C–A Cablevision, Inc., a company operating CATV systems in New Mexico; Cofer Company, Dallas, Texas; and Great Western Enterprises, a division of Gulf & Western. These initial expressions of interest never materialized into a firm offer. Continental's Arkansas and Texas systems served, in the aggregate, only 7,588 subscribers, less than 11% of the total subscribers to all of Continental's CATV systems. They included both telephone area and non-telephone area systems.

4. No other expressions of interest were received by Continental for the purchase of less than all of its CATV systems. All of the other companies listed above were interested in acquiring all of Continental's CATV systems as a package. None expressed any interest in acquiring only the CATV systems located in Continental's telephone service areas, or in acquiring any of Continental's CATV systems on a piecemeal basis.

5. In negotiations and discussions with these prospective buyers, Continental received a number of negative comments on the value of its CATV systems, even when offered as a package. For example, General Instrument felt that Continental's asking price was "unrealistically high" even though, as noted in material previously submitted to the Commission, such asking price was below the

per subscribers market value for multiple CATV systems generally. Cox Cable Communications had the same objection, on the basis that Continental's CATV systems were relatively small and could not be operated as efficiently or economically by a non-telephone company. Telecommunications, Inc. raised similar objections.

6. In summary, these specific examples of Continental's discussions and negotiations with prospective purchasers support the conclusions reached in the data previously submitted to the Commission by Continental. All of Continental's CATV systems were considered an operating unit, and all were sold as such. No interest was expressed by prospective purchasers in acquiring less. The sale of all of its CATV systems was, therefore, the only feasible course for Continental to pursue.

* * * * * * *

As noted, the Commission majority has responded to Mr. Drendel's affidavit with a mere footnote reference. It appears to me that this disposition errs gravely, in two respects: first, the affidavit in my view confirms the appropriateness of Continental's action; and, second, even if the affidavit is rejected as not decisive, it is surely sufficient to call for something more than Commission silence. The burden is on the Commission to show that *its* business judgment is somehow superior to that of Continental. The majority makes no such showing of course—and, indeed, my principal point is that it should not even presume to do so.

F.C.C. 73-1156

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
ADOPTION OF FORM 441 AS AN APPLICATION FOR LICENSE AND MODIFICATION THEREOF FOR THE EXPERIMENTAL RADIO SERVICES IN LIEU OF FORM 403, AND AMENDMENT OF PART 5 TO REFLECT THIS CHANGE

ORDER

(Adopted November 14, 1973; Released November 15, 1973)

BY THE COMMISSION:

1. In order to render less burdensome the filing of license applications and modifications thereof in the Experimental Radio Services, (Part 5) it has been determined that present Form 403, which is used by several services should be replaced by Form 441, which is specifically designed for the Experimental Service. A copy of the new form is attached hereto.

2. It is appropriate, in addition, to amend Part 5 of the Rules to reflect this change.

3. Form 403 will continue in use by applicants in Parts 21, 23 and 25 of the Commission's Rules.

4. Authority for these amendments is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

5. Substitution of Form 441 for Form 403 is a procedural matter and will lessen the burden of Experimental Applicants and Licensees. Notice and public procedure are unnecessary and would be contrary to the public interest. The procedural and effective date provisions of Section 4 of the Administrative Procedure Act (5 U.S.C. 553) are therefore inapplicable.

6. In view of the foregoing, IT IS ORDERED, effective November 27, 1973, that Form 441 is adopted and that Part 5 of the Commission's Rules is amended as set forth in the Appendix hereto.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

1. In § 5.55, paragraphs (d) and (f) are revised to read as follows:

§ 5.55 *Forms to be used.*

* * * * * * *

(d) *Application for station license.* Application for station license shall be filed on FCC Form 441 upon completion of construction in accordance with the terms and conditions set forth in the construction permit.

* * * * * * *

(f) *Application for modification of station license.* Application for modification of station license shall be submitted on FCC Form 441. A blanket application for modification of a group of station licenses of the same class may be submitted in those cases where the modification requested is the same for all stations covered by the application. The individual stations covered by such application shall be clearly indicated therein.

* * * * * * *

Federal Communications Commission Reports

6.a. If the answer to Question 6 on the reverse side is "YES", give the following:

Overall height above ground to tip of antenna _____ ft.

Distance to nearest aircraft landing area _____ ft.

Elevation of ground, at antenna site, above mean sea level _____ ft.

6.b. If the answer to Question 6 on the reverse is "YES", in the opinion of the applicant, are there any natural formations or existing man-made structures (hills, trees, water tanks, towers, etc.) which would tend to shield the antenna from aircraft and thereby minimize the aeronautical hazard of the antenna? ____ YES ____ NO

If "YES", list such natural formations or existing man-made structures.

7. CONTINUED

REMARKS:

(): FCC-24

Experimental Radio Services

FCC Form 441 — Form Approved O.M.B. No. 52-R0230 — October 1973

APPLICATION FOR NEW OR MODIFIED EXPERIMENTAL RADIO STATION LICENSE UNDER PART 5 OF FCC RULES

APPLICANTS SHOULD NOT USE THIS BLOCK

File Number | Call Sign

INSTRUCTIONS

A. This form is to be used in all cases when applying for an Experimental Radio Station License, or Modification thereof, under Part 5 of the FCC Rules.
B. Submit in duplicate direct to the Federal Communications Commission, Washington, D. C. 20554.
C. The name of the applicant must be stated exactly as it appears on the Construction Permit which is being covered, or the License which is being modified; explain name-change modifications under Remarks.
D. If there has been no change in any of the information submitted in the application for the Construction Permit being covered, or the authorization issued pursuant thereto, applicant need answer only question 1,2,3, and 4 and sign the Certification.
E. No fees are required with this application.

1. (a) Name of applicant: (See instruction C)

(b) Mailing Address (number, street, city, state, ZIP Code):

2(a) Class of Station _____

(b) Nature of Service _____

(c) Call Sign _____

3. Has there been any change in any of the information submitted in the application for the Construction Permit which is being covered herein or the authorization issued pursuant thereto?

____ YES ____ NO

(See Instruction D)

4. Purpose of application:
License to cover construction permit ____ YES ____ NO
Modification of License 1/ ____ YES
Present File No. _____
1/ Specify in questions 5, thru 8, or under Remarks desired modification.

5. TRANSMITTER LOCATION. If portable/mobile, give geographical area of proposed operation, or, give State, City, County, Street & No. and Latitude/Longitude of fixed location:

Area of Operation	State	City	County	Street & No.	Latitude / Longitude
					° ' " N ° ' " W

6. ANTENNA STRUCTURE. Will the antenna extend more than 20 feet above the ground or natural formation, or if mounted upon an existing man-made structure, will it extend more than 20 feet above such structure? ____ YES ____ NO (If "yes" see Reverse)

7. Give details of any changes in transmitter(s) or antenna systems on Reverse.

8. Specify below, exactly, all particulars of desired operations.

Frequencies (1)	Hours (2)	Power (3)	Emission (4)	Modulating frequency cycles (5)	Points of communication

1. List frequencies, separately, indicating whether kilohertz or megahertz.
2. Indicate as unlimited, day only, continuous, etc. (This item refers to intended hours of use of the specific frequency.)
3. Effective radiated power. Specify whether watts or kilowatts. If pulse emission specify peak power.
4. List each type of emission separately for each frequency. If pulse emission specify pulse duration and pulse repetition rate.
5. Give maximum modulating frequency employed in normal operation opposite type of emission involved.

REMARKS:

CERTIFICATION

All the statements made in the application and attached exhibits are a material part hereof and are incorporated herein as if set out in full in the application. The applicant waives any claim to the use of any particular frequency as of the either as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and request an authorization in accordance with this application.

I CERTIFY that the statements in this application are true, complete, and correct to the best of my knowledge and belief and are made in good faith.

BY _____ _____ _____
(print name of person signed) (signature - describe signer by checking box below) (date)

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND IMPRISONMENT. U.S. CODE, TITLE 18, SECTION 1001.

☐ INDIVIDUAL APPLICANT ☐ AUTHORIZED EMPLOYEE
☐ MEMBER OF APPLICANT PARTNERSHIP
☐ OFFICER OF APPLICANT CORPORATION OR ASSOCIATION

F.C.C. 73-1201

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
ACCURACY IN MEDIA, INC., ON BEHALF OF MARILYN DESAULNIERS CONCERNING FAIRNESS DOCTRINE RE PUBLIC BROADCASTING SERVICE.

MEMORANDUM OPINION AND ORDER

(Adopted November 13, 1973; Released November 15, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER WILEY CONCURRING AND ISSUING A STATEMENT; COMMISSIONER HOOKS DISSENTING AND ISSUING A STATEMENT.

1. By letter of January 23, 1973 (39 FCC 2d 416), we ruled upon complaints filed by Accuracy in Media, Inc. (AIM) against the Public Broadcasting Service in which it was alleged that the broadcasts of programs entitled "the three r's . . . and sex education" and "Justice?" were in violation of the fairness doctrine (see 47 U.S.C. 315) and the provision of Section 396(g)(1)(A) of the Communications Act of 1934, as amended, 47 U.S.C. 396(g)(1)(A), that, "In order to achieve the objectives and to carry out the purposes of this subpart, as set out in section (a), the Corporation is authorized to—

> (A) facilitate the full development of educational broadcasting in which programs of high quality, obtained from diverse sources, will be made available to noncommercial educational television or radio broadcast stations, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature; * * *"

Our letter ruling concluded that there was no basis for a finding of violation of the fairness doctrine. With respect to the issue of the applicability of Section 396, we noted that AIM had not given us the benefit of its views on the novel jurisdictional question it was presenting, and we invited AIM and other interested persons to brief that question separately.

2. Briefs or memoranda, including some replies, have now been submitted by AIM, the Corporation for Public Broadcasting, Horace P. Rowley, III, the Public Broadcasting Service and Daniel Voegtly. AIM has also sought reconsideration of our fairness doctrine ruling in the January 23, 1973 letter. The AIM request for reconsideration points out that it is the right of viewers and listeners to a fair presentation of issues which is paramount, *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, and that the press and media "hold a powerful tool in their hands that can be used as a weapon in molding public opinion," but it does not present any suggestion of how the Commission may have

erred in its original fairness doctrine ruling. The petition for reconsideration will therefore be denied.

3. The parties who have responded to our invitation for comments on our jurisdiction with respect to Section 396(g)(1)(A) have taken widely divergent positions. AIM urges that Congress expected the Commission to take a positive, active role, and to require strict compliance by the Corporation for Public Broadcasting. Mr. Voegtly also believes that the Commission has a duty to enforce Section 396(g)(1)(A), and that "balance is an extension of fairness to a more limited segment of programming," coupled with an effort to present each side of an issue "with similar force and credibility." The Corporation, however, urges not only that we lack jurisdiction over the operations of the Corporation, which it asserts were intended to be free of governmental control and censorship, but that we should also "refrain from engaging in an indirect review of the Corporation's programming determinations" through application of the fairness doctrine to the programs of licensees funded, provided or distributed by the Corporation.[1] AIM disagrees in a reply pleading with the conclusion of the Corporation that Section 396(g)(1)(A) is an unenforceable Congressional mandate, urging that enforcement of that section is no more prohibited censorship than is the enforcement of Section 315. Horace P. Rowley, III states that Section 396 creates a more vigorous standard than we apply under the fairness doctrine, prohibiting editorializing and requiring equal opportunities within a program series for contrasting viewpoints on any "newsworthy" issue. However, while agreeing with the Corporation that the Commission has no control over what he terms the Corporation's internal activities, i.e., the expenditure of money for programs, he contends that the Corporation is a broadcaster and thus is subject to the fairness doctrine under Section 315. He has also furnished a copy of a letter to him from the General Accounting Office stating that that office has tentatively agreed not to concern itself with program selection or content although it has legal authority to do so. Finally, the Public Broadcasting Service, a nonprofit membership corporation made up of noncommercial educational television stations which receive programming distributed by PBS and funded by the Corporation, contends that we should construe Section 396 as imposing no obligation different from that imposed upon licensees by the fairness doctrine, although it suggests that we may not have the authority to enforce the section against the Corporation.

4. As we noted in our letter of January 23, 1973, this is an area of considerable doubt, and the comments we have received, while force-

[1] The Corporation states that the Commission should continue to review the operations of noncommercial stations in other respects, including instances in which a licensee may broadcast only a portion of a program on program series funded by the Corporation. In a subsequent pleading, which we accept, the Corporation clarified its position to make clear that the Commission should not review, even indirectly, the Corporation's programming determinations with respect to programs funded, supplied or distributed by the Corporation, because this would duplicate the Corporation's mandate to achieve fairness (stated by the Corporation to be one substantive test, whether denominated under the fairness doctrine or the objectivity and balance language of Section 396(g)(1)(A)), but that the Commission would continue to apply the Fairness Doctrine "to the overall program schedule of its licensees." The Corporation reads Section 396(g)(1)(A) as applying to individual programs or series and, thus, believes it improper for the Commission to apply the fairness doctrine to any program or series furnished by the Corporation, but proper for the Commission to review a licensee's overall treatment of an issue, including a program furnished by the Corporation. We presume that upon such review, the Commission would have to accept as given the fairness of the program furnished by the Corporation if it was the only program furnished by the Corporation on that issue.

fully advocating various viewpoints, have done little to dispel the doubt. The reason for this is clear. Congress in creating the Corporation for Public Broadcasting focussed largely on that body's structure and responsibilities, and paid scant attention to its relationship, if any, to this Commission. Thus, not only is the statute devoid of specific guidance, but the legislative history is similarly tangential. For the reasons which follow, we have determined that the Commission does not have the authority to enforce Section 396(g)(1)(A).

5. We note first that Section 398 of the Communications Act, 47 U.S.C. 398, provides that nothing contained in Part IV of the Act (the part dealing with grants for noncommercial educational broadcasting facilities (Subpart A) and the Corporation for Public Broadcasting (Subpart B, added by Public Law 90–129, approved November 7, 1967, 81 Stat. 368)):

". . . shall be deemed (1) to amend any other provision of, or requirement under this Act; or (2) to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over educational television or radio broadcasting, or over the Corporation or any of its grantees or contractors, or over the charter or bylaws of the Corporation, or over the curriculum, program of instruction, or personnel of any educational institution, school system, or educational broadcasting station system."

This provision, we think, makes clear that the creation of the Corporation for Public Broadcasting by the Public Broadcasting Act of 1967 should not be construed as conferring regulatory or supervisory jurisdiction over that Corporation in the Commission unless some provision of the Act outside of Part IV either specifically confers such jurisdiction or requires it as a necessary part of the achievement of the Commission's functions. No other part of the statute refers in terms to the Corporation for Public Broadcasting, and an assertion of jurisdiction would necessarily rest upon the general mandate of Section 1, 47 U.S.C. 301, that the Commission "shall execute and enforce the provisions of this Act," and the authority in Section 312(b), 47 U.S.C. 312(b), to order "any person" to cease and desist from violating or failing to observe "any of the provisions of this Act." It is appropriate, in assessing the impact of these provisions, to take account of the facts that the Corporation not only does not operate licensed broadcasting facilities, but is not itself a network, compare *Mt. Mansfield Television, Inc.* v. *FCC*, 442 F. 2d 470 (C.A. 2, 1971), and does not own or operate any interconnection or program production facilities. Indeed, it is forbidden by law from engaging in such activities. See 47 U.S.C. 396(g)(3). It is not engaged in the interstate transmission of communications or energy by wire or radio. Compare *United States* v. *Southwestern Cable Co.*, 392 U.S. 157. In this setting of a Congressionally mandated separation from the normal context of regulatory jurisdiction, the generalized legislative history takes on added significance. That history is redolent of an intent to separate the Corporation from any outside control, specifically including government control. As Senator Pastore stated (113 Cong. Rec. 12986), "Throughout the hearings, universal determination has been expressed that the Corporation have maximum possible freedom from governmental or political interference and control." House Report No. 592, 90th Cong., 1st Sess., on H.R. 6736, p. 15, put it thusly:

104-017—73——3

"How can the Federal Government provide a source of funds to pay part of the cost of educational broadcasting and not control the final product? That question is answered in the bill by the creation of a nonprofit educational broadcasting corporation.

"Every witness who discussed the operation of the Corporation agreed that funds for programs should not be provided directly by the Federal Government. It was generally agreed that a nonprofit Corporation directed by a Board of Directors, none of whom will be Government employees, will provide the most effective insulation from Government control or influence over the expenditure of funds." [2]

Again Congressman Staggers stated (113 Cong. Rec. 26384):

"This bill, after recognizing the need for Federal funds to aid in the production of programs, then addressed itself to solving the problem of how to administer Federal funds for broadcast programs while, at the same time, avoiding Federal control of these programs.

"No one—the administration, the committee, the witnesses—wanted any hint of Federal control of broadcast programs to be permitted.

"Accordingly, the legislation calls for the formation of a separate nonprofit, private corporation to administer funds, both private and public, which will be used to provide high quality programs to the local stations. At all times the local stations have the right to accept or reject any program. The Corporation cannot require that a station broadcast any program. As required under present law, and as will be required under the new law, the sole responsibility for what goes out over the air rests upon the individual station licensee. This bill, I repeat does not impair or affect the existing statutory duty and responsibility of the station licensee."

There is also some indication that Congress may have had in mind reserving to itself the general oversight of the operations of the Corporation. As Senator Cotton stated (113 Cong. Rec. 13003):

"If this bill becomes law, as I hope it will and if, as time goes on, we have occasion to feel that there is a slanting, a bias, or an injustice, we instantly and immediately can do something about it. First, we can make very uncomfortable, and give a very unhappy experience to, the directors of the Corporation. Second, we can shut down some of their activities in the Appropriations Committee and in the appropriating process of Congress with respect to this particular network, if we wish to call it a network in the sense that it is general programming. The Corporation is much more readily accessible to the Senator from South Carolina, any other Senator, or to the Congress, if it desired to correct any injustice or bias which might appear."

6. In the light of the statutory language of Section 398, the clear, if unspecific, intent of Congress to keep the Corporation free of government control, and the detached position the Corporation itself was given with respect to the entire noncommercial educational broadcasting system, we are constrained to hold that we would not be warranted in attempting to oversee the Corporation's execution of its duties.[3] Our view is reinforced by the consideration that the individual stations remain fully responsible for all programs they broadcast; [4] it is there-

[2] At p. 19, "one of the fundamental reasons for establishing the Corporation is to remove the programming activity from governmental supervision."

[3] We also reject Mr. Rowley's view that the Corporation is a broadcaster amenable to Section 315 regulation.

[4] The legislative history leaves no doubt that local stations are to maintain full responsibility for all programming. See S. Rept. No. 222, 90th Cong., 1st Sess., on S. 1160, pp. 11, 14–15; H. Rept. No. 572, 90th Cong., 1st Sess., on H.R. 6736, pp. 18, 20; 113 Cong. Rec. 26384 (Congressman Staggers: "This bill, I repeat does not impair or affect the existing statutory duty and responsibility of the station licensee."). This being so, and in the light of the command of Section 398 that nothing in Part IV shall be deemed to amend any other provision or requirement of the Act, we reject the view of the Corporation that the fairness doctrine should not be applied with respect to programs funded, provided or distributed by the Corporation.

fore unnecessary for us to add a further layer of fairness supervision to our present enforcement of the fairness doctrine with respect to licensees and, where appropriate, networks. This basic jurisdictional determination makes it inappropriate, in our view, for us to interpret for the guidance of the Corporation the meaning of the words "strict adherence to objectivity and balance in all programs or series of programs of a controversial nature."

7. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by Accuracy In Media, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

CONCURRING STATEMENT OF COMMISSIONER RICHARD E. WILEY

It has been suggested that this Commission should assert jurisdiction over the Corporation for Public Broadcasting (CPB) and, thereby, enforce the provisions of Section 396(g)(1)(A). In support of that suggestion, it is pointed out that the Communications Act gives us broad and expansive jurisdiction over all interstate and foreign radio communications, and that it is unreasonable to assume Congress intended to enact an unenforceable statute. When viewed only in this light, it may be argued with some persuasiveness that the Commission should proceed to enforce the requirements of Section 396 with no less vigor than any other portion of the Act. Regardless of whether we *should* assert such regulatory control, a position for which I have some personal sympathy, the simple answer is that we *cannot.*

Congress chose to delimit our otherwise expansive regulatory authority over broadcasting by expressly forbidding this agency from exercising any direction, supervision or control over noncommercial educational broadcasting or CPB (see Section 398). Thus, a clear regulatory distinction was drawn between Subpart B of the Act, which created a tax supported private corporation to develop educational radio and television, and the commercially supported broadcasting system covered elsewhere in the Act. The legislative history, no less than the express limitation of Section 398, indicate that Congress apparently intended to retain direct supervisory control over "public broadcasting," rather than delegate that responsibility to this or any other agency of government. While it may be unrealistic to expect that Congress will assert its prerogative to regulate the on-going activities of CPB, that uncertainty is no warrant for this Commission to arrogate to itself a measure of regulatory authority expressly forbidden by Section 398. The most persuasive argument that we should control the activities of CPB is inadequate in the face of an express provision that we cannot. An agency misconstrues the reach of its regulatory authority when it attempts to control by implication that which it has been denied explicitly. In the absence of Section 398, the assertion of administrative supervision over CPB can be reasonably supported; but that result, however well intentioned, cannot be achieved by first ignoring the jurisdictional strictures creating CPB.

If this appears to be an anomalous regulatory situation it is, nevertheless, beyond this agency to resolve. Under the circumstances, the

only prudent policy is to acknowledge the apparent inconsistency between our regulatory responsibility over broadcasting, in general, and the specific restriction of our authority in Section 398; and to leave it to Congress to take enforcement action where appropriate or to affirmatively delegate that responsibility to this Commission. In the absence of Congressional clarification of our responsibilities, the express prohibition of authority must carry greater weight than the presumed Congressional intent elsewhere in the Act.

DISSENTING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

It is my belief that the Commission either has jurisdiction and authority over the codified activities of the Corporation for Public Broadcasting (hereinafter, CPB) or that such jurisdiction has never been accurately pinpointed and the Commission should assert it. In that connection, and throughout this discussion, I wish to stress that I am maintaining a critical distinction between "regulating" CPB (which I do not advocate) and administering all those provisions of the Communications Act (47 U.S.C. 151 *et seq.*) relating to public broadcasting (47 U.S.C. § 396 *et seq.*).

First, there is no serious doubt that the Commission, by the clear language of the Communications Act and consistent court interpretation, has plenary and expansive authority over all radio and television broadcasting in the nation, including those non-commercial stations CPB was established to serve. The Commission was instrumental in reserving these so-called "public" channels which laid the foundation for CPB, it participated extensively in the legislative process which created CPB, it is called upon regularly by Congress to comment on CPB's activities, including appropriations, and—as with all broadcasting—it assigns frequencies for and licenses to (or withholds licenses from) non-commercial stations according to the same public interest, convenience and necessity standards applicable to all stations. There is no question that individual non-commercial licensees are ultimately responsible for the broadcast of CPB programming, just as commercial stations are responsible for matters supplied by the Commercial networks.

Moreover, the inescapable language of the Communications Act empowers the Commission to "execute and enforce the provisions of this Act", of which Section 396 *et seq.* is an incorporated part.[1] If there is a patent ambiguity arising out of the language of Section 398,[2] the ambiguity should be resolved along the customarily prudent rules of statutory construction; *viz*, in *pari materia* with the entire Communications Act (and the comprehensive regulatory scheme established

[1] Because I consider the principle of overall administration of Section 396 *et seq.* to transcend the narrow issue of adjudication of 396(g)(1)(A) complaints presented by the instant case, I merely explain parenthetically that I construe the "objectivity and balance" portions to mean no more than conventional fairness doctrine (§ 315(a)(4)) obligations in different terms.

[2] Section 398 (47 U.S.C. § 398) states as follows:

> Nothing contained in this part shall be deemed (1) to amend any other provision of, or requirement under this Act; or (2) to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over educational television or radio broadcasting, or over the charter or bylaws of the Corporation, or over the curriculum, program or instruction, or personnel of any educational institution, school system, or educational broadcasting station or system.

thereby) with preponderant attention to the unequivocal edict of Section 1 of the Act that the Commission "administer and enforce" the Act, Section 396 included. And, unless it is assumed that it is the primary purpose of Congressional law to disrupt and confound the activities of the populace, it cannot be reasonably argued that administration and enforcement of a duly adopted statute (Section 396, for example) is the type of "interference" intendedly proscribed by Section 398; the proposition that equitable administration of federal law is coextensive with "direction, supervision or control" (47 U.S.C. § 398) is, on its face, uniquely cynical. Hence, I find the apparent conflict between Sections 1 and 398 of the Communications Act illusory rather than real and our administration of those portions of the Act pertaining to CPB wholly consistent with law.

Additionally, the argument that seeks to equate the Commission's regulatory responsibilities with respect to CPB to our lack of jurisdiction over commercial television networks falls from two myopic infirmities. The argument to which I advert is that, as in the case of commercial broadcasting, we have jurisdiction only over individual licensees rather than the central program sources. The two flaws are: (1) CPB is not a network and, in fact, is expressly barred from being one by Section 396(g)(3); and, (2) while there is not a single reference to commercial networks in the Communications Act, let alone a conferral of jurisdiction, there are many and specific regulations relating to CPB's powers, duties, and limitations. Thus, any such analogy is, *prima facie*, inapposite.

There are in the larger sense, however, other more compelling (if not more cogent) reasons why the Commission is the proper body to ensure CPB's compliance with the Communications Act. Inasmuch as it is obvious that *somebody* must administer those laws relating to CPB, it is my contention that the Commission, an independent, bipartisan regulatory agency, whose members are appointed by the President with the advice and consent of the Senate, and whose actions are subject to established, reasonably expeditious review by the judicial and legislative branches of government, is the most appropriate entity to handle the task. In addition to the foregoing properties, the Commission—with all attendant faults and errors—executes the difficult and sensitive regulation of broadcasting on a day-to-day basis and, I believe, has evolved a better "feel" (for lack of a more precise characterization) for such matters than any other existing body.

While I suppose that an aggrieved party could refer alleged violations of Section 396 to the Department of Justice for prosecution, that places the Executive Branch of government in "control" of codified CPB activities.

This not only leaves room, theoretically, for partisan application but limits the usefulness of the doctrine of primary jurisdiction of an administrative agency under which initial claims can receive thorough consideration. On the other hand, with all due deference to the Senator who suggested that Congress could control CPB through its appropriations function, "purse-string" power is far from the most appropriate or effective manner of administering delicately etched law. It is for that reason that Congress has provided the Commission

with a full panoply of administrative prerogatives in the broadcast field from declaratory rulings,[3] to cease and desist, to forfeiture, to short-term renewal, to revocation, to injunction [4] and so on in order that the regulatory actions can be shaped to best serve the ends of justice and the public interest. "Purse-string" power, especially in the case of multi-year appropriations, is likely to mean too little (or too much) too late; it lacks the flexibility required to fashion adequate resolutions and the public—whose funds and frequencies are involved—has no significant entree into Congressional budgetary proceedings while it is accustomed to, and regularly does, direct its inquiries and grievances about non-commercial broadcasting to the Commission, as witness the instant complaint. Consequently, abjuration in the instant matter has effectively deprived any complainant of a forum wherein the matter of possible violations can be thoroughly considered and adjudicated. To my way of thinking, that result is manifestly unsatisfactory.

Finally, it cannot be asserted with exceptional rationality that the Commission (as opposed to some other power) should not be entrusted with the fragile chore of administering those Communications Act provisions applying to CPB because of the potential for official mischief or abuse. Congress and the courts have already entrusted the Commission with immense power to regulate the nearly 10,000 broadcast stations in this country and, considering the overwhelmingly greater audiences and influence of the commercial stations, Commission administration of CPB's statutory obligations is likely to have on national communications (in the words of the late Senator Everett Dirksen) "all the impact of a snowflake on the bosom of the Potomac." If the Commission cannot be entrusted to fairly administer the Communications Act provisions relating to CPB (with a $45 million dollar a year budget and fewer than 1,000 non-commercial station outlets), then it is illogical to presume that it can fairly regulate the powerful, multi-billion dollar broadcast industry, with its 26,000 (approximately) services.[5] And, in repetition, should any such errors or abuses occur, they are immediately and reassuringly subject to judicial correction.

In view of the above, and fully comprehending the serious and touchy political implications of this posture, I believe we have incorrectly avoided a legitimate regulatory obligation.

I respectfully dissent.

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[3] 5 U.S.C. § 554(e).
[4] Seriatum, 47 U.S.C. §§ 312, 503, 309, 312, 401.
[5] *38th Annual FCC Report*, p. 160 (1972).

F.C.C. 73-1189

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS. (SIOUX FALLS, S. DAK. AND WINDOM, MINN.)	Docket No. 19734 RM-1987

REPORT AND ORDER

(Adopted November 14, 1973; Released November 19, 1973)

BY THE COMMISSION:

1. The Commission has under consideration its Notice of Proposed Rule Making adopted May 9, 1973 (FCC 73-488, 38 Fed. Reg. 13389), inviting comments on a proposal to assign Class C Channel 284 to Sioux Falls, South Dakota, and to substitute Channel 232A for Channel 285A at Windom, Minnesota. This proceeding was instituted on the basis of a petition filed by John L. Breece (petitioner), licensee of AM Station KXRB (daytime-only) at Sioux Falls. There were no oppositions to the proposal. Supporting comments were filed by petitioner.

2. Sioux Falls has a population of 72,488 [1], is located 165 miles north northwest of Omaha, Nebraska, and is the seat of Minnehaha County which has a population of 95,209 persons. Sioux Falls has one Class A and three Class C FM channels (all of which are occupied), and six standard broadcast stations of which four operate unlimited time.

3. Petitioner states that Sioux Falls is the largest city in South Dakota; is the hub and trade center for a large regional area encompassing parts of three States; is situated in the richest part of the area so far as farming and livestock interests are concerned; and is a growth area which is adding at least a thousand residents per year and expanding economically. Petitioner states that although there are four FM stations in the Sioux Falls area, one of the Class C channels is operated in a non-profit, religiously-oriented manner, and the station operating on the Class A channel gives limited coverage of the rural area. The other two Class C stations, petitioner avers, are oriented primarily to the Sioux Falls city residents whereas there is a need for programming from a station interested in the people of the outlying towns and rural territory. He contends that as the licensee of Station KXRB, a daytime-only AM station, his programming is specially directed to and interested in the kind of area involved including country and western music, carefully prepared farm and livestock marketing reports, as well as public affairs and news offerings reflect-

[1] All population figures cited are from 1970 U.S. Census.

ing such interests. He also points out that KXRB is not only a daytimer, but its presunrise authority is only 46 watts so that the ability to deliver its unique and very pertinent programming to the region is sharply restricted. Petitioner expresses an intent to apply for the use of the channel and, if authorized, to construct a station which in addition to technical superiority, would enable him to offer his service on a full-time basis to the whole area, early in the morning, as well as in the evening and he will provide the only FM station in eastern South Dakota with this kind of program orientation.

4. Petitioner states that if Channel 285A, now assigned and unoccupied in Windom, Minnesota, were deleted from the FM Table, and if a site were chosen approximately 21 miles west-northwest of Sioux Falls, then Class C Channel 284 could be utilized at Sioux Falls.[2] With this site location, Channel 284 would meet the rule requirement concerning spacing between co-channels and adjacent channels and could deliver a community-grade signal to Sioux Falls. Channel 232A could be assigned as a substitute at Windom, conforming with the Commission's minimum mileage separation rule.

5. The preclusion study showed that the proposed assignment of Channel 284 to Sioux Falls would foreclose future assignments on Channels 283, 284, 285A and 286. It would appear that since the precluded areas fall in the central and east central portions of South Dakota where few FM stations and/or allocations exist, there are a number of other channels available for assignment to communities located within the precluded areas. However, since the precluded area also included portions of southwestern Minnesota and northwestern Iowa, our Notice stated that information as to the availability of other channels to southwestern Minnesota and northwestern Iowa should be submitted. The Notice also pointed out that since Sioux Falls, with a population of 72,488, has been allocated its full quota of assignments, a substantial showing of need must be made. The Notice further stated that one factor in such a showing is whether a station operating on the proposed channel assignment would provide a first and second FM service to any area and population now deprived of or limited to one FM service, according to the *Roanoke Rapids-Goldsboro, N.C.* criteria (9 F.C.C. 2d 672 (1967)).

6. In an engineering statement attached in support of its comments, petitioner shows that the communities located in the areas precluded on Channels 283, 284 and 286 either have existing facilities and channel assignments or are not sufficiently large to warrant an assignment of a Class C channel. However, it indicates that there are at least three other Class C channels available for assignment. He further shows that in the area where Channel 285A would be precluded, several

[2] Petitioner stated that it fully intended to construct an FM facility at the reference site stated in its March 1972 petition for rule making that would allow him to operate an FM facility at 100 kW ERP with a HAAT of at least 500 feet. Preliminary exhibits were prepared specifying a tower that would allow 500 feet and then submitted to the FAA for tentative approval. The FAA indicated that the tower height was too high from aeronautical considerations for this area and would approve a tower only if it was considerably shorter. Petitioner stated he knew he could not provide superior service with the shorter tower and therefore chose a new reference site approximately 4.35 miles due north of Humboldt, South Dakota, and located approximately 21.2 miles west-northwest of Sioux Falls, South Dakota, which would qualify for a reasonably high tower. Due to this extensive move of reference site an additional study was made to determine if the site was compatible with respect to the spacing requirements.

other Class A channels are also available for assignment to the communities located therein. As to first and second FM services, the petitioner shows that a station operating on Channel 284 with 100 kW and 660 feet HAAT at a specified site would provide a first FM service to 1,792 persons in an area of 342 square miles and a second service to 3,473 persons in an area of 398 square miles.

7. We believe that Channel 284 should be assigned to Sioux Falls, South Dakota. Although the assignment of the channel would exceed the quota set forth in the FM guidelines, these guidelines are not immutable standards. Since it has been shown that there are a number of other channels available for assignment to communities that are located within the precluded areas, that all of the channel assignments to Sioux Falls are in use, that there is a channel available for assignment at Sioux Falls, that there is a demand for its use, and that assignment of the additional channel could provide for an FM station which could render a first and a second FM service to some areas, the public interest would be served by the assignment.

8. Authority for the adoption of the amendment contained herein appears in Sections 4(i), 303, and 307(b) of the Communications Act of 1934, as amended.

9. In view of the foregoing, IT IS ORDERED, That effective December 28, 1973, Section 73.202(b) of the Commission's Rules, the FM Table of Assignments IS AMENDED to read as follows:

City:	*Channel No.*
Sioux Falls, South Dakota	223, 228A, 243, 247, 284[1]
Windom, Minnesota	232A

[1] Any application for this channel must specify an effective radiated power of 100 kW and antenna height of 650 feet above average terrain or equivalent.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1158

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 2 OF THE COMMISSION'S RULES TO CONFORM, TO THE EXTENT PRACTICABLE, WITH GENEVA RADIO REGULATIONS, AS REVISED BY THE SPACE WARC, GENEVA, 1971	Docket No. 19547

MEMORANDUM OPINION AND ORDER

(Adopted November 14, 1973; Released November 19, 1973)

BY THE COMMISSION:

1. The Commission, on July 26, 1973, adopted a Memorandum Opinion and Order which was published in the Federal Register on August 2, 1973 (38 FR 20618), and which amended footnote NG105 to the Table of Frequency Allocations (Section 2.106 of the Commission's Rules and Regulations) to read as follows:

NG105 Pending adoption of specific rules concerning sharing of the band 11.7–12.2 GHz between the Broadcasting Satellite and Fixed-Satellite Services, systems in those Services may be authorized on a case-by-case basis subject to the condition that adjustments in certain systems design or technical parameters (including, but not limited to orbital locations, channel use, etc.) may become necessary during the system lifetime in order to accommodate use of the band by systems of the same or other service.

This action was in response to a Petition for Reconsideration of the Commission's action taken in the Report and Order in this proceeding on February 14, 1973 (38 FR 5502) which was filed by CML Satellite Corporation on March 26, 1973.

2. On August 17, 1973, the Association of Maximum Service Telecasters (AMST) filed a Petition for Reconsideration of the July 26, 1973, Memorandum Opinion and Order requesting modification of the revised footnote NG105 which, as modified, now permits authorization of systems in the broadcasting-satellite service on a case-by-case basis. AMST cites the need for consideration of the public impact of such a policy change in an appropriate rulemaking proceeding before any applications for a broadcasting-satellite systems can be considered, experimentally or otherwise. AMST also points out that such action is contrary to policy previously stated by the Commission in this proceeding and that no reason exists for taking such action at this time.

3. We agree in part with the arguments set forth by AMST. Our intent in modifying NG105 was to permit CML to proceed with the construction of a domestic fixed-satellite system in the band 11.7–12.2 GHz without foreclosing the development of a satellite broadcasting service in that band, should a viable system be developed and be deemed to be in the public interest, convenience, and necessity. It was

also our intent to indicate that the 11.7–12.2 GHz band was available for the development of a broadcasting-satellite system and that systems in the two services (i.e. fixed-satellite and broadcasting-satellite) would have to share the band to the extent of making whatever system modifications became necessary in order to do so. It was not intended, however, to circumvent a need for ascertainment of public need for a broadcasting-satellite service nor to foreclose development of public policy in that regard. To that extent therefore, the wording of footnote NG105, as adopted in the Memorandum Opinion and Order on July 26, 1973, was inadvertent. We do not however, construe this as prohibiting us from authorizing experimental broadcast operations in this band if we find it in the public interest to do so.

4. Accordingly, in order to clarify our intent, we are revising footnote NG105 to the Table of Frequency Allocations Section 2.106, to read as follows:

NG105 Pending adoption of specific rules concerning sharing of the band 11.7–12.2 GHz between the Broadcasting-Satellite and Fixed-Satellite Services, systems in the latter service may be authorized on a case-by-case basis subject to the condition that adjustments in certain system design or technical parameters (including, but not limited orbital locations, channel use, etc.) may become necessary during the system lifetime in order to accommodate use of the band by systems of the same or other service.

5. Accordingly, IT IS ORDERED, pursuant to Sections 4 and 303 of the Communications Act of 1934, as amended, that footnote NG105, Section 2.106, of the Commission's Rules and Regulations IS AMENDED as reflected above effective January 2, 1974.

6. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by AMST IS GRANTED as reflected herein.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1172

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of GENERAL TELEVISION OF MARYLAND, INC. SALISBURY, MD. For Certificate of Compliance	CAC-846 MD013

MEMORANDUM OPINION AND ORDER

(Adopted November 14, 1973; Released November 20, 1973)

BY THE COMMISSION:

1. On July 10, 1972, General Television of Maryland, Inc., operator of a cable television system in Salisbury, Maryland, a smaller television market, submitted an "Application for Certification," pursuant to Section 76.11(b) of the Commission's Rules, requesting certification for the following television broadcast signals:[1]

WBOC-TV (ABC/CBS/NBC, Ch. 16), Salisbury, Maryland.
WCPB (Educ., Ch. 28), Salisbury, Maryland.
WTTG (Ind., Ch. 5), Washington, D.C.
WBAL-TV (NBC, Ch. 11), Baltimore, Maryland.
WJZ-TV (ABC, Ch. 13), Baltimore, Maryland.
WMAR-TV (CBS, Ch. 2), Baltimore, Maryland.
WTOP-TV (CBS, Ch. 9), Washington, D.C.
WMAL-TV (ABC, Ch. 7), Washington, D.C.
WRC-TV (NBC, Ch. 4), Washington, D.C.
WDCA-TV (Ind., Ch. 20), Washington, D.C.

General asserts that these signals are all grandfathered pursuant to Section 76.65 of the Rules.

2. WBOC-TV, Inc., licensee of Station WBOC-TV, Salisbury, Maryland, filed an "Objection to Application for Certification and Request for Temporary Relief" on September 8, 1972. WBOC-TV asserts that four of the Washington, D.C. signals, WTOP-TV, WMAL-TV, WRC-TV, and WDCA-TV, are not grandfathered under Section 76.65 because General's notification, dated August 11, 1967 and issued pursuant to former Section 74.1105 of the Rules, gave insufficient notice of its intention to carry the disputed signals, and because full-time carriage of these signals, "does not appear to have begun" until after March 31, 1972.[2] In particular, WBOC-TV maintains

[1] Salisbury has a population of 39,000, and General was serving 10,180 subscribers as of December 31, 1972. The cable system commenced operations in 1960 and currently has 12 channels available for carriage of broadcast and access services. Of these channels, ten are used for television signal carriage, one for a community calendar message wheel and background music, and one for non-automated program originations.

[2] Additionally, WBOC-TV contends that the letters of notification were invalid because no copies were filed with the Commission. This contention is rejected. The intent of Section 74.1105 was to insure that interested parties received notice of proposed cable carriage and that there was a specific time in which to object. Since WBOC-TV concedes that it received actual notice of General's proposed carriage, failure to file copies with the Commission would not invalidate the notice given. Compare *West Valley Cablevision, Inc.*, FCC 69-896, 19 FCC 2d 431.

that General's letter was not sufficient notification because it specified that "[i]t is not General's intention to carry all of these signals at the same time on its CATV systems, nor does it intend to carry all the programming broadcast by any one of these stations." WBOC–TV claims that it interpreted this letter to mean that General would be carrying only occassional programs from the four Washington, D.C. stations, and it had no objection to such occasional programming. WBOC–TV argues that this interpretation was borne out by the occasional carriage of those signals between 1967 and 1972. Accordingly, WBOC–TV requests that the Commission limit General's carriage of WTOP–TV, WMAL–TV, WRC–TV, and WDCA–TV to the occasional carriage for which General gave notice. In its reply, General asserts that it was carrying the Washington, D.C. stations regularly prior to March 31, 1972.

3. We find WBOC–TV's opposition insufficient to refute General's claim that the Washington, D.C. signals were grandfathered prior to March 31, 1972. WBOC–TV concedes that it did receive notice in 1967 of General's proposed carriage of the four Washington, D.C. stations. The notice did not state that carriage of the programming would be occasional. Although the cable system was small, it was forseeable that the programming of these Washington, D.C. stations might be substituted to a large extent for programming it was then carrying or that the then five-channel system might be expanded to allow it to carry all of the programming from these stations. WBOC–TV failed to follow the procedure available to it to protest carriage of these signals in 1967 (nor did it object at any time thereafter, until General filed its certification application five years later). Therefore, General has been authorized to carry the signals since 1967.[3] The fact that it has not carried all of the signals at the same time, nor all of the programs of each station, does not negate the authorization.

4. General's franchise, which was renewed in August, 1971 for the ten-year period of beginning August 28, 1972, is in full compliance with Section 76.31 of the Rules, except that it contains no provision, consistent with Section 76.31(a)(6), requiring modifications of Section 76.31 to be incorporated into the franchise within one year of the adoption of such modifications. Since all other franchise provisions are in order, we believe that it is appropriate to grant a certificate of compliance to Salisbury until August 28, 1982; however, we will delay issuance of the certificate, pending receipt of a franchise amendment that satisfies the requirements of Section 76.31(a)(6).

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Objection to Application for Certification and Request for Temporary Relief" filed by WBOC–TV, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the above-captioned application (CAC–846) filed by General Television of Maryland, Inc., IS GRANTED and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[3] *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 123, 143 n. 58.

F.C.C. 73R-382

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of INTERCAST, INC., SACRAMENTO, CALIF.	Docket No. 19516 File No. BPH-7669
EDWARD ROYCE STOLZ, II, TR/AS ROYCE INTERNATIONAL BROADCASTING, SACRAMENTO, CALIF.	Docket No. 19611 File No. BPH-7924
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted November 13, 1973; Released November 14, 1973)

BY THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Intercast, Inc. (Intercast) and Edward Royce Stolz, II, tr/as Royce International Broadcasting (Stolz) for authorization to construct a new FM broadcast station in Sacramento, California. It was designated for hearing by the Commission on various issues by Memorandum Opinion and Order, FCC 72-916, 37 FR 23201, published October 31, 1972.[1] A hearing was held and the record was closed on June 14, 1973. Now before the Review Board is a second petition to enlarge issues, filed July 27, 1973, by Stolz, requesting that the record be reopened and that a misrepresentation and lack of candor issue be added against Intercast.[2]

2. Stolz, in his first petition to enlarge issues, filed June 19, 1973, requested legal qualifications and Rule 1.65 issues against Intercast, based on its alleged failure to pay the California corporation franchise tax, and the resultant suspension of its charter by the state. Intercast, on July 12, 1973, filed an opposition to that petition containing three documents which were represented as the respective affidavits of Intercast principals Kenneth Ponder, Jesse Session, and Robert Harvey. It has since been admitted by Intercast that two of these documents (the Session and Harvey statements) were not in fact genuine affidavits, but forgeries;[3] however the misrepresentation and lack of candor alleged by Stolz in his second petition arise

[1] The application of California Stereo, Inc. was also designated for consolidated hearing with those filed by Intercast and Stolz, but was subsequently dismissed with prejudice for want of prosecution. See the Administrative Law Judge's Order, FCC 73M-444, released April 11, 1973.

[2] Also before the Board are the following related pleadings:
(a) opposition, filed August 27, 1973, by Intercast; (b) Broadcast Bureau's comments, filed August 27, 1973; (c) petition for leave to file extraordinary pleading, filed August 28, 1973, by Intercast; (d) comments on (b), filed August 28, 1973, by Intercast; (e) reply, filed September 6, 1973, by Stolz; (f) petition for leave to file response to (e), filed September 18, 1973 by Intercast; and (g) response to (e), filed September 18, 1973 by Intercast. The petitions filed by Intercast on August 28 and September 18 are unopposed and will be granted.

[3] See paragraph 5, *infra*.

from the *content* of the documents rather than from their lack of authenticity. The affidavit of Kenneth Ponder stated that neither he nor any other Intercast principal was aware of the suspension of Intercast's corporate charter until Washington counsel informed Ponder on June 20, 1973, of the filing of Stolz's first petition; it further declared that Intercast had hired an accountant to deal with such matters as the California corporate franchise tax, but that this person had contracted terminal cancer and, perhaps as a result, had failed to inform the Intercast principals that the tax was due. The purported affidavit of Jesse Session stated that he visited the offices of the California Franchise Tax Board, paid the past due tax and received a certificate of revivor; it added that, while Session was doing this, he learned that "the address they had for Intercast, Inc., was Robert Harvey's former address at 1725 23rd Street, Sacramento." The purported affidavit of Robert Harvey stated that he had "been informed" that the Tax Board had listed his "former residential address at 1725 23rd Street, Sacramento" as the address for Intercast, that he did not know how they obtained this address, that he moved from this address prior to April, 1972, and that he never received the notice of suspension issued in April, 1972, or was otherwise aware of the suspension until June, 1973.

3. Stolz, in his second petition,[4] asserts that the three Intercast principals did know, or at least should have known, that California corporations are suspended if they fail to pay annual franchise taxes, since Intercast had already been suspended in 1971 for that very reason. Moreover, petitioner argues, it is probable that, despite their disclaimers, Ponder, Session, and Harvey actually did have notice of the 1972 suspension. Stolz submits a document which allegedly shows that, contrary to the sworn statements of Harvey and Session, the Tax Board listed Harvey's address both as 7025 23rd Street and as 7023 23rd Street, but never as 1725 23rd Street. Petitioner assumes that 7025 23rd Street is Harvey's correct address, and this, coupled with what he calls Harvey's "weasel words" (*e.g.*, "I have been informed") and Session's failure to produce corroborative evidence from the Tax Board, leads him to infer that Intercast was apprised of its 1972 suspension and that Harvey and Session deliberately attempted to mislead the Commission in this regard. Stolz also attacks Ponder's affidavit, calling it "evasion and double talk". He questions Ponder's claim that no Intercast principal knew of the suspension until June, 1973, and avers that the description of the alleged illness and misfeasance of Intercast's accountant is entirely lacking in vertifiable detail.

4. In its comments, the Broadcast Bureau cites a number of inconsistencies and omissions in the three "affidavits" submitted by Intercast. For example, the Bureau notes, it is not clear whether it was in fact the Tax Board's practice to notify corporations of taxes due and of suspensions, and if such notice was given, whether Harvey or Intercast's accountant was supposed to receive it. The Bureau also agrees with Stolz that more information about this accountant should be supplied. The Bureau further points out that it is uncertain whether Session informed Harvey, Ponder or both of the incorrect address

[4] Stolz's first petition was denied by the Board, by Memorandum Opinion and Order, FCC 73R–316, 28 RR 2d 367, released September 6, 1973.

allegedly used by the Tax Board, or whether they were told by someone else. In the Bureau's view, Intercast should more fully explain these matters. In addition, the Bureau objects to Ponder's speaking on behalf of the other principals as to their lack of knowledge of Intercast's suspension. Accordingly, it would have the Board require Intercast's other principals to speak for themselves on this point.

5. Intercast, in its opposition, reveals for the first time that the purported affidavits of Harvey and Session were not, in fact, prepared and signed by them, but by Ponder, Intercast claims: that Ponder had discussed the situation with the other two men and knew all the statements in the three documents to be true; that Session had ratified his affidavit by telephone and had authorized Ponder to sign in his behalf; that Harvey had been unavailable when the documents were prepared but had previously authorized the other two to act for him and subsequently ratified his purported affidavit as his own; and that all three had acted, not with the intent to deceive or mislead the Commission, but "under the constraints of time pressure and with the desire to have the questions raised in Stolz's petition . . . resolved as expeditiously as possible." [5] Intercast further argues that the affidavits were factually correct except for a single detail, namely, the former address of Harvey. According to Intercast, the affidavits were intended to state that the Tax Board had *7025* 23rd Street as Harvey's address, and that he had moved from *that* address prior to April, 1972,[6] and therefore never received the notice of suspension issued at that time. The substitution of 1725 for 7025 was, according to Intercast, simply a typographical error which neither Ponder nor Session noticed. Intercast then asserts that Stolz has built practically his whole case on this typographical error, and insists anew that none of its principals was aware of the suspension. It argues that "little point would have been served" by indicating who told Harvey about the incorrect address, or by producing supporting documents from the Tax Board. As for its failure to provide details about its accountant, Intercast declares that it "did not wish to drag the accountant's name and reputation through the public records of the Commission as it did not believe they were particularly relevant to the issue before the Commission."

6. In reply, Stolz argues that the forging of signatures by Ponder and the condonation of this act by Session and Harvey cannot be overlooked regardless of purpose or objective, but rather requires the addition of basic as well as comparative issues. Moreover, Stolz claims, the admission contained in Intercast's opposition "renders suspect every representation made by Intercast" during the course of this proceeding. In particular, Stolz asserts, Intercast's explanation of its failure to provide details about its accountant is "transparent". Responding to this, Intercast reiterates that its principals' acts, while "misguided," were not intended to deceive the Commission, nor was there any material misrepresentation.

7. To add issues in this proceeding, it would first be necessary to reopen the record. It is well established that a petition to reopen must

[5] Another trio of affidavits is submitted in support of these claims.
[6] Elsewhere in its opposition, Intercast lists the actual date of Harvey's change of address as June, 1971.

be supported by newly discovered evidence; that the facts relied upon must show that petitioner could not with due diligence have known or discovered such facts earlier; and that the new evidence must be such that it would, if true, be of decisional significance. See *La Fiesta Broadcasting Company*, 2 FCC 2d 255, 6 RR 2d 884 (1965), and cases cited therein. The Board is of the view that Stolz has failed to meet this standard. True, he has pointed out numerous lacunae in Intercast's account of its suspension and reinstatement. But he has offered no allegations raising a substantial question of wrongdoing, only theory and conjecture; and we have no reason to doubt Intercast's assertion that the only affirmative fact petitioner has alleged (*i.e.*, that the Tax Board had 7025 and not 1725 23rd Street as Harvey's address) is founded on a typographical error. In short, Stolz's argument is wholly inadequate to support the addition of misrepresentation and/or lack of candor issues. *Cf. Theodore Granik*, 12 FCC 2d 208, 12 RR 2d 803 (1968). Therefore, we will not add the issues requested by Stolz.

8. However, a serious question has been raised as to the character qualifications of Intercast's principals. Intercast concedes in its opposition pleading that it knowingly submitted to the Commission documents which purported to be, but in fact were not, affidavits. Moreover, it appears that the purpose of this conduct was to persuade the Commission that such documents were properly signed and sworn. The claim that Intercast so acted only to insure timely filing of these documents is unpersuasive, for the Commission has frequently permitted applicants who face filing deadlines to submit affidavits in unsworn form initially and to supply the proper authentication at a later date.[7] Nor is it sufficient that there may have been no material misrepresentation of fact and no motive to mislead. Even if this were true, "the willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones." *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 227 (1946). In support of its claim that there is no basis here for the addition of issues, Intercast cites the Commission's Decision in *Jane A. Roberts*, 29 FCC 141 (1960). There, an applicant was granted a construction permit even though she had allowed her husband to sign her name to numerous documents and had denied doing so in sworn testimony. But that was a final decision issued after a full evidentiary hearing had been held. It is more significant for our present purposes that the Commission had earlier believed that these matters raised sufficiently serious questions to warrant the designation of issues. See *Jane A. Roberts*, 23 FR 7153 (1958). The fact that Mrs. Roberts' application was ultimately granted does not mean that issues should not have been designated against her in the first place or that issues should not now be specified against Intercast. "[T]he favorable resolution of issues after a full evidentiary hearing does not necessarily mean that the specification of these issues in the first instance was unwarranted." *Alabama Microwave, Inc.*, 21 FCC 2d 549, 553, 18 RR 2d 475, 480 (1970), review denied FCC 70–652, released June 26, 1970. In view of the foregoing, we believe that a full inquiry into the facts and circumstances pertaining to the preparation and submission of the forged affidavits is war-

[7] See, *e.g.*, *H & H Broadcasting Company*, — FCC 2d —, 28 RR 2d 817, 819, n.5 (1973).

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ranted. See *WIOO, Inc.*, 37 FCC 2d 740, 25 RR 2d 567 (1972). On the Board's own motion, then,[8] the record will be reopened and an appropriate issue added.

9. Accordingly, IT IS ORDERED, That the petition for leave to file response to reply, filed September 18, 1973, by Intercast, Inc., IS GRANTED, and the response IS ACCEPTED; and

10. IT IS FURTHER ORDERED, That the petition for leave to file extraordinary pleading, filed August 28, 1973, by Intercast, Inc., IS GRANTED, and the pleading IS ACCEPTED; and

11. IT IS FURTHER ORDERED, That the second petition to enlarge issues, filed July 27, 1973, by Edward Royce Stolz, II, IS DENIED; and

12. IT IS FURTHER ORDERED, on the Review Board's own motion, That the record herein IS REOPENED and that the issues in this proceeding ARE ENLARGED to include the following issue:

To determine whether Messrs. Kenneth Ponder, Jesse Session, and/or Robert Harvey, and/or Intercast, Inc., have made misrepresentations or abused Commission processes or been lacking in candor with respect to documents purporting to be affidavits submitted to the Commission on July 12, 1972, and if so, the effect of such conduct on the applicant's requisite and/or comparative qualifications to be a Commission licensee.

13. IT IS FURTHER ORDERED, That the burdens of proceeding and proof under the foregoing issue SHALL BE on Intercast, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[8] See *Charles County Broadcasting Co., Inc.*, 25 RR 903 (1963); *Athens Broadcasting Co., Inc.*, 37 FCC 2d 374, 25 RR 2d 483 (1972).

F.C.C. 73R–378

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of KALT–FM, INC., ATLANTA, TEX.	Docket No. 19782 File No. BPH–7881
GLORIA D. HERRING AND A. T. MOORE, D/B AS CASS COUNTY BROADCASTING COMPANY, ATLANTA, TEX. For Construction Permits	Docket No. 19783 File No. BPH–7948

MEMORANDUM OPINION AND ORDER

(Adopted November 9, 1973; Released November 13, 1973)

BY THE REVIEW BOARD:

1. The above-captioned, mutually exclusive applications for a new FM broadcasting station in Atlanta, Texas, were designated for consolidated hearing by Commission Order, FCC 73–726, 38 FR 19283, published July 19, 1973. Now before the Review Board is a petition to enlarge issues, filed August 3, 1973, by Gloria D. Herring and A. T. Moore, d/b as Cass County Broadcasting Co. (Cass County), seeking a number of unrelated and unframed issues against KALT–FM, Inc. (KALT).[1]

2. Cass County alleges first that the issues should be enlarged to inquire into KALT's staffing proposal and the truthfulness of its representations to the Commission concerning that proposal. Petitioner maintains that this inquiry is warranted since KALT proposes to use the same managers as its existing Station KALT–AM,[2] even though it is "obvious" that these persons cannot devote the time required to manage both stations. Petitioner next contends that the articles incorporating KALT fail to give it the authority to construct its proposed FM facility,[3] and that, therefore, an issue inquiring into the legality of KALT's proposal is warranted. Third, Cass County avers that since KALT's principals have not submitted the KALT–AM annual license fee required by Section 1.1111 of the Commission's Rules, an issue inquiring into this failure and the effect that the payment may have on the applicant's financial qualifications should be specified. Cass County also alleges that the engineering data in the KALT application reveals that the applicant has not specified sufficient transmission

[1] Also before the Board are: (a) opposition, filed August 24, 1973, by the Broadcast Bureau; (b) opposition, filed September 7, 1973, by KALT; and (c) reply, filed September 19, 1973, by Cass County.

[2] KALT proposes that David A. Wommack, David A. Wommack, Jr., and George Womack, currently the full-time manager, assistant manager, and program director, respectively, of KALT–AM, will perform the same duties at the proposed FM station as they perform at KALT–AM, except that David A. Wommack, Jr. will work at KALT–FM only on a half-time basis.

[3] In support, petitioner cites portions of KALT's Articles of Incorporation giving KALT the authority ". . . to engage in the business of broadcasting . . ." and "[t]o own, sell, hold, lease, equip, maintain and operate broadcasting and receiving stations . . .".

line to supply power to its proposed antenna.[4] Additionally, petitioner maintains that KALT's application fails to disclose an estimate for a proposed transformer and underestimates the expense of modifying the existing KALT–AM tower which, petitioner opines, will cost "significantly" more than the $500 KALT proposes.[5] In view of these alleged discrepancies, Cass County contends that an issue inquiring into KALT's engineering proposal, including the effect, if any, additional costs may have on its financial qualifications, is warranted. Finally, petitioner contends that the licensee of KALT–AM has not complied with the requirements of Section 1.613 of the Commission's Rules[6] since it failed to advise the Commission of the networks with which it is currently affiliated[7] and that, therefore, the issues should be enlarged to include an inquiry into this alleged violation of the Rules. Both KALT and the Broadcast Bureau oppose the petition.

3. Cass County's petition will be denied.[8] The Board agrees with the Bureau that petitioner's allegations do not comply with the specificity or sufficiency requirements of Section 1.229(c) of the Rules. First, petitioner's allegations do not raise a substantial question as to whether KALT's proposal to duplicate the duties of the managers at its AM and FM stations is incapable of being satisfactorily effectuated. Since the duties which will be duplicated involve managerial work at stations located together, the proposal is not inherently unreasonable.[9] Therefore, the addition of an issue inquiring into KALT's staffing proposal is unwarranted. See *Colorado West Broadcasting, Inc.*, 39 FCC 2d 691, 26 RR 2d 1083 (1973), *Cf. Circle L, Inc.*, 2 FCC 2d 338, 6 RR 2d 795 (1966). Second, there is no merit to petitioner's request for a legal qualifications issue since the power to construct its proposed station appears to be implicit in the articles incorporating KALT and empowering it to engage in the business of broadcasting, and petitioner's argument to the contrary is no more than conjecture. Third, no basis exists for petitioner's allegation that KALT has failed to comply with Section 1.613 of the Rules; a copy of KALT–AM's current contract with the Texas State Network is now on file with the Commission. Furthermore, as properly noted in KALT's responsive pleading, there is no necessity for filing a copy of KALT–AM's agreement with the Humble Football Network inasmuch as KALT–AM erroneously listed that association as a network affiliation on its 1971 renewal application.[10] Finally, any doubts which may have been raised concerning

[4] KALT proposes to mount its FM antenna on the side of the KALT–AM tower but, petitioner contends, it proposes to use 18 feet less transmission line than its engineering proposal indicates is necessary.

[5] Petitioner bases this evaluation upon the opinion of its partner, A. T. Moore, who, Cass County contends, has substantial engineering experience.

[6] Section 1.613 provides that each licensee of a standard broadcast station shall file copies of contracts relating to network service with the Commission within 30 days of their execution.

[7] Petitioner contends that KALT–AM's licensee represented in its renewal application filed May 3, 1971, that it would affiliate with the Texas State and the Humble Football networks, but that Commission files do not contain any current network contracts or any indication that the affiliations have been terminated.

[8] As an initial matter, it should be noted that there is no factual basis for petitioner's allegation concerning KALT's nonpayment of its annual fee, since Commission records reveal that KALT–AM's annual 1972 license fee was submitted in a timely fashion.

[9] In addition, David A. Wommack, Jr., in an affidavit KALT attaches to its opposition, states, *inter alia*, that if the proposed staff duplication becomes infeasible, ". . . nothing would prevent a change in the status of the persons employed at KALT–AM."

[10] In the affidavit executed by David A. Wommack, Jr., affiant acknowledges that KALT–AM mistakenly listed the Humble Football Network as a network affiliation on its 1971 renewal application. He avers that Humble is not a network, *per se*, but is actually only an agency which places orders for broadcast of football games.

KALT's technical and financial qualifications have been allayed. In the affidavit executed by David A. Wommack, Jr. (see note 9, *supra*), affiant acknowledges that KALT erred in proposing less transmission line than actually required, but explains that it owns considerably more transmission line than it requires for its proposal.[11] Moreover, the Board agrees with KALT that in light of its recent financial amendment showing an additional $15,000 available for construction costs and increased legal fees,[12] it will be able to bear the costs of the proposed transformer for which it initially failed to allow. Finally, since the applicant's estimate of the costs for modifying the existing KALT-AM tower is not unreasonable on its face, and the allegation that this cost is underestimated is based on mere speculation and surmise, the Board will not add a cost estimate issue. See *California Stereo, Inc.*, 39 FCC 2d 401, 26 RR 2d 887 (1973); *Howard L. Burris*, 29 FCC 2d 462, 21 RR 2d 1093 (1971).

4. ACCORDINGLY, IT IS ORDERED, That the petition to enlarge issues, filed August 3, 1973, by Gloria D. Herring and A. T. Moore, d/b as Cass County Broadcasting Company, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[11] In his affidavit Wommack contends that KALT already owns 500 feet of transmission line.

[12] By Order, FCC 73M-1078, released September 20, 1973, the Administrative Law Judge accepted KALT's amendment to its application, filed September 7, 1973, which includes, *inter alia*, a bank letter of credit in the amount of $15,000 to cover additional costs.

F.C.C. 73R-386

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of ALVIN L. KORNGOLD, SUN CITY, ARIZ.	Docket No. 19087 File No. BPH-6755
SUN CITY BROADCASTING CORP., SUN CITY, ARIZ.	Docket No. 19088 File No. BPH-6808
For Construction Permits	

ORDER

(Adopted November 19, 1973; Released November 20, 1973)

BY THE REVIEW BOARD:

1. The Review Board having under consideration its Order (FCC 73R-379, released November 13, 1973), scheduling oral argument for December 18, 1973, and the request to change date for oral argument, filed on November 14, 1973, by Alvin L. Korngold;

2. IT APPEARING, That it would be conducive to the orderly conduct of the Commission's business to reschedule the above oral argument to January 8, 1974;

3. IT IS ORDERED, That the above request to change date for oral argument IS GRANTED, and that the oral argument herein before a panel of the Review Board IS RESCHEDULED for January 8, 1974, commencing at 10:00 a.m.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1193

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the matter of
LIABILITY OF KSLY BROADCASTING CO., LICENSEE OF RADIO STATION KSLY, SAN LUIS OBISPO, CALIF.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted November 14, 1973; Released November 20, 1973)

BY THE COMMISSION:

1. The Commission has under consideration (1) it's Notice of Apparent Liability, dated May 16, 1973, addressed to KSLY Broadcasting Company, licensee of Radio Station KSLY, San Luis Obispo, California; and (2) the licensee's response to the forfeiture notice, filed June 19, 1973.

SUMMARY OF PLEADINGS

2. The Notice of Apparent Liability for one thousand dollars ($1,000) was issued for apparent willful or repeated violation of Sections 73.123(a) and (c) of the Commission's Rules. The complainant, Dr. George L. Harper, alleged that during the October 27, 1972 "What's on Your Mind" program on KSLY, Homer Odom, the 100% stockholder in the licensee, broadcast the following personal attack while discussing a controversial issue of public importance:

> "He [referring to Dr. Harper] is either inefficient, in that he doesn't know how to get correct information, or he is willing to pander with falsehoods; in either case he is not a worthy candidate for public office."

The Commission found that the licensee had broadcast a personal attack upon Dr. Harper during the discussion of a controversial issue of public importance and failed to notify the complainant within the seven-day period required under Section 73.123(a), failed to send him a script or tape of the attack; and failed to afford a reasonable opportunity to Dr. Harper to respond to the attack over the licensee's facilities. The Commission further stated that the reference to Dr. Harper's candidacy for public office ["in either case he is not a worthy candidate for public office"] constituted an editorial within the meaning of Section 73.123(c) and that the licensee also failed to offer Dr. Harper a reasonable opportunity to respond to the editorial opposing his candidacy as required by Section 73.123(c).

3. In response to the Notice of Apparent Liability the licensee states that the forfeiture should not be imposed on the grounds that there was no malice in licensee's conduct, and that the forfeiture imposed is severe in light of the fact that the "spontaneous" utterance was made

during a "call in" show. The licensee asserts that its failure to adhere to the seven-day notification requirement of Section 73.123(a) should be no more than a "technical violation," especially since Dr. Harper did appear on KSLY four days after the attack occurred. Therefore, asserts the licensee, such "inadvertent" omission under these circumstances does not justify imposition of a $1,000 forfeiture. The licensee also states that a "spontaneous utterance" on a "call in" show is not evidence of "willful or repeated" violation of the rules within the meaning of the forfeiture provision, Section 503(b)(1)(B) of the Communications Act, and that imposition of a forfeiture in those circumstances would inhibit robust, wide-open debate on public issues and could have an unintended result of "fostering a proclivity towards presentation of issues in a bland and inoffensive matter."

DISCUSSION

4. The Commission as early as July 26, 1963 in its Public Notice (FCC–63–734) and 1964 in the Fairness Primer, 40 FCC 598, notified all licensees of their responsibilities and the procedures to follow if a personal attack occurred during the discussion of a controversial issue of public importance. The Commission stated that if an attack occurs the licensee must notify the individual or group attacked of the facts, forward a tape, transcript or accurate summary of the personal attack and extend to the individual or group attacked an offer of a reasonable opportunity to respond over the licensee's facilities. However, despite such notification requirements and the Commission's rulings, licensees failed in many cases to follow established procedures. The Commission then codified the procedures into Section 73.123(a) of the Commission's Rules in order to clarify and make more precise the obligations of broadcast licensees where they have aired personal attacks. The Commission expects licensees to adhere to all requirements of that rule within the seven-day period specified. See *In The Matter of Amendment of Part 73 of the Rules*, 8 FCC 2d 721 (1967).

5. We reject licensee's contention that the $1,000 forfeiture should be reduced on the ground that the licensee made a good faith determination that the broadcast material did not constitute a personal attack. The Commission has stated that licensees will not be allowed to escape forfeiture for violations of Section 73.123(a) by claiming in every case that they made a good faith determination that there was no personal attack. *In The Matter of Liability of WIYN, Radio Inc.*, (hereinafter WIYN) 35 FCC 2d 175 (1972). In adopting the personal attack rules we clarified the responsibility of a licensee in situations where there is a doubt as to whether an attack occurred when we stated:

> A licensee is required to send the attacked person or group, within a reasonable time and in no event later than one week after the attack, a notice of the attack which states when the attack occurred and contains an offer of a reasonable opportunity to respond . . . This time limit should be sufficient to allow a licensee to confer with counsel or with the Commission if there is doubt as to its obligation. In any event, in the doubtful situation, if the person who possibly has been attacked is notified promptly within the time limit and the licensee seeks clarification of his obligation from his counsel, or the Commission, no sanctions would be imposed, because the matter is not finally resolved within one week period. *In The Matter of Amendment of Part 73 of the Rules, supra*, 721, 722 (1967).

Licensee's conclusion that the "spontaneous remarks" on the program in question did not constitute a personal attack is unreasonable. Mr. Odom's remarks accused Dr. Harper of "pandering with falsehoods." Such statements bear directly on his integrity and character and fall within the purview of the Commission's personal attack rule.

6. We also reject licensee's contention that its failure to notify Dr. Harper of the attack within the seven-day time limit should be excused because he appeared on KSLY's facilities four days after the attack. The facts indicate that Dr. Harper was unaware of the attack when he appeared and that this appearance was pursuant to Section 315 of the Communications Act rather than an appearance in response to the attack. Relying in part on our warning to licensees that forfeitures would be forthcoming if they did not follow the requirements of Section 73.123(a), especially the seven-day notice requirement, we held in *WIYN* that failure to comply with the personal attack rules justified the imposition of a forfeiture. KSLY's failure to notify Dr. Harper within seven days, furnish him with a script, tape or accurate summary of the attack, and afford him a reasonable opportunity to respond is a clear-cut violation of the personal attack rule.

7. Additionally, we note that the Notice of Apparent Liability was also based on violation of Section 73.123(c) of the Commission's Rules (Political Editorials). However, in seeking a reduction in the amount of liability, the licensee limited its comments to the personal attack violation and did not mention the political editorializing violation. In light of the circumstances involved, we believe that the political editorializing violation alone is justification for upholding the forfeiture. Mr. Odom's statement, "in either case he [Dr. Harper] is not a worthy candidate for public office" clearly is opposition to a legally qualified candidate within the meaning of Section 73.123(c). As we have stated: "when the president and controlling stockholder of a licensee . . . endorses candidates for public office, such endorsements are indistinguishable from a station editorial within the meaning of Section 73.123(c)." *Colby Broadcasting Corporation* (*WJOB*), 32 FCC 2d 285 (1971).

8. We have considered the licensee's reply and the circumstances in this case and we are not persuaded to reduce the forfeiture to $100 as requested by licensee. In this case licensee clearly violated Sections 73.123(a) and (c) of the rules in that it made no attempt to notify the appropriate party, supply a script or tape, or offer reasonable opportunity to respond as required.

9. In view of the foregoing, IT IS ORDERED, That KSLY Broadcasting Company, Inc., licensee of Radio Station KSLY, San Luis Obispo, California, FORFEIT to the United States the sum of one thousand dollars ($1,000) for willful violation of Sections 73.123(a) and 73.123(c) of the Commission's Rules and Regulations. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Federal Communications Commission.

10. 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 KSLY Broadcasting Co.. Inc., licensee of Radio Station KSLY, San Luis Obispo, California.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1182

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of KSOO-TV, INC. (ASSIGNOR) and FORUM COMMUNICATIONS CO. (ASSIGNEE) For assignment of licenses of Stations KSOO-TV, Sioux Falls, S. Dak. and KCOO-TV, Aberdeen, S. Dak.	File No. BALCT-497 File No. BALCT-498

MEMORANDUM OPINION AND ORDER

(Adopted November 14, 1973; Released November 20, 1973)

BY THE COMMISSION: COMMISSIONERS BURCH, CHAIRMAN; H. REX LEE AND HOOKS CONCURRING IN THE RESULT. COMMISSIONER JOHNSON DISSENTING.

1. We have before us for consideration: (a) applications for the voluntary assignment of licenses of Stations KSOO-TV, Sioux Falls, South Dakota, and KCOO-TV, Aberdeen, South Dakota, from KSOO-TV, Inc. to Forum Communications Company, including a request for waiver of Section 73.636(a)(1) of the rules, (b) a timely filed Petition to Deny filed by Spokane Television, Inc., licensee of Station KTHI-TV, Fargo, North Dakota; and (c) responsive pleadings.

2. The assignee herein, Forum Communications Company, is a subsidiary of Forum Publishing Company, publisher of *The Forum*, a daily and Sunday newspaper serving Fargo, North Dakota. Forum Publishing is also the parent company of WDAY, Inc., licensee of WDAY-AM-FM-TV, Fargo, North Dakota and satellite television station WDAZ-TV, Devils Lake, North Dakota. It is Forum's present mass media holdings of North Dakota and the acquisition of KSOO-TV and KCOO-TV in South Dakota which form the basis of many of the allegations contained in the Petition to Deny.

3. Petitioner's substantive charges, which primarily relate to the grant of the instant application, are: (a) that a grant of this application will result in an undue concentration of control of mass media in North and South Dakota; (b) that Forum's request for waiver of the duopoly provisions of our multiple ownership rules should be denied; (c) that Forum's community needs survey is inadequate; (d) that KCOO-TV will be reduced from a semi-satellite to a full satellite, and (e) that assignor is "profiteering" from this sale. The other matters and allegations raised by petitioner primarily concern the operation of Forum's stations WDAY-TV and WDAZ-TV in Fargo and Devils Lake, North Dakota, respectively. Petitioner contends that certain alleged practices at WDAY-WDAZ (combination rates, operation of WDAZ-TV for private competitive reasons by artificially restricting

the amount of independent programming, anti-competitive advertising practices) are contrary to the public interest, are competitively unfair to petitioner and that such alleged practices will be utilized by Forum in the operation of the KSOO–TV–KCOO–TV parent-satellite which Forum here seeks to acquire. Lastly, Petitioner alleges that Forum operates WDAZ–TV for its private competitive advantages rather than to serve the public interest. These substantive allegations will be dealt with below. First, however, we will deal with the applicant's claim that Petitioner lacks standing.

4. Petitioner claims standing on economic grounds. Specifically it is alleged that the applicant's parent utilizes anti-competitive combination rates with its present mass media holdings and that this practice will in all probability be extended to the subject stations thus lessening Petitioner's ability to compete against the applicants in Fargo. While the applicant denies the use of anti-competitive combination rates, its principal contention against Petitioner's claim of standings is that neither KSOO–TV nor KCOO–TV serve any part of the Grade B service area of Petitioner's station KTHI–TV, Fargo, North Dakota and thus these stations do not compete with each other for revenues. It is well settled in assignment and transfer cases that the bare allegation of competition for revenues in the same market is insufficient to confer standing on a complainant. *Rockford Broadcasters, Inc.* 1 RR 2d 405 (1963). A showing that the applicant or its proposal will have a special or unique impact on the complainant is required. *WGAL Television, Inc.*, 13 RR 2d 1131 (1968). Assuming, for the purposes of determining standing, the correctness of Petitioner's factual allegations, Petitioner has demonstrated those special or unique circumstances necessary to confer standing to file the subject Petition to Deny, since the basis for claiming economic injury is peculiar to the applicant and its affiliated companies. We, therefore, turn to Petitioner's substantive allegations.

GRADE B OVERLAP-WAIVER OF MULTIPLE OWNERSHIP RULES

5. The assignee requests waiver of the overlap provisions of the Commission's multiple ownership rules since the grade B contour of KCOO–TV, Aberdeen, South Dakota, will overlap the grade B contour of WDAY–TV, Fargo, North Dakota. That station is controlled by WDAY, Inc., a wholly owned subsidiary of the assignee's parent. Thus, the provisions of Section 73.636(a)(1) of our Rules preclude a grant of these applications, absent a showing that a waiver of the relevant provisions would be appropriate.

6. The applicant argues, in part, that the Grade B overlap of Stations WDAY–TV and KCOO–TV is so small it should be considered *de minimus* and thus a waiver is warranted. We agree. The overlap encompasses 627 persons in a area of 139 square miles. This amounts to less than 1% of the area and population served by either WDAY–TV or KCOO–TV and, in our view, represents a *de minimus* situation. The *de minimus* nature of the overlap coupled with the fact that there are two television and six radio stations providing service to all or part of the overlap area persuades us that a waiver of Sec-

tion 73.636(a)(1) of our Rules in warranted. (See WSLS–TV 19 FCC 2d 704; KRNY, Kearny *Nebraska*, Mimeo 64976 (1971) and Wichita Broadcasting, Mimeo 78016 (1971).)

CONCENTRATION OF CONTROL OF MASS MEDIA

7. Petitioner argues, that even if the overlap is considered *de minimus*, the assignee's acquisition of KSOO–TV and its satellite KCOO–TV would never the less result in a concentration of control of television broadcasting in a manner inconsistent with Section 73.636(a)(2) of our Rules.[1] In support of this contention, Petitioner relys solely on the fact that the acquisition of KSOO–TV and KCOO–TV would increase Forum's media holdings to include all of Eastern South Dakota as well as all of eastern North Dakota which presently receives service from its existing facilities. Were these the only facts to be considered, we would agree with Petitioner that a substantial question has been raised. But such is not the case. As previously noted, the proposed assignee's parent publishes the Forum, a daily and Sunday newspaper in Fargo, North Dakota. However, according to Audit Bureau of Circulation figures (Opposition Exhibit B), the Forum has no significant circulation in South Dakota.

8. Further, the applicant has submitted additional information with regard to other media available in the areas served by KCOO–TV and KSOO–TV. Thus, within the Grade B contour of KCOO–TV, Aberdeen, there are two television facilities, 8 commercial and one educational aural stations as well as five daily and Sunday newspapers. Similarly with respect to KSOO–TV, Sioux Falls there are seven television stations, 34 commercial and 9 non-commercial radio stations, 9 daily and Sunday newspapers and 75 weekly newspapers providing separate media voices within its service area. This substantial number of other media services available materially lessens the concentration impact of this proposed acquisition.

9. Finally, and in light of the numerous other services available, the operating history of these stations convinces us that a grant of these applications would serve the public interest. Since 1968 neither KSOO–TV nor KCOO–TV (formerly KXAB), whether operated separately or together, has shown a profit. The licensee states that during the last fiscal year (ending September 1972) the combined operations suffered a net loss of $231,146. Financial information on file with the Commission discloses that in every year since 1968 the combined losses have exceeded $100,000 by a substantial margin. Moreover, before receiving the assignee's offer, the licensee has tried both individually and through station brokers to find buyers for these facilities and was unable to do so. The licensee further advises that in the face of these heavy losses it is unable to continue operating these stations. This financial history coupled with the licensee's unsuccessful attempts to find other buyers, persuades us that to refuse to grant these appli-

[1] This rule provides in pertinent part that no application for a television station shall be granted to any party, if: "(2) Such party . . . owns, operates, controls, or has any interest in, or is an officer, or director of any television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with the public interest, convenience or necessity . . ."

cations could well cause at least the temporary loss of the services of these stations to Sioux Falls and Aberdeen.

10. In summary, the existence of a substantial number of other media services in the areas served by KSOO–TV and KCOO–TV coupled with serious financial difficulties of these stations, persuades us that the possibility that a grant of these applications might cause an undesirable concentration of television broadcasting is outweighed by the possible loss, at least temporarily, of services from these stations. We therefore conclude, that Petitioner's allegations that Forum's acquisition of these stations would cause an undue concentration of television broadcasting, do not, under the particular circumstances of this case, raise a substantial or material question of fact.

ADEQUACY OF COMMUNITY NEEDS SURVEY

11. Petitioner makes the bare allegation that Forum's community needs survey for Aberdeen is inadequate. The applicant states, in response to the charge that its survey of the community needs and interests of Aberdeen was inadequate, that it interviewed 19 community leaders representing a broad spectrum of the area's population and, at random, contacted 45 members of the general public. Needs and interests were elicited from both community leaders and the general public in order that the assignee may determine how best to serve the community. Our *Primer on Ascertainment of Community Problems*, 27 FCC 2d 1057, requires no more.

ALLEGED REDUCTION OF KCOO–TV FROM SEMI SATELLITE TO SATELLITE

12. In response to Petitioner's bare allegation that Television Station KCOO–TV will be reduced from a semi independent satellite, by a reduction in programming, to a full satellite, the applicant asserts that while KCOO–TV will remain primarily a satellite of KSOO–TV it (KCOO–TV) will produce a local 3½ hour news program from Aberdeen for the 7:25–7:30 a.m. and 8:25 a.m. portion of the NBC "Today" program, Monday through Friday. Moreover, there will be an estimated 10 minutes of local news from Aberdeen in the 6 and 10 p.m. news blocks, Monday through Friday. The applicant further states that while organization and/or production will increase, it will be consistent with the continued satellite status of KCOO–TV.

ALLEGED PROFITEERING BY ASSIGNOR

13. In response to the allegation that the assignment violates the spirit of the Three Year Rule, Section 1.597, the applicant states that the assignor, KSOO–TV, Inc., has controlled KCOO–TV since December 23, 1969, when it acquired the construction permit of that station by assignment. KCOO received its initial operating authority on October 11, 1958, and its first license on September 15, 1970. The subject applications were filed with the Commission on December 26, 1972. Thus, KCOO–TV has been controlled by KSOO–TV, Inc. for more than 3 years, and the Commission's Three Year Rule is satisfied. While this, in and of itself, does resolve the charge, the applicant has separated the total consideration sought for the assignment, $2,250,000,

thereby attributing a portion of this total amount to the satellite, to refute the charge it is profiting from the assignment of KCOO–TV. At the outset, the assignee states that the assignor paid $700,000 for the KCOO–TV construction permit in 1969 and that it has invested an additional $147,000 in improvements in the station, thereby making its total investment in KCOO–TV $847,000. The applicant states that in 1971, KCOO–TV contributed about 28% of the total revenues realized by the joint operation of it and KSOO–TV. Using this 28% as a value of the satellite, the assignee claims that 28% of the total consideration sought for the subject assignments is $630,000 and, thus, the assignor is not profiting from the assignment of the satellite. Thus, we conclude this allegation is without foundation and raises no substantial or material question of fact.

MATTER REGARDING OPERATION OF WDAY-TV/WDAZ–TV

14. Petitioner alleges that Forum has engaged in anti-competitive practices in the operation of its stations WDAY–TV and WDAZ–TV, Fargo and Devils Lake, North Dakota, respectively. These alleged practices are treated separately below.

15. *Combination Rates*—Petitioner alleges that although WDAY–TV/WDAZ–TV may theoretically be sold separately, practical programming and pricing factors result in combination rates being the normal if not exclusive means to purchase these stations. Forum points out that like virtually all parent/satellite stations they are sold together but that they are also sold separately and that there is no requirement for purchasing time on both stations. Forum has submitted the pertinent page from Standard Rate and Data which although giving the rates for both stations combined, states separate rates are available; that, as an example, Schmidt's Beer separately purchases time on WDAZ–TV; that although Forum's stations, WDAY–AM and WDAY–FM are offered in combination that is not a must buy combination, and that WDAY–TV is never sold with WDAY–AM or FM. Assignee states that, similarly, there will be no combination rates at KCOO–TV/KSOO–TV. On this point we conclude that Petioner has made no showing of mandatory combination rates by Forum, in the operation of WDAY–TV/WDAZ–TV and that Petitioner's charges that mandatory combination rates will be utilized at KSOO–TV/KCOO–TV are without foundation.

OPERATION OF WDAZ–TV FOR PRIVATE COMPETITIVE REASONS

16. Petitioner next alleges that the applicant is intentionally operating WDAY–TV and WDAZ–TV in such a manner that WDAZ–TV will remain in permanent satellite status. Petitioner bases these allegations on claimed admissions by Forum in other proceedings that it intends to provide WDAZ–TV with sufficient WDAY–TV programming to maintain its satellite status. Petitioner then suggests that this operational philosophy will be carried over into its operation of KSOO–TV and KCOO–TV. As will be discussed in detail below, we do not believe these allegations are sufficient to raise a substantial or material question of fact.

17. We have authorized satellite stations since 1954 even in situations where substantial overlap would exist between the parent and satellite stations.[1] The purpose has been to bring television into small communities and sparsely settled areas having insufficient economic basis to support a full scale television operation. Our initial grants of satellite authority for both WDAZ–TV and KCOO–TV were based on the above rationale. It follows therefore, that in order to support an allegation that a licensee is intentionally withholding independent station status from a present satellite operation, threshold facts must be alleged which would indicate that the population within the satellite's service area is now sufficient to support its independent operation. This Petitioner has failed to do either with regard to the WDAZ–TV satellite operation[2] or assignee's proposed satellite operation of KCOO–TV. Finally, with respect to the acquisition of KSOO–TV and KCOO–TV, of which we are here principally concerned, the facts as set forth in paragraph 8 *supra* clearly establish the contrary to be the case. The continued operation of both of these stations has resulted in continued operating losses. In view of the above, we hold that petitioner's allegations in this regard raise no substantial or material question of fact.

18. *Newspaper Advertising*—Petitioner alleges that the applicant's parent, Forum Publishing, through the use of its daily newspaper, *The Forum*, gives WDAY–TV and WDAZ–TV an unfair and anti-competitive advantage over other stations in the market. This is because Forum's stations, while they pay for the advertising really do not since the payment of funds is nothing more than shifting money from one Forum pocket to another. In response to this charge the assignee states that its parent publishes, on a weekly basis, an insert entitled "Television News and Programs," which sets out the entire television programming for the coming week for all stations; there is no charge for this to any television licensee. With regard to the daily television schedules, there is no preferential treatment. *The Forum* lists the television stations, with their schedules, in the order of the station's appearance on the air; thus, WDAY–TV is on top since it was the first Fargo television station. Moreover, WDAY–TV pays for all display promotional ads in *The Forum* at the regular, openly published, rate as any other broadcast station. There are no preferential rates or tie-in arrangements of any kind with WDAY–WDAZ–TV, nor will there be any combination rates between *The Forum* and any broadcast station. Therefore, we conclude that this allegation is without foundation and raises no substantial or material question of fact.

19. In conclusion we find that none of the matters raised by the Petitioner constitute a bar to the grant of this application or require a hearing thereon. No undue concentration of control of mass media will result from this grant and a waiver of the duopoly provision of our multiple ownership rules (in particular Section 73.636) is warranted. The survey of community needs and proposed program-

[1] Current authority is found in note 9 to Section 73.636 of our rules.

[2] It is noted that petitioner previously opposed a request by Forum to change the main studio location of WDAZ–TV to Grand Forks, North Dakota, which the Commission felt would strengthen the prospect of the station eventually becoming an independent non-satellite station and which could be considered a first step in that direction. See *WDAY, Inc.*, 29 FCC 2d 437, 439 (1971).

ming are adequate. The allegations regarding unfair practices at WDAZ–TV/WDAY–TV create no substantial and material questions of fact which would warrant a hearing on this application.

20. Accordingly, IT IS ORDERED, that the Petition to Deny, filed by Spokane Television, Inc., licensee of Station KTHI–TV, Fargo, North Dakota, IS DENIED, and that the applications for assignment of licenses of Station KSOO–TV and KCOO–TV, Sioux Falls, South Dakota, and Aberdeen, South Dakota, respectively, from KSOO TV, Inc. to Forum Communications Company and Forum's waiver request of Section 73.636(a)(1) of the Commission's Rules ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

104–017—73——5

F.C.C. 73R-387

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
LAKE ERIE BROADCASTING CO., LORAIN, OHIO	Docket No. 19213 File No. BPH-6969
LORAIN COMMUNITY BROADCASTING CO., LORAIN, OHIO	Docket No. 19214 File No. BPH-7044
For Construction Permits	

APPEARANCES

Alfred C. Cordon and *Jonathan S. Bowers*, on behalf of Lake Erie Broadcasting Company; *Gordon R. Malick* and *Robert A. Marmet*, on behalf of Lorain Community Broadcasting Company; and *Henry L. Baumann* and *Charles E. Dziedzic*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted November 15, 1973; Released November 21, 1973)

BY THE REVIEW BOARD: NELSON, PINCOCK AND KESSLER.

1. This proceeding involves the mutually exclusive applications of Lake Erie Broadcasting Company (Lake Erie) and Lorain Community Broadcasting Company (Lorain) for authority to construct a new FM broadcast station in Lorain, Ohio. By Commission Order, FCC 71-408, 36 FR 7994, published April 28, 1971,[1] the applications were designated for hearing on financial and Suburban issues against Lorain, a Suburban issue against Lake Erie, and a standard comparative issue. The issues were subsequently enlarged by Review Board Order, FCC 72R-91, 34 FCC 2d 354, released April 4, 1972, to include an issue inquiring into possible violations by Lake Erie of Rules 1.65 and/or 1.514.

2. In an Initial Decision, FCC 72D-68, released November 1, 1972, Administrative Law Judge Frederick W. Denniston concluded that both applicants possess the requisite qualifications to be licensees. With regard to the Rule 1.514/1.65 issue specified against Lake Erie, Judge Denniston concluded that Lake Erie had violated Rule 1.65 but not 1.514; however, he found that its failings under the former rule were inadvertent and therefore only significant as a comparative factor. The Judge ultimately concluded, under the standard comparative issue, that Lake Erie's preferences under the diversification, integration and efficiency criteria outweighed the Rule 1.65 demerit and warranted a grant to it. The proceeding is now before the Review Board

[1] The application of Vocom Industries, Inc., which was consolidated for hearing with the above applications, was dismissed with prejudice by Order of the Presiding Judge, FCC 71M-1771, released November 9, 1971.

on exceptions filed by both applicants and the Broadcast Bureau.[2] The Board has reviewed the Initial Decision and the record in light of these exceptions, replies and accompanying briefs, as well as the arguments of the parties at the oral argument held before a panel of the Board on October 30, 1973. We believe the Presiding Judge's findings of fact are substantially complete and accurate and his conclusions sound, and, except as modified herein and in the rulings on exceptions contained in the attached Appendix, those findings and conclusions are adopted. In this Decision, we shall discuss principally the reasons why we do not believe that Lake Erie should be disqualified under the Rule 1.514/1.65 issue, since it is the major subject of controversy.[3]

3. The Rule 1.514/1.65 issue is predicated on the fact that various interests acquired and activities engaged in by Lake Erie principals since the filing of the Lake Erie application on December 10, 1969, were not reported to the Commission by amendment until February 18, 1972. These activities involve Robert E. Stroupe, a 1.6% stockholder of Lake Erie, and a joint enterprise consisting of the remaining Lake Erie principals.[4] With respect to Stroupe, the Lake Erie application reports that he was employed as an announcer at Station WLEC, Sandusky, Ohio. Stroupe, who had been employed there since 1963, left WLEC in May, 1970. The Lake Erie application also states that Stroupe had an interest in a CATV company which was not in operation at that time. The company, North Central Television, Inc., was organized by Stroupe and began obtaining CATV franchises in early 1970. At one time, this was Stroupe's principal business and he was its general manager. At present, he is no longer a paid employee and holds 6% of the company's stock. The company operates systems in several Ohio communities within 25 miles of Lorain, but none within the applicant's proposed 1 mv/m contour. Since July, 1971, Stroupe has also been president, director and 33⅓% stockholder in the *Northern Ohio Weekly Scene*, a weekly publication which lists television and CATV schedules, and is distributed free of charge in the area serviced by North Central Television, Inc. On October 1, 1970, the eight other Lake Erie principals formed a limited partnership known as Community Cable Television Company (CCTC). On October 28, 1970, CCTC applied for a CATV franchise in Sheffield, Ohio, and on November 10, 1970, the Sheffield Township trustees granted it a non-exclusive CATV franchise. However, the project was subsequently abandoned and no system was constructed. These facts, like those involving Stroupe's activities, were not reported by amendment to the Lake Erie application until February 18, 1972.

[2] The Board also has before it a petition for leave to amend, filed October 12, 1973, by Lorain which reflects the association of one of its principals with a bank in Lorain County. The petition recites good cause and is unopposed; it will accordingly be granted and the amendment accepted.

[3] The Board agrees with the Judge's favorable resolution of the financial issue respecting Lorain and the *Suburban* issue against Lake Erie, to which no exceptions have been addressed, and the *Suburban* issue respecting Lorain, to which limited exceptions are addressed, and, except for our ruling on Lake Erie Exception No. 4, no further discussion of these issues is needed.

[4] The Board specified a Rule 1.514 issue herein because it appeared that Stroupe's unreported interests may have predated the filing of the Lake Erie application; however, the record developed indicates that the information contained in the application did accurately reflect Stroupe's interests at that time. Accordingly, as did the Judge, we find no violation of Rule 1.514.

4. In our view, the record evidence does not support the assertion of Lorain and the Broadcast Bureau that Lake Erie's failure to report the foregoing matters at an earlier date constituted an attempt to conceal the information. Rather, an examination of the relevant chronology of events and the circumstances surrounding each of the omissions establishes that they were merely inadvertent errors. In its application filed December 10, 1969, Lake Erie reported that Stroupe had a business, "Central Television CATV—not in operation as yet", and that he was employed as an announcer at Station WLEC, Sandusky, Ohio. In October, 1971, the parties exchanged exhibits, and it was revealed at that time by Lake Erie that Stroupe published a weekly television and cable guide. In a supplemental exchange of exhibits in January, 1972, Lake Erie reported the existence of CCTC. Thereafter, on February 3, 1972, Lorain petitioned the Board to enlarge issues with respect to Rule 1.65, and on February 18, 1972, Lake Erie submitted its amendment showing the interests of Stroupe and its other principals. Thus, it is apparent that each of the interests in dispute was voluntarily revealed by Lake Erie at some point prior to the filing of the enlargement request. Where, as here, an applicant voluntarily discloses certain interests, albeit not in a timely fashion or without the particularity required or all changes in the status of those interests, such voluntary disclosure, while not necessarily determinative, clearly is an indication that the applicant was not attempting to conceal the details of those interests. Rather, such action supports the conclusion that the omissions were merely inadvertent errors.

5. In addition to the foregoing, the circumstances surrounding each of the omissions support a conclusion that there was no intent to conceal. We do not view the termination of Stroupe's employment at WLEC as significant in this proceeding in light of the record evidence that he has had other broadcast experience at another station and that he had been at WLEC since 1963. Thus, the extent of Stroupe's broadcasting experience was not seriously affected by his leaving WLEC in 1970. With respect to Stroupe's other interests, there is record evidence that Stroupe, residing in Sandusky, Ohio, was principally concerned with his CATV interests, whereas the other eight Lake Erie principals were primarily concerned with the Lorain application and that contact between Stroupe and the others was therefore infrequent. The record, therefore, does not support the contention of appellants that the Lake Erie principals preparing the Lorain application must necessarily have known of Stroupe's activities. More significant, in our view, however, are the facts that Stroupe is only a 1.6% stockholder in Lake Erie, the smallest interest of any principal, and that he will not occupy a role as officer or director. In addition to this quite limited involvement in the applicant, Stroupe is also only a 6% owner in North Central Television, Inc., and has larger interest in the *Northern Ohio Weekly Scene* is in a magazine which does not editorialize or otherwise serve as a journal of opinion, but rather, functions as an adjunct to the CATV systems in the area. Thus, the nature of Stroupe's activities was, at most, a questionable significance in this proceeding.

6. With regard to CCTC, the participation of virtually all of the

Lake Erie ownership in a CATV venture could be a significant comparative factor. However, the record herein is very clear that the project never reached fruition and was in fact quickly abandoned because of prohibitive cost factors when it was determined that the proposed FM tower to be used for the instant application could not be used for CATV purposes as originally thought. The partnership agreement was never filed; the proposed partners did not contribute capital; and in February, 1971, the partnership agreement was abandoned. Although Lake Erie did not at the time notify the Sheffield trustees of its decision to withdraw, there is no evidence in the record to show a wrongful purpose in not doing so or that CCTC was in fact proceeding in any real manner to keep the project alive.

7. In light of the foregoing and the sworn testimony of Lake Erie's principals denying that they attempted to conceal information, and absent other evidence of intent to conceal, the Board finds no wrongful intent in connection with the 1.65 violations; and, absent such intent or a pattern of violations establishing a disregard for the Commission's Rules, the violations do not reflect on the applicant's basic qualifications. See *Gross Broadcasting Company (KJOG–TV)*, 41 FCC 2d 729, 27 RR 2d 1543 (1973); *Media, Inc.*, 41 FCC 2d 30, 27 RR 2d 1077 (1973); and *A. V. Bamford*, 41 FCC 2d 835, 37 RR 2d 1659 (1973). Finally, we do not agree with the position of the Broadcast Bureau on appeal that the omissions of record form a pattern of violation that is in itself disqualifying. The number and significance of these incidents do not suggest to us a consistency of purpose to violate, or to flagrantly disregard, the rules. Accordingly, we would affirm the Judge's assessment of a comparative demerit only against Lake Erie for its Rule 1.65 violations. *Cf. Vogel-Elligton Corporation (WHOD)*, 41 FCC 2d 1005, 27 RR 2d 1685 (1973).

8. As the Presiding Judge correctly found, Lake Erie is to be favored on the basis of substantial comparative preferences. We find particularly significant the facts that Lorain owns and operates the only standard broadcast and only other aural facility in Lorain, whereas no Lake Erie principal has other media interests in the city; that Lake Erie proposes full-time integration of 19.7% of its ownership whereas Lorain proposes no full-time integration; and that Lake Erie proposes 100% new programming whereas Lorain proposes 50% duplication. In our view, these comparative advantages Lake Erie enjoys clearly outweigh the one demerit assessed against it for violation of Rule 1.65. We therefore agree with the Administrative Law Judge's conclusion that a grant of the Lake Erie application would serve the public interest, convenience and necessity.

9. Accordingly, IT IS ORDERED, That the petition for leave to amend, filed October 12, 1973, by Lorain Community Broadcasting Company IS GRANTED and the amendment IS ACCEPTED; and that the application of Lake Erie Broadcasting Company (BPH–6969) IS GRANTED, and the application of Lorain Community Broadcasting Company (BPH–7044) IS DENIED.

JOSEPH N. NELSON,
Member, Review Board,
Federal Communications Commission.

APPENDIX

Rulings on Exceptions of Lake Erie Broadcasting Co.

Exception No.	*Ruling*
1	Denied as being without decisional significance.
2	Denied. This finding is made in substance by the Administrative Law Judge in para. 31 of the Initial Decision.
3	Granted in substance. See para. 4 of this Decision.
4	Denied. The Judge properly concluded that Lorain complied with the ascertainment requirements of the Commission's *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971). Lake Erie challenges Lorain's ascertainment efforts outside its principal community, and particularly in Elyria, Ohio, a city of 54,000. However, the record is clear that Lorain contacted and ascertained problems from three area leaders who could speak from authoritative positions as to the area's needs. In addition, the applicant conducted 30 at random phone calls in Elyria the results of which reinforced its ascertainment of problems from community leaders. In the Board's view, therefore, Lorain's efforts were in compliance with *Primer Q* and A 6 and 7 (see also *Gilroy Broadcasting Company, Inc.*, 41 FCC 2d 20, 27 RR 2d 1034 (1973)).

Rulings on Exceptions of Lorain Community Broadcasting Co.

1	Granted in substance. However, see para. 4 of this Decision.
2	Denied. The Board is of the view that the ruling complained of was neither arbitrary nor abuse of discretion, and therefore it will not be disturbed.
3	Denied. The procedures set forth by the Judge, *i.e.*, that the evidence presented be by written testimony or by affidavit, were reasonable and were not complied with by Lorain. Moreover, Betleski's testimony was subject to cross-examination and the reasons for termination of the franchise set forth in the Resolution of the Sheffield Township trustees conformed with Lake Erie's explanation.
4	Denied for the reasons set forth in rulings 2 and 3 above.
5	Denied. The Judge's findings are accurate and are adequately supported by the record.
6	Denied. The failure to report the change in Stroupe's employment in the circumstances of this case, did not constitute a violation of Rule 1.65 of any significance. See paragraphs 4 and 5 of this Decision and para. 12 of the Initial Decision.
7	Denied as being without decisional significance. See note 4 of this Decision.
8, 9, 11	Denied in substance for the reasons set forth in paras. 4 and 5 of this Decision.
10	Denied. The record establishes only that Stroupe and Sens worked and knew each other at Station WLEC and that Sens met with Betleski and the other Lake Erie principals. It does not establish that knowledge of Stroupe's activities must be imputed to the corporation. See para. 5 of this Decision.
12	Denied. Stroupe's interest in North Central Television, Inc., was only 6%; none of the CATV systems operated by the company are within Lake Erie's proposed 1 mv/m contour; and the CATV enterprise of the other Lake Erie principals (CCTC) had been abandoned by the time of the hearing. See para. 8 of this Decision.

Exception No.	*Ruling*
13, 15	Denied. The Judge's evaluation of the applicants under the integration and efficiency criteria is accurate and complete, and requires no modification. See para. 8 of this Decision and paras. 16 and 18 of the Initial Decision.
14	Denied. The record does not establish that Lorain's past broadcast record was either unusually good or unusually poor.
16	Denied for the reasons set forth in paras. 7 and 8 of this Decision.
17	Denied for the reasons set forth in this Decision.

Rulings on Exceptions of the Broadcast Bureau

1, 2	Denied. See ruling on Lorain Exception No. 6.
3	Denied for the reasons stated in paras. 4–6 of this Decision.
4	Denied for the reasons stated in this Decision.

F.C.C. 72D–68

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of LAKE ERIE BROADCASTING CO., LORAIN, OHIO LORAIN COMMUNITY BROADCASTING CO., LORAIN, OHIO For Construction Permits	Docket No. 19213 File No. BPH–6969 Docket No. 19214 File No. BPH–7044

APPEARANCES

Alfred C. Cordon and *Jonathan S. Bowers*, on behalf of Lake Erie Broadcasting Company; *Gordon R. Malick* and *Robert A. Marmet*, on behalf of Lorain Community Broadcasting Company; and *Katherine Savers McGovern*, on behalf of the Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
FREDERICK W. DENNISTON

(Issued October 26, 1972; Released November 1, 1972)

PRELIMINARY STATEMENT

1. By Designation Order released April 21, 1971, (FCC 71–408), the Commission assigned these applications for FM Channel 285 allocated to Lorain, Ohio, for hearing together with one filed by Vocom Industries Inc. (Docket No. 19215, File BPH–7191). The latter application was subsequently dismissed with prejudice by Order released November 9, 1971 (FCC 71M–1771) and will not further be considered. While originally assigned to Administrative Law Judge James F. Tierney (FCC 71M–609), it was subsequently reassigned to the undersigned (FCC 72M–8).

2. Excluding those issues which had related solely to Vocom, and are now moot, the designated issues are as follows:

1. To determine whether Lorain Community has available the additional $42,100 required for construction and first-year operation of its proposed station without reliance on revenues to thus demonstrate its financial qualifications.

* * * * * * *

4. To determine the efforts made by Lake Erie Broadcasting to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.

5. To determine the efforts made by Lorain Community to ascertain the Community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.

* * * * * * *

7. To determine which of the proposals would, on a comparative basis, best serve the public interest.

8. To determine in the light of the evidence adduced pursuant to the foregoing issues, which, if any, of the applications for construction permit should be granted.

3. Hearing was convened in the Offices of the Commission in Washington, D.C. on February 22, 1972, and the issues outstanding (Issues 1, 4, 5, 7 and 8) against Lake Erie and Lorain Community were heard. Subsequently, as provided for at the hearing, Lake Erie submitted certain late-filed exhibits which were received by Order, FCC 72M–314, released March 13, 1972, and the record again was closed.

4. On April 4, 1972, the Review Board released its Memorandum Opinion and Order, 34 FCC 2d 354, enlarging the issues against Lake Erie as follows:

9. To determine whether Lake Erie Broadcasting Company has failed to comply with the provisions of Sections 1.514 and/or 1.65 of the Commission's Rules; and, if so, to determine the effect of such non-compliance on the applicant's basic or comparative qualifications to be a Commission licensee.

Thereafter, the Presiding Judge reopened the record (Order released April 5, 1972, FCC 72M–447) and cancelled the date established for the filing of Proposed Findings of Fact (Order released April 14, 1972, FCC 72M–502). On June 12, 1972, a further hearing was held on Issue 9, *supra*. Opportunity was accorded Lorain Community to submit rebuttal evidence, and a hearing date for such rebuttal was contingently set for June 30, 1972 (Order released June 15, 1972, FCC 72M–785). However, due to Lorain Community's failure to comply with the procedures established for such rebuttal, the material submitted by Lorain Community was not accepted by the Presiding Judge, and the hearing tentatively set for June 30, 1972 was not convened (Order released June 29, 1972, FCC 72M–851). The record was again closed. Proposed findings of fact and conclusions of law were filed by Lake Erie, Lorain Community,[1] and by the Broadcast Bureau; replies were filed by the two former.

FINDINGS OF FACT

Lorain Community Broadcasting Company (Issue 1)

5. The financial issue specified by the Commission is whether Lorain Community would have available the additional amount of $42,100 required to meet its estimated costs of construction and first-year operation without reliance on revenues. Lorain Community had estimated in its application that it would require $43,600 to meet costs of construction and first-year operation. The Lorain National Bank has agreed to lend Lorain Community Broadcasting Company $45,000 for use in the construction and operation of an FM broadcast station. While that commitment originally expired by its terms on July 1, 1972, it was subsequently extended to expire January 1, 1973. The signatures of all the stockholders guaranteeing the loan will be required by the bank, and each of the Lorain Community stockholders has signed a "Stockholder Guarantee" agreeing to guarantee one-fourth of the pro-

[1] A subsequent Erratum, filed August 14, 1972, was also filed, and has been accepted.

posed bank loan and to execute such corporate notes(s) as is required by the bank. It is accordingly clear that Lorain Community has the required funds available to it.

Ascertainment of Community Needs (*Issues 4 and 5*)

6. The City of Lorain is situated 27 miles from Cleveland, Ohio, on the banks of Lake Erie; it covers 22.25 square miles in Lorain County. Governed by a Mayor and City Council, it is served by one daily newspaper, the *Lorain Journal*, with a daily circulation of 39,700. It has one radio facility, WLRO, an AM station licensed to Lorain Community Broadcasting Company, one of the applicants herein. The community has 97 churches, is served by two hospitals, and by four banks and two savings and loan institutions.

7. Industries located in Lorain, employing over 500 persons, include the U.S. Steel Corporation, American Shipbuilding Co., Ford Motor Co., B. F. Goodrich Chemical Company, Lorain Division of Koehring Company and Lorain Products Corporation. In Lorain, there are 37,280 persons employed in industry and there are 25 public schools.

8. In conducting its survey of community needs, the principals of Lake Erie relied upon the 1970 Census data of the United States Department of Commerce, which indicated the following: Lorain has a total population of 78,185; including 70,211 White and 7,366 Blacks. The Black population represents 9 percent of the total. Lorain County has a total population of 256,843; including 239,252 Whites and 16,388 Blacks. The County population is, therefore, 6.8 percent Black.

9. In addition to Lorain, the predicted contour of the proposed FM station will include, in its service area, the following communities: Elyria, with a 1970 population of 53,427; Amherst with a population of approximately 10,600; Vermillion with a population of 11,000; North Ridgeville with a population of 14,000; Avon with a population of 8,000; Avon Lake with a population of 12,500; and Sheffield Lake with a population of approximately 9,000.

10. Lake Erie endeavored to follow the Commission's Primer as a guide for the making of the community leader and general audience survey, and also relied on the fact that many of the principals of Lake Erie were people who knew the community. Lake Erie conducted its first survey in November 1969. Principals of the company, including Harold Sens, Robert Stroupe, Adrian Betleski, and Thomas Tubbs, went into the community and made 28 contacts with community leaders and members of the general public.

11. In June of 1970, the principals of Lake Erie made a further effort to familiarize themselves with the needs of the community and to follow the new standards for ascertainment as set forth in the then recently released "Primer". They went into the community and made 81 new contacts in Lorain itself. Additionally, at this time, principals of the company also made contacts in the aforementioned outlying communities of the proposed service area. These surveys were made by stockholders, including John Clark, Adrian Betleski, Gene Sofranko, Edward Gross and Harold Sens, through personal face-to-face interviews. Leaders and citizens of all sections of the communities involved were contacted, including political, industrial, educational, religious and financial organizations. Also, at this time, a general

survey was made in the city of Lorain by using a responsible adult, Mrs. Mary Jane Snodgrass, who stationed herself in the Mid-Way Mall Shopping Center, a shopping center which serves most of the area residents. The center attracts more than 300,000 shoppers weekly. According to the sales surveys, 39 percent of the shoppers come from Lorain and 35 percent from Elyria and the rest of the surrounding communities which the applicant proposes to serve.

12. In April of 1970, a telephone survey of the general audience was conducted. Over 100 telephone calls were made at random using the Lorain and Elyria telephone directories.

13. Finally, in February of 1971, a further survey was made to insure that it had adequately surveyed members and leaders of minority groups in the Lorain area. At this time, Adrian Betleski contacted 11 members of minority groups, including Blacks and Puerto Ricans. This survey included members of the general audience and minority group leaders, including the President of the Mexican-American Club, and a superintendent of U.S. Steel who has many ties with the minority community.

14. Lake Erie also undertook to survey communities which are included within its proposed service area, including: Elyria, Amherst, Vermillion, South Amherst, North Ridgeville, Avon, Avon Lake and Sheffield Lake. These interviews were conducted, for the most part, by principals of Lake Erie. A total of 65 contacts were made in these communities, including 22 in Elyria itself. The Mayors of South Amherst, Avon, North Ridgeville, Amherst, Sheffield Lake and Elyria were contacted. In addition, officials with the fire departments, major businesses, governmental organizations, churches, the professions, hospitals, police departments, the Chamber of Commerce, public libraries, as well as members of the general public, were contacted in these outlying communities.

15. As a result of the surveying efforts, Lake Erie found the following to be the needs and interests of Lorain and the outlying communities (those most frequently mentioned are listed first):

1. Water and air pollution
2. Better public transportation
3. Urban renewal for the downtown area
4. Improvement of parks and recreational facilities, especially for youth
5. High crime rate
6. Improvement in schools and education
7. Lack of unity and quality in city leaders
8. The need for a new City Hall
9. More community pride
10. More low cost and rental housing
11. Better roads
12. Better race relations
13. Apathy
14. The need for trained policemen and better police protection
15. Better communications between public and private citizens
16. More jobs
17. Inflation and the economy
18. Financial problems—both individual and city
19. Lack of culture
20. The need for sanitary and storm sewers
21. Law enforcement
22. Better traffic control
23. Welfare

24. Unsafe streets
25. Social disintegration of the family unit
26. Sunday sales
27. Parking
28. Harbor improvement
29. Mental health programs
30. Out-patient services
31. Juvenile delinquency
32. Taxes
33. Drug abuse
34. More respect for adult authority
35. More parking for Lorain High School
36. Improved lighting
37. Rampant conservatism
38. The need for a 4-year college
39. Lack of decent hotels

16. In addition to the needs and interests as listed in the preceding paragraph, the principals of Lake Erie have found, through their surveying, a need for the broadcast of sporting events. The local Lorain station, being daytime, does limited sportscasting as does the local Elyria station.

17. To meet the needs and interests as ascertained by Lake Erie, Lake Erie proposes to broadcast live the meetings of the Lorain City Council on Mondays for approximately 1 hour and 30 minutes, a program designed to serve ascertained needs and interests, such as, water and air pollution, urban renewal, public transportation problems, rental housing, improvement of the parks, better roads and better traffic control, which are frequently discussed by the City Council; a 30-minute public affairs program, *Soundoff*, to be broadcast on Tuesday, Wednesday and Thursday at 7:30 p.m.; a discussion type program with guests and telephone interviews with local listeners concerning subjects of interest to the community, thus offering an opportunity for the public to bring forward for discussion many of the ascertained community problems mentioned in the survey; a weekly 5-minute program, entitled *Black Forum On The Air*, which will be presented by Black people with the needs and interests of the community's Black population in order to better race relations; an interview and discussion type program, *Town Talk*, on Monday through Friday, from 7:30 to 7:35 a.m., consisting of discussion and interviews centering around local, national and regional matters pertaining to the needs and interests of the community, including special emphasis on the problem of drainage sewers in the outlying communities, a frequently mentioned problem; a weekly 15-minute program, entitled *Your Country*, which will be a special cultural program of music and features pertaining to the different ethnic groups making up the proposed service area, directed to the lack of cultural understanding, a community problem found to exist; and a weekly 5-minute program, to be broadcast on Wednesdays from 7:05 to 7:10 p.m., entitled *Your Chamber and You*, which will feature interviews with local businessmen discussing local business and community affairs.

18. In addition, two programs concerning education, the first, to be broadcast on Saturday afternoons and whenever specially planned, consisting of Quiz Bees, panel discussion programs and debate contests, and the second, *Teen Scene*, a 5-minute program, to be carried on Mondays from 6:30 to 6:35 p.m., will be presented by the school

teachers of the local schools, concerning local school activities, thereby meeting two ascertained needs, helping to bridge the generation gap by informing all members of the community of constructive youth activities; a program, *Bulletin Board*, to be carried Monday through Friday, from 9:30 to 10 a.m., consisting of announcements by national and local civic and charitable organizations concerning their activities, directed to the lack of community pride as an ascertained need; a program, entitled *4–H Roundup*, a 5-minute program produced by the local 4–H director covering the activities of the 4–H Club in the community; a program, entitled *Scouting Report*, a weekly 5-minute program covering Boy Scout and Girl Scout activities; the *Boater's Weather Advisory*, to be broadcast six times daily during the summer, will inform boaters of local weather conditions; two programs which should appeal to the large rural population in the proposed service area, the first of which is a 10-minute weekly program, presented by the local Extension Agent, will present general information on growing, and the second, to be broadcast Monday through Friday, for 5 minutes from 11:55 to 12 noon, will present the latest grain and market reports as supplied by the Cleveland market.

19. Lake Erie also proposes to broadcast school safety messages, the stock market reports, social security information, a weekly church service from 10:30 to 11 a.m. on Sundays, daily devotions during sign on and sign off of each broadcast day, and announcements concerning hospital admissions and releases, births and obituaries and fire department reports.

20. In response to the need for the broadcast of local sporting events, Lake Erie will broadcast as many of the important football and basketball games in Lorain and the surrounding areas as is possible. Lake Erie expects to devote about seven hours a week to this type of programming during the September through March season. Lake Erie will program about one hour per week of coaches' shows which will call attention to the sporting events of the week.

21. Principals of Lorain Community, using the preliminary Primer and experience, conducted three separate survey efforts to ascertain community needs and interests in the area to be served. On February 4, 1970, preparatory to filing the application, the principals of Lorain Community surveyed 43 community leaders by a personal interview and 50 members of the public considered average. Twelve additional community leader surveys were conducted in late February and early March 1970 by Andrew J. Warhola, a principal. In July and August of 1970, Lorain Community mailed 750 postal cards to residents regarding proposed duplication of program offerings of Station WLRO(AM), Lorain, Ohio for several hours daily. A total of 100 responses were obtained, and the results of this survey are described below with respect to the duplicated programming issue. On February 27 and 28, 1970, Austin W. O'Toole, a 25% owner and Chairman of the Board of Lorain Community, interviewed ten community leaders. On February 21, 24, 25 and 27, 1970, Andrew J. Warhola, a 25% stockholder and President of Lorain Community, interviewed eleven community leaders. On February 23, 25 and 28, 1970, Warren E. Finkel, a 25% stockholder, Treasurer and director of Lorain Community, interviewed four community leaders. On February 14, 1970,

George T. Mobille, a 25% stockholder, director and Vice President, Secretary of Lorain Community, interviewed nine community leaders. On February 14, 1970, Richard Koba, General Manager of Station WLRO(AM) and proposed General Manager of the station, interviewed nine community leaders.

22. On the basis of its survey efforts, Lorain Community listed the primary community problems to be:

Overcrowded schools
Air and water pollution in federal systems
Lack of effective communications and dialogue between segments of the community and city government
Improvements in street and other municipal developments
Improvement of parks and recreational facilities
Crime
Creating a unified purpose for everyone in the area

23. As a further effort in February 1970, Lorain Community surveyed 54 persons selected at random from the telephone book. The most important subjects indicated by this random survey were as follows:

Overcrowded schools
Air and water pollution
Lack of effective communication and dialogue with city government
Need for certain changes and improvements in roads with some specific streets and crossings mentioned
Improvement of parks and recreation facilities
Stronger zoning requirements within the city of Lorain
Better relations between parent-teachers and students
Improved education for the students
Careful budgeting and allocation of tax funds
Improved traffic handling throughout the city
Crime
Lack of adequate bus transportation

In addition the applicant made 30 calls to telephone subscribers in Elyria and received responses regarding air pollution, water pollution, loose dogs, snow removal services, traffic and road conditions, and juvenile problems. Other contacts were made in Amherst Township, Vermillion, Avon and Avon Lake, North Ridgeville, Grafton, North Eden and Eden Township. The problems mentioned were water and air pollution, street lighting, traffic conditions and road and highway needs. There were 16 calls completed in these areas.

24. Typical illustrative programs proposed by Lorain Community to serve the needs and interests as ascertained are as follows:

Lorain Closeup (Public Affairs) between 12:20 and 12:25 p.m., Monday through Friday.
Recognition Week, featuring subjects on National Negro history week between 1:00 and 1:30 p.m. on Sunday.
RFD, a 5-minute agriculture program would be presented Monday through Friday, 6:06 to 6:10 a.m.
Lorain Heritage, for 5 minutes at 12:25 p.m., Monday through Friday and on Saturday at 7:15 a.m. and 1:15 p.m.
Cradle Call, a register of births at 10:00 to 10:05 a.m., Monday through Friday.
The station proposes interview and forum type programs.
Lorain City Council Meetings every Monday night.
Daily Devotions open the broadcast day and at sign off.
Lorain Grace Baptist Church program, ½ hour at 7:30 a.m. Sunday.
Lorain Baptist Church, at 8:05 to 8:10 a.m. Sunday.

Salvation Army's "Heartbeat Theater," 10:35 to 11:00 a.m. Sunday mornings. A remote church broadcast on a rotating basis among the local churches each Sunday.

High School Sports Contests including live games of high school-varsity teams. Further programming is shown under the duplicated programming issue.

Further specific program proposals to ascertained needs include *Here and Now*, the Joan Polk Show (duplicated from WLRO(AM)), *Lorain Closeup*, religious programming, *Recognition Week* and *Lorain City Council Meetings*.

25. Lorain Community proposes duplication of the programming of Station WLRO(AM) between the hours of 6:00 a.m. and 12:35 p.m. daily and will duplicate hourly newscasts not to exceed 10 minutes per hour throughout the remainder of the broadcast day from 12:35 p.m. until sign off at midnight. Lorain Community completed a random sample survey by direct mail to ascertain public reaction to duplicated programming. On the basis of 101 responses, or 13.3% of the direct mailing, it was found that the vast majority, 76.2%, answered "yes" to the question "Would you like to hear WLRO's regular AM programming on the FM as well?" The analysis of Lorain Community of the responses showed that the majority of respondents considered the music and informational format of WLRO(AM), with local news and weather emphasis, as the primary advantage which would be received from duplicated programming.

26. Lorain Community showed program offerings for the months of December 1971 and January 1972 as illustrative of programs presented on WLRO(AM) which would have been duplicated on the FM facility under the policy. In addition, Lorain Community showed special agricultural and news information at 6:02 a.m. and the one-hour program *Here and Now* with Mrs. Joan Polk. Sunday programming included religious and foreign language programs.

Sections 1.514 and 1.65 Issues (Issue 9)

27. The Lake Erie application was filed December 10, 1969. In that application, it was stated that Robert E. Stroupe, one of the Lake Erie owners, had as a business "Central Television—CATV—not in operation as yet" and that he was employed as an announcer in a Sandusky, Ohio, radio station, WLEC. By subsequent amendment filed February 18, 1972 and granted March 1, 1972, Stroupe's interests in North Central Television and in a weekly magazine "The Northern Ohio Weekly Scene" were further defined, and an interest of the other principals in Community Cable Television Company in Sheffield Township was disclosed. This led to the addition of Issue 9. It was clearly established that this information concerning Stroupe was correct as of the time of filing the application and hence there is no indication of a violation of Section 1.514 of the Rules. The matters of record deal only with the question of whether post filing developments should have been covered by amendments to the application and are herein dealt with solely as a Section 1.65 matter.

28. Stroupe, a 1.6% Lake Erie stockholder (4 shares of 254 shares issued), was the organizer of a group which ultimately became North Central Television, Inc. Inactive when the Lake Erie application was filed on December 10, 1969, it obtained necessary franchises in early

1970, and was incorporated August 1, 1970. The CATV system serves about 2,000 homes in Sandusky, Ohio, and in six adjacent townships, all outside the predicted 1 mv/m contour of the proposed FM station. Stroupe was General Manager of North Central from June 1970 to June 1971. Since the latter date, he has held no management position and receives no compensation, but is a 6% stockholder, a vice president and member of its Board of Directors. The noted changes in his status, and as to franchises and commencement of operations, were not reported by amendment of the Lake Erie application until February 1972. According to Stroupe his position of Director of that company is due to the new owners, who control eight directorships, being "nice guys."

29. North Central Television in turn has owned a weekly publication entitled "The Scene," later "The Northern Ohio Weekly Scene." It commenced publication in July 1970, as "The Scene" but was incorporated in the revised name and became a separate operation in July 1971, being incorporated in September 1971. The publication is a free-distribution publication primarily listing television schedules in the Sandusky area, which the local paper refused to print. In addition to advertisements, bulletin board type announcements, articles on pet care, horoscopes, and the like, are carried but not editorial opinions. The sample copy of record, however, contains only TV, CATV program listings and advertisements. Stroupe, under the name of "Bob Lee" which he uses for radio and television work due to difficulties in pronouncing his name, is listed as one of two publishers of the publication. Stroupe is President, a member of the Board of Directors, and 33⅓% owner of the corporation. None of Stroupe's activities with respect to, or activities of, the publication were disclosed until the amendment filed in February 1972.

30. On October 1, 1970, all of the principals of Lake Erie except Stroupe organized a limited partnership named Community Cable Television Company for the purpose of building and operating a CATV system. The partnership applied for a franchise from the trustees of Sheffield Township, Ohio, on October 28, 1970, which was issued on November 10, 1970. Shortly thereafter, "over a period of a few weeks," it was found that the cost of pole rental contracts made the CATV project impracticable and it was abandoned, but no fixed date of abandonment is established. The partnership agreement was never filed as required by Ohio law, nor were capital contributions made by the partners as also required by law. Finally, in February 1971, the partnership agreement was abandoned.

31. While the partnership agreement was signed by all participants, the acknowledgement form was not executed. According to Adrian F. Betleski, one of the principal witnesses for Lake Erie, and who is a lawyer, the agreement would be effective only when recorded with the clerk of the court and this was not done. Betleski deemed no action necessary to surrender or cancel the franchise since it was a non-exclusive grant and imposed no obligations; nevertheless, on February 17, 1972, Betleski addressed a letter to the Township Trustees advising them that Community Cable Television Company had terminated its operations some time ago and is advising of its relinquishment of the franchise. Among other things, the franchise was conditioned,

however, on the company proceeding "in good faith" with construction of the system, within 90 days of the completion of pole clearances, and on completion within 270 days thereafter. Subsequently, on April 18, 1972, due to the nature of a question by the Presiding Judge, Community Cable obtained a Resolution from the Township Trustees formally terminating and setting aside the November 10, 1970 franchise.

32. None of the foregoing information concerning Community Cable was included in the application herein until the amendment filed February 18, 1972, which it did on the advice of counsel on the theory that if disclosed by other than the applicant, it might be construed as something hidden or secret.

33. Stroupe lives in Sandusky, Ohio and his business interests are centered there. Between the time of filing the original application and the preparation of hearing exhibits, the contact between Stroupe and the other Lake Erie principals was limited. As a result, between those times, information concerning the changes in Stroupe's business interests was not made known to the other principals. However, during the preparation of hearing exhibits, discussions revealed the changes which were made known through the filing of an appropriate amendment on February 18, 1972.

Integration of Ownership and Management

34. Lake Erie proposes to integrate eight of its nine principals in management. Harold E. Sens, a 19.7% shareholder, will be President, director and full-time General Manager of the station. Mrs. Sens has 12 years of broadcasting experience including Sales Manager and General Manager of Radio Station WLEC in Sandusky, Ohio, his current position. Mr. Sens proposes to leave his present employment and establish permanent residence in Lorain if Lake Erie receives the FM grant. Mr. Sens has been active in a wide variety of Sandusky and county civic, charitable and educational activities.

35. Robert E. Stroupe, a 1.6% stockholder, will be a half-time employee for Lake Erie and will assume administrative duties consisting of making commercials and other announcements and also assisting in programming. Mr. Stroupe has been in the field of broadcasting since 1958 when he was employed as Station Manager with WWIZ, Lorain, Ohio. He also served as a station announcer with WLEC, Sandusky, Ohio. Mr. Stroupe's civic activities include: Chairman of the 1969 Erie County March of Dimes Campaign, Division Chairman of the 1968 United Fund Drive.

36. Adrian F. Betleski, a 7.9% stockholder of Lake Erie, will be Secretary, director and part-time Station Manager devoting 14 hours per week to this position. Mr. Betleski is a long-time resident of Lorain, having practiced law there for more than 20 years. As an attorney, Mr. Betleski will handle the local legal affairs of the station. Mr. Betleski has an extensive record of civic activities in Lorain and its county.

37. John R. Clark, a 7.9% stockholder, will serve as Associate General Manager of the station, devoting 12 hours per week in this capacity. Mr. Clark was born in Lorain and resides there today. He is an architect and has been particularly active in organizations related to

building improvements in Lorain. Mr. Clark has had other civic activities of a wide nature.

38. Ronald N. Cole, a 19.7% stockholder, will serve as an Associate General Manager, devoting 8 hours per week in this capacity. Mr. Cole, who is a resident of Sandusky, Ohio, has been active in civic affairs there.

39. Eugene M. Sofranko, a 7.9% stockholder, will be Vice President, director and Public Service Director of the station, devoting 12 hours per week in this capacity. Mr. Sofranko was born in Lorain and continues to live there. Mr. Sofranko has been active in many local civic activities in Lorain.

40. Edward J. Gross, a 7.9% stockholder of Lake Erie, will serve as Business Manager of the station, devoting 8 hours per week in this capacity. Mr. Gross was born in Lorain and continues to live there. His activities in local civic affairs are also extensive.

41. Thomas A. Tubbs, a 7.9% stockholder of Lake Erie, will be Treasurer, director and Financial Director of the station, devoting 12 hours per week in this capacity. Mr. Tubbs is a resident of Lorain where he has had many local civic activities.

42. In summary, the following table indicates the proposed management involvement of the Lake Erie principals:

Name	Percent ownership	Residence		Percent or hours per week	Capacity
		Present	Proposed		
Harold E. Sens	19.7	Sandusky	Lorain	Fulltime	Pres., dir. & gen. mgr.
Robert E. Stroupe	1.6	Sandusky	Sandusky	Halftime	Commercials, announcements & programming
Adrian F. Betleski	7.9	Lorain	Lorain	14 hrs.	Sec., Dir. & parttime station mgr.
John R. Clark	7.9	Lorain	Lorain	12 hrs.	Asso. gen. mgr.
Ronald N. Cole	19.7	Sandusky	Sandusky	8 hrs.	Asso. gen. mgr.
Eugene M. Sofranko	7.9	Lorain	Lorain	12 hrs.	Vice pres., dir. & public service dir.
Edward J. Gross	7.9	Lorain	Lorain	8 hrs.	Business mgr.
Thomas A. Tubbs	7.9	Lorain	Lorain	12 hrs.	Treasurer, dir. & financial dir.
James E. Printy	19.7	Sandusky	Sandusky		

Thus, 41% of the ownership will be non-resident, and but 59% resident in Lorain; one 19.7% owner will be integrated into management on a full-time basis; a non-resident will serve on a half-time basis; with the remainder, except for Printy who will have no management activities, devoting an average of from one to one and a half days a week to management.

43. Lake Erie also proposes that six of the aforementioned principals will regularly meet to plan public affairs programming. This group consists of the foregoing who are listed as residents of Lorain.

44. Andrew J. Warhola, President, director and 25% stockholder of Lorain Community, devotes 50% of his time to WLRO station affairs and will be available on a shared basis with the FM station. He is the present General Manager of Station WLRO(AM) during the illness of Mr. O'Toole, and will be of the proposed FM station. The amount of time devoted to the proposed station is not disclosed but will be assumed to be one-half of the time indicated, although there

is no clear indication it may be that much. He will continue the active practice of law.

45. Warren E. Finkel, Treasurer, Business Manager and 25% stockholder of Lorain Community, will devote approximately 20 hours per week to the business affairs of the stations of which one-half will be assumed to be with the proposed station. He will continue the practice of architecture.

46. Austin W. O'Toole, Chairman of the Board and 25% stockholder of Lorain Community, formerly served as General Manager of Station WLRO but is not now active due to illness. In the event his health permits, he may return to full-time activity on a daily basis as Assistant General Manager. George T. Mobille, Vice President, Secretary and 25% stockholder, who resides in Washington, D.C., is available for regular contact with the station regarding legal affairs. However, neither Messrs. O'Toole nor Mobille are capable of integration at a level which may presently be considered to be of decisional significance.

47. In summary, the following indicates the management involvement in the proposed station of Lorain Community principals, each of whom resides in Lorain:

Name	Percent ownership	Percent or hours per week	Capacity
Andrew J. Warhola	25	25%	Gen. Mgr.
Warren E. Finkel	25	10 hrs.	Bus. Mgr.

48. Both applicants propose available auxiliary power capable of providing power necessary to maintain operation at all times, irrespective of possible power failure beyond the control of the licensee.

Duplicated Programming

49. Lorain Community, which now operates standard broadcast station WLRO in Lorain, proposes to duplicate the programming of that station over the proposed FM facility between 6:00 a.m. and 12:35 p.m. daily, and during the remainder of the day until sign off at midnight will duplicate WLRO news broadcasts for not to exceed 10 minutes per each hour, or seven hours daily of duplication.

50. Lorain Community made a survey in July and August 1970 by a random mailing of 750 postcards in the area to be served, from which 87 replies were received; subsequently, 14 more were received for a total of 101. Of these, 77% answered "yes" to the question "Would you like to hear WLRO's regular AM programming on the FM as well?" Lorain Community views these responses as showing that a majority of respondents consider the music and informational format of WLRO, with local news and weather emphasis, as the primary advantage which would be received from duplicated programming. It also considers the result of the survey to indicate that a different listening audience would be supplied the FM signal. A large portion of the responses indicate, however, that WLRO listeners may shift from the AM to FM to receive a better quality signal; are generally com-

mendatory of WLRO programs; or indicate a preference for FM rather than AM.

PROCEDURAL MATTERS

51. Lorain Community attached to its Proposed Findings an "Appendix B—Offer of Proof." Such "offers" are inappropriate in Proposed Findings and the Appendix will be stricken. The circumstances of each of the three "offers" are such as to require comment as incorrect inferences might be drawn from the manner in which they are stated.

52. The first offer is that, "if permitted," Lorain Community would show that eight-named individuals were appreciative of the services provided by Station WLRO since July 1971. The eight letters in question were attached to Lorain Community's Exhibit No. 6 offered at the hearing, but had been withheld from the prior distribution of evidence that had been specified by Order (FCC 72M–92) (Tr. p. 168). No offer was made by counsel to produce the individuals, and, in light of objections made, such letters were stricken from the exhibit.

53. The second "offer" was that, "if permitted," Lorain Community would show that one of the owners of Lake Erie had failed to correctly prepare program and maintenance logs in 1960 in connection with an unrelated application, and that this would reflect adversely on his ability to perform his proposed duties. Counsel for Lorain Community confronted the witness with copies of alleged program logs of the unrelated station of which the witness had been an employee for the stated purpose of impeaching his testimony that he would bring valuable broadcasting experience to Lake Erie. (Tr. p. 144). The witness categorically denied he had executed the logs in question. The copies exhibited had not been authenticated, portions were cut off, and counsel admitted "I do not know what it is." Although cautioned that the alleged logs should have been authenticated or the Commission's file in the case produced (Tr. p. 149), no opportunity was sought by counsel to do so, and the objection to the use of the log copies was sustained (Tr. p. 151).

54. The third "offer" is that, "if permitted," Lorain Community would show that when Lake Erie obtained the revocation of the CATV franchise issued by the Trustees of Sheffield Township, discussed elsewhere herein, no representations were made as to prohibitive costs as the reason for withdrawal from the CATV operation. Although counsel for Lorain Community had had a copy of the Resolution for a week prior to the hearing, he waited until the end of the hearing to request opportunity to rebut the Lake Erie assertion as to the reason for abandonment. Despite the lateness of this request, a special procedure was established (Order released June 15, 1972, FCC 72M–785) with which counsel did not comply (Order released June 29, 1972, FCC 72M–841). The offer in any event is wholly irrelevant as the Resolution itself, signed by the Trustees, recites high installation cost as the reason for abandonment.

55. Contrary to the implications of the "Offer of Proof," Lorain Community was not deprived of opportunity to present evidence in a proper manner.

56. The Broadcast Bureau seeks to demonstrate inconsistency between statements of Stroupe in his testimony with that given in re-

sponse to interrogatories. The latter were not made of record, nor was the witness confronted with them at the hearing. By footnote 3 on page 6 of the Bureau's Proposed Findings, it is requested that official notice be taken of the Interrogatory Responses of Lake Erie, dated May 19, 1972. Such action would be improper under the circumstances, and the request is denied.

CONCLUSIONS

1. *Section 1.65 Issue.* Two separate instances affecting Lake Erie require analysis in the light of Section 1.65 of the Rules which requires amendment of pending applications within thirty days when they are "no longer substantially accurate and complete in all significant respects" or whenever there has been "a substantial change as to any other matter of decisional significance." The first is as to Robert E. Stroupe's activities and interests and the second, as to the Lake Erie principals' activities in cable in Lorain.

2. The Lake Erie application listed Stroupe, a 1.6% stockholder in Lake Erie (4 shares out of 254 subscribed shares), as being "Announcer WLEC 1963 to present" and also listed "Central Television—CATV—not in operation as yet." Stroupe left Station WLEC in May 1970, but this was not the subject of amendment of the Lake Erie application until the February 18, 1972 filing. While the Broadcast Bureau cites this failure to report Stroupe's change in occupation, it offers no authority for the proposition that this is a substantial change or a matter of decisional significance or otherwise comes within the requirements of Section 1.65. It is concluded that the failure to amend to show this change in Stroupe's employment did not violate Section 1.65.

3. Stroupe's cable television activities are of a different nature and clearly should have been reported by appropriate amendment. In December 1969, when the Lake Erie application was filed, the venture was only in a planning stage, following four years of study by Stroupe, who was trying to assemble a group to back the venture. Ownership rights were not fixed at this time although Stroupe was the entrepreneur. Thus, the reference to "CATV—not in operation as yet" was an accurate statement. The Broadcast Bureau would fault Lake Erie for not having spelled out the percentage of ownership by Stroupe at the filing date, a matter which it did not deem sufficiently important to clarify during the processing stage.

4. Beginning in the first quarter of 1970, however, North Central began to receive franchises from communities in the Sandusky area. Clearly, North Central was sufficiently viable that appropriate amendments to the Lake Erie application should have been filed to include franchises. Moreover, Stroupe became General Manager on June 1, 1970, serving in that capacity for one year and the company was incorporated in August 1970.

5. In July 1970, North Central Television started publication of a weekly television guide, variously called "The Scene" and "Northern Ohio Weekly Scene." In July 1971, after "big money" took over the cable system, "The Scene" became a separate operation of which Stroupe is President and a one-third owner and one of its three "Publishers." Stroupe is active in the management and operation, including the selling of advertising but does no writing. Its circulation is about

25,000 which is distributed free from door-to-door, and mails out about 35 copies of which about six are paid mail subscriptions. While mail subscriptions are accepted, they are not actively solicited, as they lose money on them. While some syndicated columns, letters, articles on pet care, health columns and notices are carried, the portions of the publication of record contain no news items as such, although Stroupe indicated articles about the parks and experiences in downtown Sandusky are sometimes carried, none of which is written by him. While the Review Board in its Order released April 4, 1972 (34 FCC 2d 354), characterized the "Northern Ohio Weekly Scene" as a "newspaper" based on the statements in pleadings then before the Board, it is clearly not a newspaper in the accepted sense.

6. As of the time of hearing, Stroupe's interest in North Central Television, Inc. is 6% (3,000 shares out of 50,000 outstanding) and he is still a director and vice president although the new ownership is represented by eight directors. While retaining the title of vice president, Stroupe performs no management functions, nor has he since June 1971, and receives no compensation. As to the "Northern Ohio Weekly Scene," a weekly magazine-type television guide, Stroupe is a 33⅓% owner, president, a director and actively works for it.

7. Stroupe's activities and interests in both the cable and magazine operations should have been the subject of amendments to Lake Erie's application. Stroupe, who lives in Sandusky, did not know of this requirement, and, in view of the remaining principals being located in Lorain, contact was limited, and it was not known to the latter until discussions leading to the preparation of hearing exhibits disclosed it, leading to the filing of the February 18, 1972 amendments.

8. The Broadcast Bureau argues that Sens and Betleski both knew of Stroupe's activities, that the failure to report was intentional and that therefore applicant lacks the basic qualification of applicant. There is no justification in the record for such assumptions. Sens knew of Stroupe's departure from WLEC because Sens was employed by the same station. The Bureau, however, attributes to Sens knowledge of Stroupe's cable activities because the latter testified, with regards to his efforts to raise money to originate the North Central enterprise, he discussed it "as a coffee break conversation over a period of time" with "friends of mine." From this the Bureau creates the inference that Stroupe must have discussed it with Sens because they also had coffee together. It would then use this inference to characterize Stroupe's unequivocal statement that he did not discuss North Central affairs with Sens as "inconsistent" and hence to be discarded in favor of the inference. The Bureau, moreover, would attribute knowledge of Stroupe's activities, and the internal changes in North Central and the magazine, to Betleski because the latter had learned of the incorporation of North Central by "hearsay afterwards," and because Betleski discussed the perparation of the Lake Erie application as well as the proposed Lorain CATV with Sens. Thus, by second degree imputation, Betleski is charged with the knowledge of Stroupe's activities, which had merely been imputed to Sens.

9. The contention of prior intent on the part of Lake Erie and that it is unqualified to be a licensee, must be rejected. Other than the fact that Sens knew that Stroupe's employment with WLEC had termi-

nated (as to which no authority is cited that its reporting was required by Section 1.65) none of the other facts reviewed can be attributed to either Sens or Betleski, nor to the corporate applicant, Lake Erie. Thus, the matter is for consideration as to Lake Erie's comparative, rather than basic, qualifications.

10. As to the CATV in Lorain, proposed by all but one of Lake Erie's principals, it is not entirely clear when it moved from an organizational effort to a viable enterprise, the partnership agreement never having been consummated. The grant of the non-exclusive franchise on November 10, 1970, however, definitely should have been reported by an amendment (Order of Review Board, released April 4, 1972, 34 FCC 2d 354). Section 1.65 required that this should have been reported by amendment not later than December 10, 1970. While it is clear the project was subsequently abandoned the record does not establish the exact date; if it occurred prior to December 10, 1970, there would have been nothing to report. While Lorain Community, which had the burden of proceeding with the evidence, did not establish this date, neither did Lake Erie which had the burden of proof. It is clear the group abandoned the project upon learning of the greater-than-expected cost of pole rentals which was described variously as "immediately after" and "a period of a few weeks" after the Sheffield franchise was granted. In any event, it was clearly abandoned by February 1971. Betleski testified that during discussions with communication counsel it was concluded to do nothing about the matter because it had been abandoned; but in preparing for the hearings herein it was later concluded it should be reported.

11. Not having established that the abandonment occurred by December 10, 1970, the franchise should have been reported by an amendment, as well as the subsequent abandonment. Hence it is clear that Lake Erie failed to comply with Section 1.65; but since the matters to have been reported resulted in a withdrawal of a potentially adverse factor, it is similar to that in *Lorain Community Broadcasting Co., et al.*, 18 FCC 2d 686. It therefore will not be considered a basic disqualification but will be considered with Lake Erie's comparative qualifications.

12. In summary, Lake Erie has failed to comply with Section 1.65 with respect to the following:

a. The completion and operation of North Central Cable Television, initially correctly reported as "not in operation as yet," with which Stroupe, a 1.6% stockholder was associated, and in a changing role.

b. The institution of the "Northern Ohio Weekly Scene," by North Central Cable Television, and Stroupe's changing role therein.

c. The attempts of Lake Erie's principals to institute a CATV in Sheffield Township, and its subsequent abandonment.

These relate to matters of little decisional significance and the omissions were clearly inadvertent. As they cannot be condoned these failures require that a comparative demerit be assigned to Lake Erie.

Lorain Community Financial Issue (Issue 1)

13. For the reasons heretofore stated, it is clear that Lorain Community has adequate funds available to cover construction and first-year operation of its proposed station without reliance on revenues.

It is therefore concluded that Lorain Community is financially qualified.

Community Ascertainment (*Issues 4 and 5*)

14. For the reasons stated above, it is concluded that both Lake Erie and Lorain Community have met the requirements of the so-called "Primer," 27 FCC 2d 650, and have properly ascertained the needs of the community to be served and propose to satisfy them.

Comparative Evaluation (*Issues 7 and 8*)

15. *Diversification of control.* The only media interests of Lake Erie are those of Robert Stroupe, detailed above. These consist of a 6% stock interest in North Central Television, Inc., a cable television system outside the predicted area of the proposed station. While a director and vice president of that company, Stroupe has no management function nor does he receive compensation; his interest can only be considered nominal. Stroupe is also a 33⅓% owner, president and a director of the TV guide, "Northern Ohio Weekly Scene," distributed outside the predicted area of the proposed station. While not a newspaper, it is assumed to be a media of mass communication within the Commission's *Policy Statement.* Stroupe's interest in Lake Erie is so small, and the nature of his interests such, that no significance need be assigned thereto. On the other hand, the Lorain Community principals have full ownership and full control of the only AM station in Lorain. Thus, Lake Erie must be assigned a substantial preference on this factor.

16. *Best practicable service—full-time participation by owners.* Harold E. Sens, a 19.7% owner, will devote full time to the station as its President, a director, and General Manager. Robert E. Stroupe, a 1.6% owner, will be a half-time employee in announcing and programming. Six of the remaining nine owners will have management responsibilities ranging from eight to fourteen hours per week, but this is not sufficient to be given weight. Sens and Stroupe are both experienced broadcasters; although both now live in Sandusky, Sens will locate in Lorain if the station becomes operational. Such weight as might be ascribed to the integration of Stroupe is diminished, if not eliminated, by his non-residence. None of Lorain Community's owners will be integrated in a meaningful degree. Andrew J. Warhola, a 25% owner, will devote half his time to radio affairs including the present WLRO(AM) or apparently 25% to the proposed station. Warren E. Finkel, also a 25% owner, will devote 10 hours per week, which is insufficient to be meaningful for integration consideration. The remaining two 25% owners, one of whom is resident in Washington, D.C. and the other who is incapacitated, are conceded to be incapable of integration at a level of decisional significance, although they will actually or potentially participate to a degree.

17. As to past participation in civic affairs by the participating owners, the record of Lorain Community is greatly superior, as that of its two principals credited with integration, has been in Lorain, whereas that of Lake Erie's Sens has been in the Sandusky area. In past broadcasting experience, Sens has had 12 years including his present capacity as Sales and General Manager of Station WLEC, Sandusky, and that of Warhola and Finkel as owners and manage-

ment participation of WLRO since 1969. The past broadcast record of Lorain Community through WLRO, as noted below, is not shown to be either unusually good or unusually poor and hence will be disregarded.

18. *Program duplication.* Under the standard of efficient use of frequency, the Commission considers efficiency factors. Lorain Community, which will duplicate a large part of its WLRO programming over the proposed FM station, has not shown any efficiencies to be gained by the duplication. Lorain Community has established that many listeners are pleased with WLRO programming, that some would like to see it repeated over an FM station; but the main thrust of the responses to its survey is that listeners wish an FM station in the area. There is no indication of a preference for one by WLRO, either with or without duplication, as contrasted with an independent FM station, nor indication of efficiency or benefit to be received by a grant to WLRO. It is therefore concluded that a grant to Lorain Community would result in less efficient use of frequencies than a grant to Lake Erie.

19. The final evaluation of these factors indicates many countervailing considerations. Lake Erie is clearly preferred under the standard of diversification of control of mass communications media and slightly to be preferred as to integration of management and substantially to be preferred with respect to efficient use of frequency. But Lake Erie suffers from a competitive demerit for its failures to observe Section 1.65. In view of the importance of the diversification standard, however, it is concluded that the public interest would be better served by the granting of the Lake Erie application.

ULTIMATE FINDING

Accordingly, IT IS ORDERED, 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 Lake Erie Broadcasting Company, Docket No. 19213, File No. BPH–6969, is GRANTED, and that of Lorain Community Broadcasting Company, Docket No. 19214, File No. BPH–7044, is DENIED;

IT IS FURTHER ORDERED, That Appendix "B" attached to the Proposed Findings of Lorain Community Broadcasting Company is STRICKEN, and the request of the Broadcast Bureau (Footnote 3, page 6), in its Proposed Findings, for the taking of notice, is DENIED.

FREDERICK W. DENNISTON,
Administrative Law Judge,
Federal Communications Commission.

F.C.C. 73-1137

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
LYONS CATV, INC., LYONS, KANS.	CAC-2472 KSO68
MCPHERSON CATV, INC., MCPHERSON, KANS.	CAC-2473
For Certificates of Compliance	KSO69

MEMORANDUM OPINION AND ORDER

(Adopted October 31, 1973; Released November 6, 1973)

BY THE COMMISSION:

1. Lyons CATV, Incorporated, and McPherson CATV, Incorporated, operate 33-channel cable television systems at Lyons and McPherson, Kansas, respectively. These two systems, located within the Wichita-Hutchinson, Kansas television market (#67), have already received certificates of compliance to provide the following television broadcast signals:[1]

KCKT-TV (carried only by the Lyons system) (NBC, Channel 2) Great Bend, Kansas
KARD-TV (NBC, Channel 3) Witchita, Kansas
KAKE-TV (ABC, Channel 10) Wichita, Kansas
KTVH (CBS, Channel 12) Hutchinson, Kansas
KPTS (Educ., Channel 8) Hutchinson, Kansas
KBMA-TV (Ind., Channel 41) Kansas City, Missouri
KWGN-TV (Ind., Channel 2) Denver, Colorado

However, on April 27, 1973, each system filed a "Request for Temporary Modification of Certificate of Compliance or Other Relief." These requests, like the original applications, are unopposed.

2. Pursuant to Section 76.63 of the Commission's Rules, as it relates to Section 76.61(b)(2), the Lyons and McPherson systems have been authorized to carry two distant independent television signals, KBMA-TV (Channel 41, Kansas City, Missouri) and KWGN-TV (Channel 2, Denver, Colorado), in addition to all local stations, none of which is an independent. It now appears that although by letters of April 19, 1972, Lyons and McPherson requested Mid-Kansas, Inc., a common carrier microwave company, to provide relay of KWGN-TV and KBMA-TV, KWGN-TV cannot be made available from either Mid-Kansas or any other source "until sometime late in 1974." The basic cause of this delay is allegedly Mid-Kansas' inability

[1] CAC-389 and CAC-390, granted August 30, 1972, by the Chief, Cable Television Bureau, pursuant to delegated authority. These certificates expire March 31, 1977. Lyons has a population of 4,355, and McPherson, 10,851. The systems commenced operations on August 13, 1973, and May 14, 1973, respectively. In addition to the seven channels for television broadcast signals, each system offers full access cablecasting services, pursuant to Section 76.251 of the Rules.

to reach an acceptable interconnection arrangement with Mountain Microwave Corporation, a common carrier microwave company that now brings KWGN–TV as far as Dodge City, Kansas. Lyons, McPherson, and Kansas State Network, Inc. (holder of a 60 percent interest in each cable system) maintain that they have been willing to expend substantial sums to build their own microwave system to obtain the signal of either KWGN–TV or another permissible independent signal within a reasonable time; however, these efforts have also foundered, although they are continuing. In the meantime, present cable subscribers are threatening to disconnect because they are paying to receive only one broadcast channel more than they can receive with their regular rooftop antenna, and other residents have stated that they will not subscribe until an additional channel is available.

3. To minimize this signal carriage crisis, Lyons and McPherson propose temporary carriage of the non-network programming of Station WDAF–TV (Channel 4, NBC), Kansas City, Missouri, until a second independent signal is available. They argue that the only signals that are now readily available in the Lyons-McPherson area, in addition to KBMA–TV, are the Kansas City network affiliates, whose signals have been distributed in this general area by Mid-Kansas for a number of years. Lyons and McPherson propose carriage of the NBC affiliate, because their parent company, Kansas State Network, is the licensee of Station KARD–TV, the NBC affiliate already being carried. Therefore, KARD–TV, rather than the other two local network affiliates, would feel the economic impact, if any, of this proposal. The cable systems have undertaken to provide network program exclusivity to KARD–TV, and KARD–TV has consented to the carriage proposal.

4. In *Vilas Cable, Inc.*, FCC 73–379, 40 FCC 2d 637, the Commission permitted a smaller market cable system, located in a small community, to carry the non-network programming of two network affiliates, in lieu of a single independent station, upon a showing that the cost of utilizing microwave transmission to obtain an independent would be prohibitive. Although the subject requests involve different facts, we believe that the rationale underlying Paragraph 18 of the *Reconsideration of the Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 333, cited in *Vilas Cable, Inc.*, is equally applicable. In essence, this rationale favors granting special relief, where necessary, to permit cable systems to meet the minimum levels of signal carriage diversity permitted by the carriage rules. While on the one hand, the Lyons and McPherson systems are larger than the *Vilas* system, and their requests for relief are not based on prohibitive cost but rather *force majeure*, on the other hand, the relief sought is lesser in degree and for only a limited duration. In the circumstances, we conclude that the public interest would be served by grant of the requested temporary relief. However, we will limit this temporary authorization to carry WDAF–TV to one (1) year from the release date of this Memorandum Opinion and Order, or until a second permissible independent signal is available for carriage on the Lyons and McPherson cable systems, whichever occurs first.

In view of the foregoing, the Commission finds that grant of the subject requests for temporary modification of certificates of compliance would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Request for Temporary Modification of Certificate of Compliance or Other Relief" filed by Lyons CATV, Incorporated (CAC–2472), and by McPherson CATV, Incorporated (CAC–2473), IS GRANTED to the extent indicated in Paragraph 4 above, and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73–1139

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 76 OF THE COMMISSION'S RULES AND REGULATIONS RELATIVE TO CABLE TELEVISION SYSTEMS AND THE CARRIAGE OF NETWORK NEWS PROGRAMS ON CABLE TELEVISION SYSTEMS	Docket No. 19859

NOTICE OF PROPOSED RULE MAKING

(Adopted October 31, 1973; Released November 5, 1973)

BY THE COMMISSION: COMMISSIONERS REID AND WILEY CONCURRING IN THE RESULT.

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

2. We recently have had occasion to consider the applicability of our signal carriage rules to network news programs. All three major national television networks "feed" their evening news programs to affiliates two or three times daily.[1] This universal and accepted practice raises a question under Section 76.61(e)(2) of the Commission's Rules, however, as to whether each feed is a separate "program" which a cable television system may carry if it is "not carried by a station normally carried on the system."[2]

3. To be sure, there usually is little or no difference between the contents of each feed. More than fifty percent of the time, the feeds are identical. And most differences just consist of technical mistakes in one of the feeds. Only rarely is a change substantial or substantive—e.g., addition of new film or coverage of a late-breaking story. Accordingly, the difference usually is not sufficient to create a separate "program" within the meaning of Section 76.61(e)(2).

4. This result is, however, less than satisfactory. It forces cable subscribers to miss a small but significant amount of news coverage, since a cable operator cannot predict when a difference between feeds will be significant enough to create a separate "program." In addition, the present rule saddles cable subscribers with a particular feed's technical mistakes. Finally, it runs against the broad national policy of diversity in news programming. As the Supreme Court noted in *Associated*

[1] We note, of course, that some affiliates receive network programming through rebroadcast agreements with other stations.

[2] Section 76.61 provides in pertinent part:

(e) In addition to the television broadcast signals carried pursuant to paragraphs (a) through (d) of this section, any such cable television system may carry:

(2) Any television station broadcasting a network program that will not be carried by a station normally carried on the system. Carriage of such additional stations shall be only for the duration of the network programs not otherwise available, and shall not require prior Commission notification or approval in the certificating process.

Press v. *United States*, 326 U.S. 1 (1945), and as we so often have iterated, "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . ." Indeed, in Paragraph 19 of our *Reconsideration* we noted that "availability of full network service" was "of particular importance in those cases where the programs not otherwise available include network news . . ."

5. Accordingly, we find that a relaxation of present restrictions would be appropriate. The proposed rule (Appendix A) thus would increase the availability of network news programs while limiting the impact on stations which a system normally carries.

6. Section 76.61(e)(3) would allow a cable television system to carry a network news program from any television station, unless the program simultaneously duplicated a signal which the system normally carried. The proposed rule deliberately does not draw a distinction in terms of different feeds, since such a standard would be unworkable. It would require both television stations and cable systems to identify the feed used not only by each network station which the system normally carried, but also by each network station whose news program the system might carry. Since a station's choice of feeds may vary from day to day, this would be an exercise in futility.[3] To be sure, this formulation will allow a few cable systems—most commonly those near the border of two time zones—to carry the same network news program several times daily. In most cases, however, the cost of importing a signal for just a largely duplicative half hour of news will be prohibitive.

7. Section 76.5(ii) merely would add "network news program" to the existing list of definitions. The proposed rule would define "network news program" in conventionally accepted terms. Thus a program would need to meet all three criteria in order to fall within the rule. Section 76.5(ii)(1) restates and reflects the meaning of "news program" pursuant to our program logging rules.[4] By its terms, it therefore excludes programs which are in the nature of "public affairs;"[5] inclusion of such programs would expand the rule's scope further than we contemplate. Section 76.5(ii)(2)(3) also would limit the breadth of the rule, by excluding special reports and regularly scheduled documentaries.

8. Section 76.61(e)(2) would be a technical amendment to the existing rule, in order to avoid precisely the problem to which this Notice of Proposed Rule Making is addressed. By excluding network news programs from its scope, proposed Section 76.61(e)(2) would prevent a cable system from claiming that different feeds constituted separate "programs."

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[3] We recognize, of course, that some stations—particularly those in the Eastern Standard Time Zone and those which receive network programming by rebroadcast agreements—have little or no control over their choice of feeds. Where both the normally carried stations and the other stations consistently use the same feed, we will entertain requests for waiver.

[4] Section 73.112, Note 1(c) states that "news programs" include "reports dealing with current local, national, and international events, including weather and stock market reports; and when an integral part of a news program, commentary, analysis, and sports news."

[5] Section 73.112, Note 1(d) states that "public affairs programs" include "talks, commentaries, speeches, editorials, political programs, documentaries, forums, panels, roundtables, and similar programs primarily concerning local, national, and international public affairs."

9. Finally, Section 76.61(e)(3) would allow a cable television system to carry a network news program unless the program were broadcast simultaneously by a station which the system normally carried.[6] It thus affords greater protection than our present exclusivity rules, to stations which a cable television system normally carries.[7] Like present Section 76.61(e)(2), the proposed rule would not require a cable television system to secure a Certificate of Compliance in order to carry an additional network news program.

10. Authority for the proposed rule making instituted herein is contained in Sections 4(i), 303 and 403 of the Communications Act of 1934, as amended.

11. All interested persons are invited to file written comments on the rule making proposals on or before December 14, 1973, and reply comments on or before December 24, 1973. In reaching a decision in this matter, the Commission may take into account any other relevant information before it, in addition to the comments invited by this Notice.

12. In accordance with the provisions of Section 1.419 of the Commission's Rules and Regulations, an original and 14 copies of all comments, replies, pleadings, briefs, or other documents filed in this proceeding shall be furnished to the Commission. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room at its Headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX A

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Part 76—Cable Television Service

1. In § 76.5, paragraph (ii) is added, to read as follows:

§ 76.5 *Definitions.*

* * * * * * *

(ii) *Network news program.* Network programming which (1) includes reports dealing with current events, stock market reports, commentary, analysis, and sports news; and (2) is offered by one of the three major national television networks to its affiliated stations on a daily or weekly basis at a regularly scheduled time or times; and (3) has a total duration of thirty minutes or less.

* * * * * * *

2. In § 76.61, paragraph (e)(2) is amended as follows and paragraph (e)(3) is added, to read as follows:

§ 76.61 *Provisions for the first fifty major television markets.*

(e) * * *

(2) Any television station broadcasting a network program, other than a network news program, that will not be carried by a station normally carried on the system. Carriage of such additional stations shall be only for the duration of the network programs not otherwise available, and shall not require prior Commission notification or approval in the certificating process.

[6] As with the exclusivity provisions of Sections 76.91 and 76.93, a station may forfeit its protection by unduly delaying its broadcast of a program. We noted in Paragraph 33 of our *Reconsideration* that "to qualify for simultaneous exclusivity protection, no more than five or ten minutes of a program may be overlooked."

[7] The rule thus would parallel the present network exclusivity provisions of Sections 76.91 and 76.93, to the extent that it would prohibit simultaneous duplication. It would provide expanded protection, however, to stations which did not qualify for exclusivity under Section 76.91(b)'s priorities. Section 76.93(b) would prohibit carriage of additional network news programming, of course, if a station were entitled to same-day exclusivity.

(3) Any television station broadcasting a network news program, except at the same time that the network news program is broadcast by a television station which the cable television system normally carries. Carriage of such additional stations shall be only for the duration of the network news program, and shall not require prior Commission notification or approval in the certificating process.

3. In § 76.59, paragraph (d) (2) is amended as follows and paragraph (d) (3) is added, to read as follows:

§ 76.59 *Provisions for smaller television markets.*

(d) * * *

(2) Any television station broadcasting a network program, other than a network news program, that will not be carried by a station normally carried on the system. Carriage of such additional stations shall be only for the duration of the network programs not otherwise available, and shall not require prior Commission notification or approval in the certificating process.

(3) Any television station broadcasting a network news program, except at the same time that the network news program is broadcast by a television station which the cable television system normally carries. Carriage of such additional stations shall be only for the duration of the network news program, and shall not require prior Commission notification or approval in the certificating process.

F.C.C. 73-1171

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of OSTRANDER TV & CABLE, INC., GROTON, NEW YORK For Certificate of Compliance	CAC-973 NY212

MEMORANDUM OPINION AND ORDER

(Adopted November 14, 1973; Released November 20, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING.

1. On August 8, 1972, Ostrander TV & Cable, Inc., filed the above-captioned application for a certificate of compliance to add signals to an existing cable television system at Groton, New York.[1] Groton is located within the Syracuse, New York, major television market (#35). The system currently provides its 610 subscribers with the following signals:

WNBF-TV (CBS, Channel 12), Binghamton, New York.
WBJA-TV (ABC, Channel 34), Binghamton, New York.
WICZ-TV (NBC, Channel 40), Binghamton, New York.
WHEN-TV (CBS, Channel 5), Syracuse, New York.
WNYS-TV (ABC, Channel 9), Syracuse, New York.
WOKR-TV (NBC, Channel 13), Rochester, New York.
WSYR-TV (NBC, Channel 3), Syracuse, New York.
WHEC-TV (CBS, Channel 10), Rochester, New York.
WCNY-TV (Educ., Channel 24), Syracuse, New York.

Ostrander has requested authorization to carry the following distant signals:

WROC-TV (NBC, Channel 8), Rochester, New York.
WPIX (Ind., Channel 11), New York, New York.
WNEW-TV (Ind., Channel 5), New York, New York.

An objection to the proposed carriage of WROC-TV has been filed by Newhouse Broadcasting Corporation, licensee of Station WSYR-TV, Syracuse, New York, and Ostrander has replied.[2]

2. In support of its request to carry WROC-TV, Ostrander argues that the signal is grandfathered because it was carried prior to

[1] The population of Groton is 2,500; Ostrander is in the process of expanding its twelve-channel capacity to twenty channels.

[2] The Commission also notes a letter dated August 22, 1972, from Mr. Phillip J. Jackson, General Manager of Television Broadcast Station WSKG, Binghamton, New York. The import of Mr. Jackson's letter is somewhat ambiguous, since he appears to comment upon, rather than object to, the fact that only one educational channel is presently being carried by Ostrander. WSKG is an educational station entitled to carriage, upon request, pursuant to Section 76.61(a) of the Rules; while no such request has apparently been made to Ostrander, should this occur the Commission would, of course, be prepared to act on an appropriate application for certificate.

March 31, 1972. Carriage of WROC–TV began in July, 1965. On January 11, 1968, a "Request for Order to Show Cause" was filed by the licensee of WCNY–TV, an educational station entitled to carriage. Ostrander thereupon commenced cariage of WCNY–TV,[3] but was required to "temporarily" discontinue carriage of WROC–TV in order to do so, because of a limited channel capacity. The deletion of WROC–TV has continued to the present. In its opposition, Newhouse argues that Ostrander dropped WROC–TV voluntarily, and that therefore it cannot be considered grandfathered under the Commission's Rules. Newhouse further submits that the circumstances surrounding this voluntary deletion of WROC–TV are not "unique" so as to warrant its resumed carriage, and that no significant subscriber disruption would result from the Commission's denial of Ostrander's application.

3. Section 76.65 of the Rules provides that none of the carriage rules shall be deemed to require the deletion of any television broadcast signal which a cable system was authorized to carry or was lawfully carrying prior to March 31, 1972. Carriage of WROC–TV was authorized pursuant to former Section 74.1105(d) of the Rules; hence the signal was "lawfully carried" prior to March 31, 1972, although this carriage was suspended four years prior to this critical grandfathering date. In *Midwest Video Corporation*,[4] we indicated that claims of grandfathered status for signals carried by cable systems sometime prior to March 31, 1972, but discontinued prior to that date, would be carefully examined according to the uniqueness of the facts involved in each situation. In the instant case, we note especially the limited channel capacity of Ostrander's system. Since WCNY–TV was required to be carried, and since all available channels were already being utilized, suspending carriage of one signal was a necessity and apparently involuntary. Ostrander is presently in the process of expanding its channel capacity. Had Ostrander had 20-channel capacity in 1968, it could have added WCNY–TV without deleting WROC–TV. To decide that Ostrander may not now resume carriage of WROC–TV would be to penalize Ostrander for its channel capacity in 1968, and to discourage systems from expanding their channel capacity before 1977.[5] Our rules have always favored carriage of educational television stations, and Ostrander's adherence to the rules in 1968 should not now be used to deny the resumption of its carriage of WROC–TV. We conclude that carriage of WROC–TV is grandfathered pursuant to Section 76.65.

4. As a result of the addition of two distant independent signals, Ostrander would be required, pursuant to Section 76.251(c) of the Rules, to provide its subscribers with public and educational access channels. Because of its channel expansion activity, however, Ostrander will also provide local government and leased access channels. Such a plan, of course, more than satisfies the Commission's requirements.

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[3] Thus the "Request for Order to Show Cause" was rendered moot and was dismissed by the Chief, Cable Television Bureau, pursuant to delegated authority, on October 30, 1973 (SR–1689).

[4] 40 FCC 2d 441 (1973).

[5] In this respect, we note that twelve-channel capacity in 1968 was consistent with the state of the art, and the Commission had no requirement for greater channel capacities.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Opposition to Request for Certification," filed by Newhouse Broadcasting Corporation, IS DENIED.

IT IS FURTHER ORDERED, That the "Request for Certification" (CAC–973) filed by Ostrander TV & Cable, Inc., IS GRANTED, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1166

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of PACIFIC POWER & LIGHT CO. For Consent To Transfer of Control of the Following Corporations Holding Domestic Public Radio Licenses or Construction Permits: Evergreen Telephone Company, Northwestern Telephone Systems, Inc., Olympic Telephone Company, Beaver Telephone Company, Cascade Telephone Company, Ilwaco Telephone Company, and Vashon Telephone Company	File Nos. 8406-C1-TC-(6)-73, 8407-C1 - TC-(12)-73, 8399 - C1 - TC-73, 8527 -C1-TC-(2)-73, 8528-C1-TC-(2)-73, 8529-C1-TC-73, 8531-C1-TC-73, 8638-C2-TC-73, 8639-C2-TC-73, 8446-C2-TC-73

ORDER

(Adopted November 14, 1973; Released November 16, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has before it the above captioned applications of Pacific Power and Light Co. (Pacific) to acquire the stock of Telephone Utilities, Inc. (TU) which controls a number of operating telephone companies that hold various radio authorizations.

2. Pacific and Continental Telephone Corp. have been competing for control of TU, and on July 18, 1973, we granted Continental's applications for transfer of control (41 FCC 2d 957). Therefore, to maintain parity between the two competing parties, we subsequently granted, on August 8, 1973, interim authority to Pacific to acquire the stock of, and the voting rights to the stock of TU, subject to certain limitations on the exercise of corporate control.[1] Final action on Pacific's applications was not taken at that time because we were not then prepared to resolve allegations of corporate and security law violations raised by Continental.

3. We have now been advised that an agreement has been reached by Continental and Pacific whereby all litigation between the two was terminated and Pacific purchased the TU stock Continental acquired through its tender offer (1,123,008 common and 6,503 preferred) for $15,343,472.[2] By letter of October 2, 1973, counsel for Continental withdrew its petition to deny and other pleadings pending before the Commission in opposition to the grant of Pacific's applications.

[1] See *Memorandum Opinion and Order* released August 8, 1973, 42 FCC 2d 375.
[2] Continental lists its total cost for the shares at $15,617,054, including legal fees and other costs associated with the tender offer and the TU contest.

4. Having reviewed all matters in this case, we conclude that Pacific is legally, technically, financially, and otherwise qualified to own and operate the radio facilities involved, and that a grant of the captioned applications would serve the public interest.

5. Accordingly, IT IS HEREBY ORDERED that the captioned applications of Pacific Power and Light Company ARE GRANTED, and that the conditions previously imposed upon Pacific ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1168

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Application of PACKET COMMUNICATIONS INC. For Authority Under Section 214(a) of the Communications Act, as Amended, and Pursuant to Section 63.01 of the Commission Rules and Regulations To Institute and Operate a Packet-Switching Communications Network in the Contiguous United States by Leasing Inter-Exchange Lines From Established Communications Common Carriers	File No. P-C-8533

MEMORANDUM OPINION, ORDER AND CERTIFICATE

(Adopted November 14, 1973; Released November 16, 1973)

BY THE COMMISSION:

1. The Commission has before it for consideration the above-captioned application, filed January 23, 1973 and amended on June 21, 1973, by Packet Communications Inc. (PCI), a Massachusetts corporation, pursuant to Section 214(a) of the Communications Act and Section 63.01 of the Commission's Rules seeking authority to institute and operate a communications network providing terminal-computer and computer-computer communications utilizing technology known as "packet-switching."

2. "Packet Switching" technology was initially developed by U.S. Government sponsored research for the Department of Defense Advanced Research Projects Agency (ARPA). Unlike the conventional telephone system, in which circuits are switched to provide an individual customer with exclusive use of a particular line or circuit, a "packet switching" circuit transmits small groups (packets) of digitized data over a network of lines to a designated recipient, usually a computer. These packets are stored and forwarded over the best available path through the network.

3. The service applicant initially proposes is characterized by it as a "value added" service in that it will take channels leased from other carriers and combine them with computers and software to transmit data more efficiently and with less error. It states, "In the rapidly developing computer technology field, it is likely that other types of 'value added' innovations will appear which may require the development of new Commission specifications, rules, definitions, and processing criteria." However, in order to expedite the initiation of the offering of service, PCI is willing to have itself treated as a traditional common carrier, whether or not the Commission will ultimately deter-

mine that such service should be regulated by it as "common carriage", and whether or not it will require the filing. The channels leased from other carriers will be used to link computers and terminals through mini-computers to transmit data "packets" of approximately 1000 data bits each. Charges to customers will be based upon the numbers of packets sent independent of distance. The service will be message switching as defined by Section 64.702 of the Commission's Rules. It does not intend to offer "data processing" services at this time. Purpose of the network would be to serve various data transmission markets. PCI anticipates that the initial phase of its network will connect some 20 cities and ultimately (1978) some 57 cities.

4. PCI now proposes to establish initially one 50 Kilobit per second line, between 26 pairs of cities which are located throughout the contiguous United States. Users will be able to interconnect with PCI's network in either of two modes, namely, computer connections through its mini-computers ("Packet Switching Processors (PST's)) or terminal connections whereby access from terminals to the various customer computers (hosts) will be provided by means of "Terminal Access Processors" (TAP's). PCI also states that the entire network will be supervised and monitored by two Network Operations Centers (NOC's), one in the Boston, Massachusetts area and the other in the western area of the United States. PCI anticipates that the initial phase will be in operation by the first quarter of 1975.[1]

5. Public notice that the application had been accepted for filing was given on January 29, 1973 (Common Carriers Information Report No. 633, Mimeo No. 95214). Statutory notice of the filing of the said application was given as required by Section 214(b) of the Communications Act and copies of the application were served on the governors of the 48 contiguous United States.

6. A number of letters [2] were submitted expressing interest in, or support of, the application itself or the concept of packet-switching. A letter was filed February 23, 1973 by the Ohio Public Service Commission questioning authority of the FCC to authorize the provision of intrastate service. Comments were filed by Telecommunications Network, Inc., Telenet Communications Corporation, Western Union Telegraph Company (Western Union), Data Transmission Company (DATRAN), and Computer Corporation of America.

7. Telenet Communications Corporation (a subsidiary of Bolt, Beranek and Newman, Inc.) comments that it was formed for the purpose of constructing a multipurpose packet-switching network for the provision of nationwide data communications services on a common carrier basis and requests that the Commission's action on PCI's application be without prejudice to filing of its own application, which has now in fact been filed.

8. Telecommunications Network, Inc. states that it is pursuing plans to provide commercial data communications services to the remote ac-

[1] PCI contemplates that by the middle of the third year after the initiation of network service that approximately 100 customer computers will be connected and 30 TAP sites will be installed to provide access from terminal users.

[2] Letters were received from National Physical Laboratory, EDUCOM, Interuniversity Communications Council, Inc., Interactive Data Corp., National Bureau of Standards, Data Resources, University of California (Los Angeles), University of California (San Diego), Board of Governors of the Federal Reserve System, International Timesharing Corp., Information Network Division of Computer Science Corp (INFONET).

cess computing industry by use of a store-and-forward distributed message switching (DMS) technology and urges a Commission policy of open competitive entry.

9. The Computer Corporation of America (CCA) in its letter advises the Commission that it is planning to offer a nation-wide data bank service, which will provide data storage facilities for remote access by computers and terminal devices. CCA states that the proposed telecommunications network of PCI lends itself ideally to its planned application because of: (a) terminals located in various regions of the country, (b) the proposed low transmission rates which will be a function of the volume of data transmitted rather than the distance traversed, (c) virtually error-free transmission and (d) the available capacity in bits per second. CCA further states that since no other telecommunications service known to it will fulfill these requirements, it plans to use the proposed PCI offering.

10. In its comments Western Union takes no position on the merits of the application, but expresses its belief that PCI is a common carrier and must have authority pursuant to Section 214 to render the proposed service.

11. MCI carriers, in their comments, express doubt that a Section 214 authorization is required. They urge the Commission to consider critical and novel regulatory questions presented by such proposals by addressing the whole subject in a rule-making proceeding which will treat legal, policy, economic, technical, tariff and other questions which should be resolved before any hybrid data service [3] may be soundly considered and acted upon.[4]

12. In its comments, DATRAN states that it does not oppose the application and that it believes PCI type carriers are subject to Section 214 and should submit all material required by Section 61.38 of the Commission's Rules.[5] DATRAN also states that the Commission must be concerned with all concepts of such carriers and the effects upon structure of the common carrier industry. Further, DATRAN states that PCI must not be permitted to obtain facilities from AT&T which are not available to the specialized carriers.

13. In the reply comments submitted by PCI on April 6, 1973, it states that it does not oppose the concept of "open entry" for other carriers desiring to offer this type of "value added" service, that it believes that upon grant of its application it will be regulated as a common carrier, and that it is not now proposing to offer "hybrid data processing service," but, rather is proposing to offer a pure communications service.

DISCUSSION

14. With respect to the concerns expressed by MCI and DATRAN, we recognize that the entry of "value added" carriers such as PCI

[3] According to our Computer Inquiry decision and rules "hybrid data processing service" refers to a service which offers both communications and data processing services.

[4] MCI Data Transfer Corporation, a wholly-owned subsidiary of MCI Communications Corporation which is the controlling stockholder of most of the MCI specialized common carriers, has filed an application (FCC File No. P–C–8589) for authority to institute and operate a Hybrid Data Service in the continental United States through use of the ARPA concept.

[5] See discussion in letter granting AT&T's Tariff Application 931 waiving the Section 61.38 data requirements.

into the market for communication services will of course impact upon the structure of the industry. It will, however, introduce new and improved means by which users having data transmission requirements may satisfy those requirements in a manner not now available from any generalized or specialized carrier. For this basic reason, we see no justification to postpone further action on PCI's proposal.

15. We also agree that there are a variety of basic issues that remain to be resolved with respect to the terms and conditions including certain restrictions (See discussion in letter granting AT&T's Tariff Appl. 931) reflected by AT&T's tariffs and applicable to the transmission facilities PCI proposes to lease from AT&T. Mindful of these important issues, we plan in the near future to institute an appropriate proceeding to examine the reasonableness and lawfulness of AT&T's tariff provisions with respect to shared use and resale of its private line services and facilities. That proceeding will take account of and fully treat the questions raised by the MCI carriers in their petition for rule-making which is now pending.

16. Further, it is our opinion that the services PCI initially will offer the public over its proposed facilities would constitute PCI a common carrier within the meaning of Section 3(h) of the Communications Act and thus subjects PCI to the certification and other applicable requirements of Title II of the Communications Act. In the event that PCI in the future should seek to modify its basic service offering in a manner that will alter its status as a common carrier (e.g. the offering of data processing as well as data transmission services), PCI will be obliged to obtain prior authorization for such change of status and service. Our authorization herein will be limited to the provision of its "Package switching" data message service offering.

17. Concerning the recommendations that the Commission pursue a policy of "open entry" with respect to multi-purpose packet switching networks, it is our present intention to follow a liberal policy of authorizing such operations. It is apparent that there is a growing market to be serviced by such operations and that existing common carrier services are not now available to satisfy the demands of that market. In this respect, we feel that the findings and philosophy reflected in our Specialized Common Carrier decision in Docket 18920 dealing generally with the market for data transmission and other specialized services are relevant and apposite here and support a competitive environment for the development and sales of the type of services proposed by PCI.

18. On the basis of the information submitted in the application we find that PCI has substantially complied with the applicable provisions of Section 214 and Part 63 of our Rules to the extent that it can be permitted to lease and operate the associated equipment for the establishment of a packet-switched network. We conclude that the present and future public interest, convenience and necessity will be served by a grant of PCI's application.

19. Accordingly, IT IS HEREBY CERTIFIED that the present or future public convenience and necessity require the leasing and operation by PCI of 50 kilobit per second lines for the purposes and between the 26 pairs of cities as set forth in its application.

20. IT IS ORDERED, That PCI is authorized to lease and operate facilities and to provide the services as described in said application subject to the condition that PCI shall not expand its service offerings to data processing, hybrid data processing, or any other service other than the "Packet Switching" data message service proposed in said application without prior approval of the Commission.[6]

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[6] With respect to the letter of February 23, 1973 from the Ohio Public Service Commission, this Commission takes no position at this time concerning whether pursuant to this authorization PCI may provide intrastate service in the State of Ohio.

F.C.C. 73-1143

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 73, SECTION 73.682(a) (22) OF THE COMMISSION'S RULES AND REGULATIONS CONCERNING THE INCLUSION OF PROGRAM IDENTIFICATION PATTERNS IN THE VISUAL TRANSMISSIONS OF TELEVISION BROADCAST STATIONS	Docket No. 19314 RM-1783

REPORT AND ORDER

(Adopted October 31, 1973; Released November 7, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND REID CONCURRING IN THE RESULT.

1. Responding to a petition filed by International Digisonics Corporation on April 12, 1971, a Notice of Proposed Rule Making in the above-entitled proceeding was adopted by the Commission on September 8, 1971 (FCC 71-953, 36 Fed. Reg. 18657). The deadlines for filing comments and reply comments in the proceeding, specified in the Notice as December 8, 1971, and January 7, 1972, were extended by subsequent Orders to and including March 10, 1972, and up to and including May 10, 1972, respectively.

2. As listed in the Appendix hereto, 48 parties filed comments on the matters raised in this proceeding. Seven of these comments, one of which was accompanied by a petition for its late acceptance, were filed after the March 10 deadline. However, since preparation of a decision in this matter has been delayed by other factors, the late filed comments may be considered without impeding the orderly disposition of this matter. Accordingly, these comments have been accepted and considered in this proceeding.

3. Timely filed reply comments were submitted by ten parties, who are also listed in the Appendix.

4. All such comments and reply comments have been considered fully in arriving at a decision in this instant proceeding, whether or not specific mention is made of a particular filing in this decision.

5. At issue is the action to be taken, in the light of three years experience with its application, with respect to a rule, adopted April 15, 1970, by a Report and Order in Docket 18605, for the purpose of making possible the implementation of a system whereby transmitted television programs and commercials might be identified by automatic means.

6. This rule, specifically § 73.682(a)(22) of our rules and regulations, reads as follows:

"The intervals within the first and last ten microseconds of lines 21 through 23 and 260 through 262 (on a 'field' basis) may contain coded patterns for the purpose of electronic identification of television broadcast programs and spot announcements. No single transmission shall exceed one second in duration. The transmission of these patterns shall not result in significant degradation of broadcast transmission."

The text of the rule, as adopted, is essentially the same as that proposed by International Digisonics Corporation (IDC), whose petition resulted in the institution of the proceeding in Docket 18605.

7. Identification patterns inserted in recorded program material, and transmitted in accordance with this rule would occupy small rectangular blocks in the extreme four corners of the active television picture, but normally would not be visible to the broadcast audience, since the usual television receiver is so adjusted by the manufacturer that the periphery of the received picture is hidden from view. The transmitted patterns, however, are susceptible to interception by receiving equipment especially designed for this purpose.

8. After the rule became effective, IDC undertook to provide an identification service to advertisers interested in obtaining an independent verification of the times their commercials were broadcast over particular television stations. It established strategically placed unattended monitors in the major market areas intended to intercept the transmitted identification patterns previously inserted in recorded program material broadcast by stations in the area, to extract the identifying information and relay it to a central computer, where it is correlated and compiled in a form suitable for distribution to IDC's clients.

9. Almost from its inception, this service has been plagued by the occurrence of pattern transmissions which have failed to comply with the requirements of § 73.682(a)(22); in many instances, as amply attested by all concerned with this problem, transmitted patterns frequently have occupied more of the active picture area than the rule permits, and on occasion have been grossly misplaced. This difficulty has been experienced primarily in the transmission of identification patterns printed on motion picture film, which has constituted the great bulk of recorded commercial material furnished for broadcast. The situation has persisted up to the present time, despite strenuous and continued efforts of IDC, working with film processors and broadcast station licensees, to devise and implement methods and procedures which would result in satisfactory pattern transmission.

10. During this period, relying on IDC's assurances that eventual compliance with the rule would be achieved when the parties involved in the preparation and transmission of program material on film containing identification patterns were furnished with the proper tools and educated in the procedures necessary to insure proper pattern transmission, the Commission refrained from active enforcement procedures, and authorized transmissions not complying with the certain provisions of the rule through a series of Public Notices, which, in effect, granted limited waivers of the rule to all television broadcast stations.[1]

[1] FCC 70-1148, November 22, 1970; FCC 71-72, January 21, 1971; FCC 71-953, September 17, 1971. See also Memorandum Opinion and Order (FCC 71-54) adopted January 18, 1972.

11. While some improvement in the situation resulted from IDC's efforts, it eventually concluded that the processes of film production and projection were subject to inaccuracies and instabilities of such magnitude that identification patterns on films could not be transmitted consistently with the degree of precision necessary to meet the requirements of the rule, and, in the petition which initiated this proceeding sought an amendment of Section 73.682(a)(22), to relax these requirements. The proposed amendment reads as follows:

"The first and last ten microseconds of the first six field lines measured from the top of picture (as used in § 73.699, Fig. 6) and the last six field lines measured from the bottom of picture (as used in § 73.699, Fig. 7) may contain identification patterns intended for the purpose of electronically identifying television program and commercial material. In order to allow for alignment tolerances, the patterns may occupy an additional three field lines at either the top or bottom of picture. No single transmission of identification patterns shall exceed one second in duration. The transmission of these patterns shall not result in significant degradation of broadcast transmission." [2]

This rule, in effect, doubles the basic size of the picture areas which may be employed for identification pattern transmission, specifies pattern locations with respect to the active picture area, rather than as to numbered scanning lines, as does the present rule, and prescribes a "floating" three field line tolerance, additive to either the top or bottom pattern areas, primarily to provide for framing variations in film projection at the broadcast station. It was IDC's contention that coded motion picture film in then current production would be transmitted consistently in accordance with this rule.

12. A number of detailed oppositions were filed in response to the IDC petition. Taking cognizance of the positions advanced in these oppositions, which, among other things, reiterated the claims of many broadcasters and of some agencies engaged in film processing that undue burdens were involved in the preparation and broadcast of coded film, we specified the following issues in this proceeding:

(1) Will identification patterns on motion picture film be transmitted consistently in accordance with the proposed rule?

(2) Will pattern transmissions in accordance with the proposed rule cause significant degradation of picture transmission?

(3) Does the preparation and transmission of film containing identification patterns place an additional and continuing burden on film processor and broadcaster which is disproportionate to the benefits the system provides?

(4) Is the broadcaster effectively prevented from insuring that his station will operate in accordance with the rules by his practical inability to determine, prior to its actual use, that a film including identification patterns will be transmitted in accordance with the rules?

(5) In view of the findings made with respect to the issues above, should the amendment to Section 73.682(a)(22) be adopted as proposed, adopted with some modification, or should the rule be deleted?

13. Since we indicated that we intended to authorize continued identification pattern transmissions during the course of the proceeding, we urged that showings with respect to the first two issues be supported by specific evidence based on properly conducted measurements of transmitted patterns, and other appropriate investigation.

14. For the resolution of Issue (3) we requested, among other things, specific information as to the extent that identification pattern trans-

[2] This is sometimes referred to, in the subsequent discussion as the "6+6+3 standard"

mission was rendering the "rapid, efficient, and accurate" service which was contemplated when the rule authorizing these transmissions was adopted.[3]

15. Many of the comments filed in response to the rule making notice report the results of investigations, some quite elaborate and extensive in nature, of the probability that identification patterns recorded on film would be transmitted in accordance with the proposed rule. Several of these studies, based on measurements at the broadcasting station of patterns on film still-framed in the projector, are of somewhat limited value, even though carefully conducted, since, as most parties agree, measurements made under such conditions may not closely reflect the performance of the moving film. However, these studies, together with a detailed analysis submitted by the Society of Motion Picture and Television Engineers (SMPTE) of the variables involved in the production and projection of coded film which must be expected within tolerances susceptible to practical maintenance, all provide valuable corroboration of results obtained in test programs conducted by IDC and the Columbia Broadcasting System (CBS), both of which employed technical measurement systems which yielded results reflecting the actual on-the-air characteristics of the transmitted identification patterns.[4]

16. The conclusions drawn (and we believe, fairly) by the parties from their measurements (excluding, for the moment, IDC) is that, while the proposed rule, if adopted, would receive a higher degree of compliance than would the present rule, an appreciable percentage of pattern transmissions would still exceed the limits prescribed in the rule, while a small percentage would involve deviations so great that a rule devised to accommodate all such deviations would be so relaxed as to be virtually meaningless.

17. The variability in the observed transmitted pattern size extended in both directions—in some cases patterns were unduly large, in others, extremely small. An opinion voiced by several of the parties engaging in these studies, based on observations of the vestigal nature of many of the transmitted patterns was that it appeared unlikely that such patterns could be intercepted and reliably decoded by practical means. CBS stated that about 20 percent of ostensibly coded film commercials it had examined would appear to present problems of this nature.

18. IDC's own observations, and its further experience in attempting to achieve satisfactory functioning of the identification system has led it to conclusions not dissimilar to those other parties with respect to the first issue.

19. Moreover, in its evaluation of the reliability of detection of received identification patterns, when the patterns are recorded on film, it confirms the suspicion voiced by other parties that, under present

[3] Over the past few years the Commission has received many letters from national advertisers and advertising agencies, furnished by IDC or sent directly by advertisers, in support of the IDC system. Generally, however, these letters express a need for a reliable and accurate means of program identification, and the hope, or, perhaps, the expectation that the IDC system would eventually fulfill this need. However, the letters contain little evidence that the companies submitting them were satisfied with the existing performance of the system or were relying on it as the primary means for off-the-air determinations of the transmission of their commercials.

[4] In addition to IDC and CBS, parties submitting measurements include Cox Broadcasting Corp., Taft Broadcasting Co., Association of Maximum Service Telecasters, Inc., American Broadcasting Companies, Inc., Storer Broadcasting Co., and RKO General, Inc.

conditions, the accuracy of detection of coded patterns on film at IDC monitors is so low as not to support an identification system on which complete reliance may be placed.

20. Specifically, IDC states that "a recent study of videotapes of actual transmissions by 114 licensees in 38 cities of more than 1600 film and tape identification patterns during the past ten months concludes that more than 93.8% of the patterns have been transmitted with 6+6+3 allowance . . . 6.4% of the patterns have exceeded that standard. Likewise, although approximately 80% of the transmitted patterns have been detectable, almost 20% remain too small to activate monitors." It includes that "since the 6+6+3 standard cannot reasonably be met 100% of the time and does not allow sufficient margin for detection tolarances, it would be impracticable in application to automatic monitoring."

21. IDC alleges that the major reason for limited accuracy with which it has been able to perform its identification service is "missed detections . . . caused by tolerances in the broadcast process and the consequent transmission of a pattern too small to register on a monitor. This, however, is a result of the present unrealistic regulations, not an inherent defect in the system. By purposefully keeping identification patterns as small as possible to avoid an occasional over-line transmission which could result in a fine for a broadcaster under the rules, regardless of the lack of an effect on viewers, IDC must run the risk of patterns which are transmitted too small for detection. The existence of this risk is not dictated by the system, but by the regulation."

22. IDC is prepared to concede the special technical problems faced by the broadcaster in transmitting identification patterns included on film: "Because the tolerances in film production and broadcast are not yet completely predictable, IDC believes it likely that some small number of identification patterns on *film* always would exceed any reasonable field line standard. This would mean that the possibility would always exist that a licensee might violate the Commission's transmission standards simply by broadcasting an identified film unless each film and each identification pattern were pre-screened and the station's film chains aligned with extreme frequency. Since the broadcasting industry has determined that such a situation is intolerable, it is apparent that the proposed 6+6+3 standard, and any similar specified-line standard, simply does not provide the best remedy for the existing problems of an occasional over-line broadcast and attendant inadvertent violation of the Commission's regulations.

23. IDC insists that its identification system, in spite of the limited accuracy of its present performance, is nevertheless of considerable use to advertisers and others. It calls attention to numerous letters, directed to the Commission by various advertisers and advertising agencies urging Commission action to prevent the elimination of IDC service.

24. Eight companies engaging in TV advertising on a national or regional basis have filed formal or informal comments in this proceeding urging a continuation of the IDC service and attesting to its present or potential value in the direction and verification of their advertising efforts.

25. The Screen Actors Guild (SAG) and American Federation of Radio and Television Artists (AFTRA) emphasize that a feasible electronic monitoring system would facilitate residual payments to members of performer's unions. Present methods for computing these payments are slow, of unsatisfactory accuracy, and inordinately expensive. Recognizing the initial difficulties experienced in the implementation of the IDC system, they aver an amendment of the rules as proposed by IDC would remove these difficulties, and make possible the implementation of a presently suspended provision of their collective bargaining agreements, which, for each agreement, read as follows:

> The parties recognize that a system of coding of television commercials would be beneficial to the Industry. Therefore, on notice from the Industry [Guild] [AFTRA] Standing Committee that an adequate and feasible system or systems for monitoring of televised commercials is operative and with the consent of the ANA–AAAA Joint Policy Committee on Broadcast Talent Union Relations and [Screen Actors Guild] [AFTRA], Producers shall take appropriate steps to code all commercials for which such Producer is responsible hereunder, with the necessary identifying data and information.

26. Generally in support of the IDC proposals are the individual comments of ten optical laboratories, all of which have worked with IDC in placing identification patterns on film. They express confidence that, within the relaxed tolerances which the rule proposed by IDC would make possible, the patterns could accurately be placed on film, and such additional burdens as may be involved in adding these patterns is assumed as necessary in insuring that film will continue to be used in the production of television commercials.

27. However, the Association of Cinema Laboratories (ACL), an organization representing 98 firms, of which 68 are film processors, elaborates on the difficulties involved in insuring that the final film product will have accurately located identification patterns, and the special problems involved in placing such patterns on film that is originally "shot" in 16 mm format. It points to the detailed study submitted by SMPTE in this proceeding in support of its position that the IDC system is fundamentally incompatible with film.

28. While the above comments were directed to the IDC proposal that initiated this proceeding, they are, in the main, equally applicable to its revised proposal, which is described hereunder.[5]

29. Having concluded that the rule it had proposed despite its leniency as compared to the existing rule, is inadequate, in that it will still present compliance problems for broadcasters, and have the effect of requiring a restriction on identification pattern size so stringent that satisfactory accuracy of detection cannot be achieved, IDC

[5] Also pointed out in the comments is that identification pattern transmission pursuant to the present rule, or any modification thereof, will continue to present a problem which has troubled many broadcasters—that they are engaged in the transmittal of information prepared by others whose nature and content is not readily reviewable by the station licensee, since it is in "coded" form. Consequently, the licensee is effectively precluded from adequately discharging his statutory responsibility to maintain control over the content of his station's transmissions. We have provided for a full exploration of this question with respect to visual or aural signals utilized for automatic program identification in the rule making proceeding in Docket 18877. It should be noted in passing, however, that any policy developed in this area may need to be sufficiently broad to encompass such "data" transmission by broadcast stations as the Commission, in the future, may find it in the public interest to authorize, e.g., the transmission of signals providing captioning of television programs for those with impaired hearing who have receivers especially equipped to utilize those signals.

abandons its support of the rule amendment it presented in its petition, and, instead, in its comments, proposes the following as a substitute:

"The visual transmission may include identification patterns intended for the electronic identification of program and commercial material, provided that no single transmission of identification patterns shall exceed one second in duration and that the existence of the identification patterns shall not result in significant degradation of the broadcast transmission."

30. IDC alleges that such a rule, which relies only on the one second limitation on pattern transmission time and the prohibition against "significant degradation of the broadcast transmission" for the protection of the viewing audience from adverse effects of visible identification patterns, has the following virtues:

(1) It will relieve the broadcaster from the burdens imposed by the present rule, which include onerous or impracticable pre-screening and exacting adjustment and maintenance of film projection equipment, as well as sparing him the hazard of inadvertent violation of a rule establishing a fixed standard.

(2) It will permit IDC flexibility so that pattern size and placement may be modified as necessary for the improvement of detection accuracy.

(3) It will relieve the Commission of administrative burdens "by creating a situation in which the regulation is almost self-enforcing". IDC suggests that the advertiser, the monitoring service and the broadcaster will all work to eliminate pattern transmissions which might trouble the public, and public complaints to the Commission could be relied on as indicia that such efforts are inadequate, and enforcement or remedial action is necessary.

31. IDC urges that operation under the rule it now proposes could, in fact, be conducted without "significant degradation" of programming—that the occasional presence of visible identification patterns does not in any degree adversely affect the viewers enjoyment of television programs. It claims that this has been proven by experience with identification transmissions beginning on May 1, 1970. Since that time "none of the literally billions of pattern 'exposures' has been seen, or, if seen, regarded by any of the millions of television viewers as an annoyance warranting the registering of a complaint or even an inquiry at the Commission". This has been the case, IDC notes, despite the fact that, as shown in its study included in Appendix A to its comments, a number of transmissions have included patterns exceeding in size both those permitted by the existing rule, and by the "6+6+3" rule which IDC had proposed in its petition.[6]

32. In further support of its position, IDC refers to the results of a survey and tests included in Appendix B to its comments, performed for IDC by Home Arts Guild Research Center, an independent research organization. The Center conducted both tests designed to obtain viewer reactions in the home environment to regular program material, and simulated showings of program material including

[6] IDC quotes a conclusion reached by the Commission in the Report and Order in Docket 18605, in support of its position that visible identification patterns, per se, do not cause "significant degradation" of the television picture, viz., "the effect of the code transmissions on the quality of the viewed picture is negligible, even when the picture includes the code. The size, placement and length of exposure of the code patterns are such that a viewer, not alerted to look for them, would be unaware that the transmissions had taken place. We believe they could not, in any sense, be held to be obtrusive or distracting." It must be observed that this conclusion was reached after Commission personnel witnessed a demonstration in which videotaped three field line patterns (the largest patterns permissible under the rule then proposed), properly located in the extreme corners of the picture raster, were made visible by a deliberate reduction in picture size to bring its periphery into view. Whether we would have reached the same conclusion if the identification patterns had been considerably larger and had extended further into the picture area, we, of course, are unable to say.

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identification patterns of various sizes before a carefully selected panel of typical viewers. We quote the summary of the Center's conclusions verbatim:

> "It is our conclusion that the IDC code patterns are not disturbing to the television viewer in contrast to a great many other occurrences, both of a visual and aural nature that are disturbing. In fact, in the normal home viewing environment people do not notice the code at all.
>
> "In a more critical viewing situation with large simulated codes presented (up to the equivalent of 28 lines per corner) less than 1% of the code appearances are noted. Those few that are noted are categorized as having no more than a negligible effect on the viewer.
>
> "When viewers are completely informed of the nature and timing of the code and are shown television commercials containing very large code patterns (up to the equivalent of 36 lines per corner) the great majority of code appearances (more than 90%) are judged as having no more than a negligible effect on the viewer."

33. This approach by IDC to the question assumes that "significant degradation" of the picture occurs only when identification patterns are so prominent and apparent as to distract or annoy the viewer. Other parties adopt a more restrictive interpretation of the term—the most conservative opinion is to the effect that any intrusion of a pattern into the viewed area of the picture results in degradation of the picture.

34. If we were to accept fully IDC's conclusion that, limited to one second in duration, visible identification patterns of considerable size produce no adverse effects on the viewing of programs, the question of whether transmitted identification patterns of given characteristics will, in fact, appear in the viewed picture area of the television receiver is relatively unimportant. On the other hand, if the intrusion of these patterns into the viewed area is held to be objectionable, per se, a determination of the limitations on pattern size necessary to prevent or minimize such intrusions becomes a matter of considerable importance.

35. Without passing on the relative merits of these positions at this time, we note that both IDC and SMPTE have reported on the results of studies they have caused to be made as to relative amount of masking of the active picture occurring in typical television receivers, with relationship to the particular question of the size of identification patterns whch could be accommodated in the unviewed picture area in receivers available to or in the hands of the general public.

36. The IDC study involved the examination of 51 receivers of recent manufacture, of various makes, types and sizes, to determine the number of field lines masked, in each of the four corners of the active picture, measured at points marking the end of the first and the beginning of the last 10 microseconds of the scanning line (the limits of the extension of the identification patterns into the active picture in the horizontal direction, under the existing rule or the rule IDC initially proposed in this proceeding). The study found that the mean masking for this group of receivers was between 13.2 and 25.9 field lines, depending upon which of the four corners of the active picture is considered. The deviation from this mean is substantial, however. For instance, it is noted that the basic six field line pattern contemplated in the rule proposed in the Notice, and for the rule covering videotaped transmissions suggested by IDC in its comments, as discussed hereunder, would

be at least partially visible in one or more corners of the picture on up to 13.7 percent of the receivers examined in the study. Jansky & Bailey, the firm conducting the study, was unable to translate the results of its study into terms of the percentages of the various makes and types of the receivers examined which are in the hands of the general public.

37. The SMPTE pleading includes a study of receiver masking conducted in the Rochester, New York area under the direction of Mr. Ronald J. Zavada. In this study, four local television stations simultaneously transmitted a test slide, especially designed to permit, on the basis of individual viewers' reports of particular numbers or letters seen at the periphery of the viewing screens of their receivers, an evaluation of the degree of masking occurring in each of these receivers. Public participation in the test was solicited through newspapers and by direct handouts, and 5,948 viewers completed and submitted a questionnaire providing information required for the evaluation. Of particular pertinence to this proceeding is the analysis of the viewers' ability to see one or more of three letters arranged in the four corners of the test slide. These letters were between 6 and 7 field lines in height and placed so that the innermost letter from each corner (i.e., the letter placed furthest into the picture in the horizontal direction) was just included within an estimated 10 microsecond points from the beginning and end of the active picture. While an extensive analysis of the results of the test is included in the report, we will note here only items in the summary to the effect that 15 percent of the participants reported seeing at least one letter in at least one corner, and a further finding that approximately 9 percent of viewers were able to see at least one letter set (which was included in about the innermost half of the horizontal extension of the area expected to be occupied by the pattern) in at least one corner.

38. While the IDC method of testing is the more exact, the more approximate SMPTE procedure provided results from a much larger sample, and one, moreover, which should represent the actual distribution of receivers in the hands of the public. It may be noted that the particular results obtained, in the two tests as cited, are not greatly different, and taken together, might be summarized thus—a six or seven field line pattern transmission would be at least partially visible, in at least one corner of the viewer's picture, in 13 to 15 percent of all receivers.

39. While IDC believes that the rule it now proposes provides adequate protection for the viewer, and the same time relieves the broadcaster of undue burdens, it notes that the considerations which make impracticable the imposition of specific standards of filmed pattern transmissions have much less applicability to patterns on videotape—transmission of videotaped patterns may be made to comply with stated standards. It cites certain industry reports predicting the utilization of videotape for virtually all commercials within a five or six year period. Accordingly, it suggests that, in addition to adopting the one-second-no significant degradation rule, the Commission may wish to establish a separate standard, applying only to videotaped identification pattern transmissions. It offers the following as an acceptable standard:

"The first and last ten microseconds of lines 22 through 27 and 257 through 262 (on a field basis) of the television transmission of videotape material may contain identification patterns intended for the electronic identification of program and commercial material, provided that no single transmission of identification patterns shall exceed one second in duration and that the existence of the identification patterns shall not result in significant degradation of the broadcast transmission."

40. The expansion of the vertical dimension of the identification pattern from the three field lines permitted by the present rule, to six field lines corresponding to the interim standard presently applicable, as proposed above, is necessary, even for videotape, states IDC, because playback imperfections can at times result in omission of portions of a picture line, "together with tolerances in the functioning of IDC monitors."

41. IDC avers that, the results of the technical studies it has made, as reported in the Appendices to its comments, support its contention that patterns transmitted in accordance with the six line standard "would remain well within the non-viewed picture area and, even if they did not, they would not be considered bothersome by viewers. Broadcasters would find, as they have in the past, that identification patterns on tape have been consistently reliable."

42. ABC and Eastman in their reply comments, point out that since the IDC proposal, as outlined above, differs substantially from the one based on IDC's petition which was offered for consideration in the Notice of Proposed Rule Making, it is not appropriate to consider it in the instant proceeding—that the requirements of fairness and for adequate notice to other parties will be satisfied only if the new proposal is made the subject of a further rule making proceeding. Nevertheless, ABC devotes a major portion of its reply to an analysis of the new IDC proposal, and all but two of the nine other reply comments treat the proposal in detail, without questioning its validity from a procedural standpoint.

43. IDC finds little support for its "one second-no significant degradation" proposal by the commenting parties. The objections raised may be summarized as follows:

(1) That the standard is virtually unenforceable since "significant degradation" is not a term precisely defined, or indeed, susceptible to precise definition.

(2) That, relieved of its obligation to meet a specified pattern placement requirement, IDC would proceed to expand the size of the patterns on film to the extent necessary to achieve a satisfactory level of identification accuracy. CBS suggests that "code blocks imprinted on film would have to be increased to a point where 26 field lines could penetrate into one or more corners of the picture, in well over 1% of all transmission". Eastman anticipates "at least a 12 to 15 line penetration top and bottom" would be required "to achieve the minimum reliability required for detection, and to account for the variables listed in the reports heretofore submitted by the SMPTE". It is urged that experience with the public's passive acceptance of those occasionally visible patterns transmitted under present conditions forms no basis for predicting its reaction to larger patterns, transmitted with the greater frequency which might be anticipated should increased reliability of the IDC system achieved through the employment of larger patterns result in its greater acceptance and use by advertisers.

(3) The rule could not in any sense be considered a temporary one, to be supplanted by a definite line standard on conversion of all pattern transmissions to videotape. Many parties vigorously contest IDC's forecast of the rapid retirement of film, and cite industry trends which portend not only the continued but perhaps expanded use of film in the future. It is the position of a number of the parties that any program identification system (which most of the parties now concede

as desirable) must be and continue to be practicably applicable to film as well as to videotape. They hold that the present IDC system is not satisfactory for film, and questions its complete feasibility when applied to videotape.

(4) The rule does not relieve broadcasters of all of the burdens which are imposed under the present rule. IDC has suggested that they still would have to conduct "random" prescreening to detect grossly misplaced patterns. Public objections to visible pattern transmissions (which would be deemed as evidence of "significant degradation" under the rule) would develop only after the offending transmissions had occurred, and possibly subject the broadcaster to sanctions for rule violations.

(5) If IDC's predictions were realized, and all identification patterns were recorded on videotape, the broadcaster would be rendered even less able than under present conditions to exercise control over the informational content of these transmissions.

44. It is the virtually unanimous recommendation of broadcasters and broadcast organizations that both IDC's original and modified proposals be rejected, and that the existing rule (Section 73.682(a)(22)) be deleted, perhaps after a period of time aimed at accommodating an orderly retirement of commercials presently bearing identification patterns.

45. It is further urged that the Commission turn its attention to other means of program identification which do not have the demonstrated deficiencies of the present system. Eastman Kodak Company and Association of Maximum Service Telecasters, Inc. (AMST) suggest, as an alternative, the aural system presently under consideration in Docket No. 18877: CBS, National Broadcasting Co. (NBC), and SMPTE favor the development of the optimum parameters for a program identification system through a broadly based inquiry into various possible methods: the CBS and SMPTE proposals contemplate the creation of an all-industry committee which, in addition to program identification, would develop technical standards for a variety of ancillary signals foreseen as useful additions to the basic program transmissions.[7] In this general context, we note the statement of Broadcast Advertisers Reports, Inc., (BAR) that it is studying the feasibility of a recently developed "voice print" method which, if it can be practicably applied, would make possible a system of electronic program identification not requiring the addition of any extraneous signal whatsoever to the broadcast transmission. In any event, states BAR, even if this particular system is not ready to offer an immediate solution to the electronic monitoring problem, the functioning of the IDC system can be safely terminated for the period required for the orderly development of an acceptable automatic system without seriously discommoding the industry, for which BAR has long provided an alternative program identification service.

DISCUSSION

46. The initial question to be decided is whether we can properly arrive at a decision herein in the light of a situation in which the petitioner for the rule amendment set forth in the Notice of Proposed Rule Making, and with respect to which comments were invited, has abandoned support of this amendment, and, in its comments, requested

[7] In the autumn of 1972, the Joint Committee for Intersociety Coordination, whose membership includes IEEE, NAB, SMPTE, EIA, and NCTA, established an Ad Hoc Committee on Television Broadcast Ancillary Signals, for conducting the kind of study contemplated by SMPTE and CBS.

consideration of another, much more permissive, rule. Other parties directed their comments to the merits of the rule originally proposed, and, some of the parties argue, have not been afforded an adequate opportunity to deal with the new proposal. These parties urge this proposal should be made the subject of further rule making.

47. This is, of course, the course of action which would normally be required under such circumstances. However, as a practical matter, we observe that literally all of the arguments marshalled by the parties who opposed adoption of the rule originally proposed apply with equal or greater force to the revised proposal, except, perhaps, for the likelihood that broadcasters' cited problems with the transmission of identification patterns on film would be appreciably lessened should IDC's new proposal be adopted. Furthermore, the majority of those who filed reply comments, which generally include those who had opposed the original proposal, took cognizance of and directed their comments to the revised proposal, which they found little more to their liking. Of course, IDC has enjoyed no opportunity to reply to these oppositions, but it inevitably sacrificed this opportunity when it undertook to submit its new proposal under these circumstances and rested its case upon such a presentation. We believe, finally, that whether the procedures which are employed can be deemed fully adequate, depends to a great extent on the nature of our decision in this matter. Thus, had we found such merit in the revised IDC proposal that we considered its eventual adoption a distinct possibility, our proper course would have been to initiate a new proceeding. However, this is not the case, and we believe the record is fully adequate to support our action in this proceeding.

48. Existing Section 73.682(a)(22) of our rules permits the transmission of identification patterns by television broadcast stations of no more than 1 second in duration pursuant to technical standards intended to result, at the reception point, in patterns located in the four corners of the active picture, each somewhat less than 20 percent of the picture width in horizontal extent, and no more than three field lines in height. The establishment of this standard was supported by a finding that patterns of the size and at the locations permitted by the rule would not appear in the viewing field of the average television receiver in use at the time the rule was adopted. The requirement of the rule that pattern transmissions not cause "significant degradation of the broadcast transmission" is an additional safeguard, intended to afford some measure of protection for the television program service from adverse effects which conceivably might result, even when identification patterns were transmitted fully in accordance with the specified technical standards.

49. There is no disagreement among the parties to this proceeding that the "rapid, efficient, and accurate automatic program identification service" which this rule was designed to accommodate cannot be provided by a system functioning within the technical limitations prescribed by the rule.[8]

[8] The variables involved in the recording and transmission of identification patterns on film are of such magnitude that the maintenance and enforcement of this rule would effectively preclude all transmissions of patterns recorded on film; videotaped pattern recordings sufficiently small to be transmitted, in all cases, in accordance with the rule, according to IDC would be of insufficient size for reliable detection by its monitoring receivers.

50. This being the case, two diametrically different courses of action are proposed. The first, urged by the owners and operators of broadcasting stations, by NAB and by the networks, who have been subject to the considerable burdens involved in attempting in their operations to achieve compliance with the rule, and parties involved in the production and processing of film, who see the continuation of the identification system pursuant to the rule proposed in the Notice as forcing a conversion of program recording to videotape, is that the rule be deleted and that identification transmissions under the present system be terminated, perhaps over a sufficiently long period of time to allow the orderly retirement of existing recorded program material containing identification patterns.

51. The second approach, favored by IDC, by organizations engaged in advertising on television, who see an automatic program identification service as an answer to many of their practical problems, performers unions, who believe such a service would expedite and facilitate the payments of residuals to their members, and by some optical houses, concerned, like others involved in film processing with the effect that Commission action may have on the continued use of this recording medium, but electing to cast their lot with IDC, is the amendment and relaxation of the existing rule to the extent necessary to accommodate the demonstrated vagaries of the IDC system.

52. The basic rule which IDC now supports, as previously discussed, imposes just two restrictions on identification pattern transmissions: (1) a limitation of one second on their duration, and (2) a condition that they not cause "significant degradation to broadcast transmissions."

53. From IDC's standpoint, no doubt, such a rule has much to recommend it. Tailored to the requirements of its system, which, at least for transmissions of identification patterns on film, has proved itself incapable of operating within any specified limits for pattern size and placement, the rule is devoid of such limits; IDC would be free to adjust these parameters in any way found necessary to improve the presently unsatisfactory pattern detection accuracy. Since broadcasters would have no specific standard to meet in their transmssions of these patterns, their present opposition to the use of coded film material might be expected to diminish. Based on past experience with noncomplying pattern transmissions, and the results of the viewer tests it has reported in this proceeding is IDC's confidence that the television audience would not react adversely—at least to the extent of filing verbal or written protests—to visible one second identification patterns, even if they are of considerable size—thus, in IDC's view, "significant degradation" would be unlikely to occur.

54. IDC urges that "although the proposed standard is not as specific as the existing regultaion, it is nevertheless an enforceable standard. The Commission may continue to monitor licensees. If their transmissions of identification patterns consistently exceed the national distribution of transmitted pattern size found to exist today, an explanation may be sought. National figures compiled in a manner similar to Appendix A could provide a general indication of transmissions which clearly do not constitute significant degradation unless some evidence to the contrary, such as a number of viewer complaints, becomes

available. IDC is willing to supply, or the Commission may itself prepare, quarterly summaries of national performance in the transmission of identification patterns. Were these ever to indicate an overall change in transmitted pattern placement which the Commission had reason to believe was causing interference to any party, it could put the industry on notice of this fact. If modifications were not forthcoming, enforcement action could be taken."

55. Contrary to IDC assertions, we do not consider "significant degradation" as a "standard" under any accepted meaning of the latter term, and the cumbersome, and, as we evaluate it, woefully ineffective procedure which IDC outlines for its enforcement bears no perceptible resemblance to any procedure which the Commission has heretofore employed in ascertaining violations of its technical rules and in exacting compliance therewith. Rather, IDC has devised a singular (and, we are almost inclined to say, preposterous) regulatory scheme applicable only to identification pattern transmissions.[9] [10]

56. Furthermore, we are unable to agree with IDC's apparent view that instrusions of non-broadcast program identification signals into the television picture should be tolerated up to the point where the public finds them so objectionable that it is moved to file verbal or written complaints, and any regulations which undertakes to limit these intrusions to some predetermined and measurable level (established well below the limit of public toleration), is somehow "unrealistic". If the regulatory theory which IDC espouses in this case were applied to other technical facets of broadcast operation, it would dictate the elimination of frequency tolerances and specified limits on the magnitude of interfering signals from our rules, and require us to rely, after the fact, on complaints of injured parties to determine when remedial action should be taken. The result, we submit, would be regulatory choas. While, of course, such a general breakdown need not occur should this unusual scheme be adopted with respect to program identification signals alone, the only apparent reason for according these signals such unique regulatory treatment—that the signals cannot be transmitted within a specified tolerance—is quite insufficient to justify this action.

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[9] IDC appears to be of the impression that, because of previous Commission action, the public interest requires that a program identification service continue to be rendered by the IDC system. Thus, on page 12 of its comments, it states: "In its first consideration of the IDC automatic monitoring system in 1969–70, the Commission found that 'the economy, convenience and efficiency of broadcasting would be enhanced by the authorization of this service and the public interest thereby served'. Nothing has transpired in the interim which would support a change in this finding." The language which IDC quotes is contained in paragraph 44 of the Report and Order of April 15, 1970 (FCC 70–386). As a full reading of this paragraph will reveal, the finding which we made was that the rendition of a particular non-broadcast service in the broadcasting band—that of automatic program identification—is in the public interest. This was a necessary antecedent to the adoption of rules permitting the transmission of program identification signals by any means whatsoever, and constituted no endorsement of any particular system.

[10] Even if viewer complaints are received, or pattern transmission "consistently exceeds the national distribution of pattern size", it appears that the individual licensee would not be subject to sanctions—rather "an explanation may be sought", or we could "put the industry on notice." If all else fails, "enforcement action could be taken"—we are not sure against whom. The Commission obviously cannot issue a violation notice to "the industry"; an alternative would appear to be the mass issuance of such notices to all television stations carrying identification patterns for causing "significant degradation to broadcast transmission." It is difficult to believe that such action would not be contested in the courts, but it is not difficult to predict the outcome of a test of such "unconstitutionally vague" regulation. The adoption by the Commission of IDC's "rule" would be a virtual guarantee for IDC of future freedom from troublesome regulatory problems.

57. The proposed rule is objectionable also in that it is so devoid of technical specifications and limitations as to offer what is, in effect, a carte blanche for the transmission of program identification signals by any method whatsoever, in any part of the visual television signal—including all of the active picture area, and in any portion of the vertical blanking interval available under our rules for the transmission of special signals.[11]

58. While IDC has proposed the six field line rule as a supplement to its one second-no significant degradation proposal, for application only to videotaped program identification transmissions, our dissatisfaction with its basic proposal prompts us to examine the virtues and deficiencies of the six field line rule with respect to its adoption alone as an amendment to existing Section 73.682(a)(22) of the rules.

59. Whether or not this rule were adopted with the language specifically limiting its application to videotaped identification transmissions, the net effect of its adoption would be the same—all identification pattern transmissions meeting its requirements must necessarily be supplied from videotaped recordings.

60. In general, videotaped identification transmissions have not suffered from the gross errors in pattern placement which have plagued the transmission of patterns recorded on film, and the broadcaster has not had to contend, to the same degree, with the technical problems which he encounters in attempting to achieve satisfactory transmission of film identification patterns. It would further appear that transmissions of videotaped patterns have been detected by IDC's monitoring system with a much higher level of accuracy than have transmissions of patterns recorded on film.

61. IDC insists, however, that to obtain a sufficiently high degree of detection accuracy with its present monitoring system, a rule for videotape should specify a six field line limit, permitting pattern transmissions having twice the verticle extent of patterns conforming with the existing rule (and incidentally, six times the size of the one line pattern, which, in the original proceeding (Docket 18605) IDC suggested might become feasible if all identification patterns were recorded on videotape).

62. In assessing the magnitude of adverse effects on television picture reception which might result from identification pattern transmission within a six field line tolerance, we have turned to the results of the tests made in behalf of IDC and SMPTE, discussed above, which, as we interpret them, indicate that a portion of at least one of the four identification patterns included in a six field line identification transmission might be visible to some extent on up to 15 percent of receivers in the hands of the general public.[12] Thus, assuming that degradation of the television picture of some degree will occur when any non-picture material appears on the screens of viewer's receivers, pattern transmissions pursuant to the six line standard would cause

[11] For instance, the adoption of the rule would appear to make possible the transmission of program identification signals on line 20 in the vertical interval, a proposed use of this line which the Commission has recently had occasion to inform the national networks (FCC 73-370) cannot be authorized without formal rule making.

[12] SMPTE has suggested that as more and more receivers with rectangular picture tubes are placed in use the percentage of receivers on which these identification patterns might be visible would steadily increase.

such degradation on many receivers. While any unnecessary degradation is, per se, undesirable, our past experience has indicated that one second patterns complying with the six line standard, to the degree that they might be within the viewing area of some receivers, would not produce a degree of degradation so serious but that it might be tolerated if the adoption of the rule produced a result which was, overall, in the public interest. To make such a finding, however, we must determine the indirect benefits accruing to the public through the rendition of an automatic program identification service requiring the use of active picture area are sufficiently great to justify such picture degradation as may occur. While we, in effect, made such a determination in adopting the existing rule, a new determination must be made, both because the new rule contemplates use of a larger portion of the active picture area, and at the same time would permit a program identification service of only limited scope—that is, utilizable only with videotape. Furthermore, another serious question is presented—if the more restricted system can render a service which, considered by itself, would still confer appreciable public benefits, can we justify authorizing it under a rule permitting use of the active picture area for its rendition, when such use would be unnecessary with videotaped recordings except for the limitations of a system designed primarily for employment with a recording medium which the adoption of the proposed rule would effectively preclude from being used? [13]

Decision

63. In this matter we are dealing with the use of frequencies which are allocated both nationally and internationally for the rendition of a television broadcast service to the general public, and the Commission has been dedicated consistently to the use of these frequencies for the maintenance and improvement of that service. In the furtherance of this aim we have adopted policies which we have determined will promote the optimum operation of the facilities which provide this service. Such policies, in certain instances, are reflected in rules which permit broadcast stations to transmit signals not intended for reception and use by the broadcast audience, for purposes calculated to support the efficient and economical performance of the broadcast function; subject, however, to technical restrictions intended to insure that such signals will not impair or limit broadcast service to the public.

64. Thus, in the television broadcast service, pursuant to Section 73.682(a)(21) of the rules, stations have been authorized to transmit

[13] Private interests, of course, are substantially affected by the action which we take here. IDC has allegedly invested several millions of dollars in the monitoring service which it established after our adoption of Section 73.682(a)(22) of the rules, and this whole investment could well be jeopardized if we do not adopt rules permitting the continuation and improvement of its present service. Should we adopt rule amendments which, in practical effect, would require that identification patterns, in the future, be recorded on videotape, those engaged in the production and processing of motion picture film allege that such action would result in a rapid conversion from film to videotape, with resulting financial loss to the film industry. IDC states that this conversion is already occurring, and, to the extent that it is making increasing use of videotape, it is taking advantage of a trend, not creating it. It asserts that the film maker's fears are, in any event, based entirely on speculation. While these considerations are obviously of major importance to the parties involved, they cannot be controlling in the public interest determination which we are required to make in this proceeding.

cue, control, and test signals on certain lines in the vertical blanking interval. Such signals, intended primarily for the use by broadcasters themselves, are transmitted outside of the active picture area, and have no adverse impact whatever on the quality of the transmitted television picture.

65. In the Report and Order in Docket 18605, we determined that television broadcast stations should be permitted to transmit special signals intended for use by persons not members of the general public for the automatic identification of television programs. The public interest justification for the transmission by television stations of such non-broadcast signals involved an extension of the theory under which we had found that the transmission of non-broadcast signals should be permitted for broadcast station use, that provision for automatic program identification would promote the efficient and economical functioning of organizations participating in the preparation of programming for television transmission, to the ultimate benefit of the viewing public.

66. By the above-mentioned Report and Order, we amended our rules with the adoption of Section 73.682(a)(22), which permits television broadcast stations to transmit program identification signals of short duration, in certain specifically limited portions of the active picture area. This action was not taken lightly. It was, and remains, the only instance in which the Commission has, by rule, authorized the inclusion of non-broadcast signals in television picture information. We believed that the transmission of the identification signals in this area was made necessary by the characteristics of the recording medium which the identification system was primarily designed to accommodate, motion picture film (such film was, and perhaps still is the principal medium on which television program material is recorded). As we observed in the Order (Para. 45):

> "If the automatic identification information could be transmitted by means having not even a theoretical potential for degradation of broadcast material transmitted to the public (for instance, as has been suggested, in the vertical retrace interval), this, of course, would be desirable. However, it seems evident that any automatic identification information must be incorporated in the program material at the time it is recorded, and transmitted as a part of the program material . . .".

In a finding precedential to the adoption of the rule, we determined that program identification patterns transmitted in accordance with this rule would be of such size, and be so located that they would not be within the viewing areas of most receivers, and such marginal visibility as might occur on receivers with less than normal overscan would not be sufficient to result in appreciable degradation of the television picture, particularly in view of the short duration of each pattern transmission.

67. We are now faced with a situation in which it has been fully demonstrated that a program identification service established to take advantage of the privileges offered by Section 73.682(a)(22) of the rules cannot function viably within the restrictions which this rule prescribes, and we are considering two possible amendments to the rule, which are treated as alternatives.

68. The first of these, the "one second-no significant degradation" rule, has been offered as a basis on which the identification system pur-

portedly would be able to provide the kind of service its proponent initially intended that it render—from identification information recorded on either motion picture film or on videotape (although we have only IDC's assertions that an identification service of adequate accuracy, utilizing motion picture film as the recording medium, would result even if this rule were adopted).

69. However, we have found that this proposed rule, which prescribes no technical limitations whatever on the size and location of transmitted identification patterns, and represents an almost complete abandonment of the carefully constructed restrictions of the existing rule, involves an undue hazard for picture degradation, and is literally unenforceable. It is, therefore, a completely unacceptable substitute for our present rule.

70. The "six field line proposal", although permitting the transmission of identification patterns considerably larger than allowed by the existing rule, we have indicated might represent, at this point, a tolerable compromise if its adoption would make possible the operation of an identification system unrestricted in its applicability. We find that it would fail to meet this criterion. The transmisson of identification patterns consistently meeting the requirements of such a rule could only be produced from videotape recordings. Such a limitation militates against the adoption of the rule on two counts:

(1) Assuming that film will continue to be used as a recording medium for television programs, some other system must be developed for the automatic identification of such programs (most parties now agree that the automatic program identification function is, per se, desirable). We believe that the provision for a multiplicity of such systems, each limited in its area of applicability, represents an unwarranted and uneconomical use of broadcast frequencies.

(2) Assuming that the restricted applicability of the six field line standard is not a fatal defect, we fail to see how the public interest will be served by doubling the size of the picture area available under the existing rule for identification pattern transmissions simply to accommodate identification information recorded on videotape. It seems to us that this medium should require less, not more, information capacity than the rule now affords.

71. If either of these rules had been initially proposed to make possible the establishment of an automatic program identification system they almost certainly would have been rejected out of hand by the Commission as not meriting further exploration in a formal rule making proceeding. If they are to be given any more serious consideration at the present time, it seems obvious that we must find that the public interest in the continued operation of the existing identification system, whatever its limitations, is sufficiently compelling to require us to make provision in our rules to accommodate those limitations.

72. In our consideration of this aspect of the matter, we would first lay finally to rest any misunderstanding which may exist that the Commission has found it in the public interest that a program identification service be rendered by the "IDC automatic monitoring system". Up to the present time, the Commission has made two formal determinations in this matter:

(1) It has found that the transmission on broadcast frequencies of signals intended to be used in the rendition of a non-broadcast automatic program identification service to be in the public interest.

(2) It has authorized the licensees of television stations to transmit program identification signals in accordance with the conditions specified in Section 73.682 (a) (22).

The finding described in (1) was, of course, a necessary preliminary to the adoption of any rule specifically authorizing the transmission of signals for program identification, and standing by itself constitutes no more than a statement of policy. Section 73.682(a) (22) is the only rule which we have adopted which permits the transmission of program identification signals. It specifically prescribes the technical limits within which these signals may be transmitted. While the rule was intended to accommodate signals transmitted in an identification system IDC had designed, its adoption did not, in any way, commit the Commission to the support of that system, per se, when it failed to operate within the parameters prescribed in the rule.

73. The direct beneficiaries of affirmative rule making in this instance would be IDC, and those advertisers who have undertaken to avail themselves of IDC's services. As we have previously observed, the benefit the public reaps from the rendition of an automatic program identification service is, in any case, indirect, deriving from the more efficient and economical performance by program producers made possible by the availability of the identification service. Arraigned against this factor, and clearly outweighing it in importance, is the possible detriment to the television broadcast service if identification information is transmitted by such means that some direct impact on this service is inevitable. In adopting the existing rule, we permitted invasion of the active picture area by the identification signal on the theory that such invasion was necessary if the identification system was to be of general application, but adopted safeguards intended to make the impact of the signal on television viewing negligible. We are unable to find a public benefit resulting from action which permits the continuation of the existing identification service by the adoption of permanent rules, which either permit identification transmissions in the active picture area under conditions where their impact on the television broadcast service is not negligible (the one-second-no significant degradation rule) or where the impact is unnecessary (the six field line rule).

74. We are unpersuaded by IDC's argument that since a "useful" service is being provided by an identification system which has operated at variance with the existing rule without public complaint being registered, we are compelled by the mandate of the Communications Act to "encourage the larger and more effective use of radio" to forthwith tailor our rules essentially to fit the actual operation of the system. Rather, in the light of our experience in this matter, we are convinced that our proper course of action at this time is to reject proposed rules which might accommodate the deficiencies in the performance of the present system, to require that identification transmissions be made within the limitations prescribed in the existing rule, and to delete the rule and bring about the termination of these transmissions if compliance with the rule is not achieved.

75. We are mindful of the fact that the present situation has developed largely as a result of IDC's extended, and, it transpires, fruitless efforts to make its system, as it was originally intended, function

in some acceptable manner with motion picture film. Had it earlier abandoned these efforts, and placed all identification patterns, as it apparently now does, on videotape, by this time it might have evolved a system which, not only would provide identification pattern transmissions in compliance with the existing rule, but have had in operation a monitoring network capable of detecting these patterns with an acceptable degree of accuracy. Under such circumstances, the occasion for this proceeding would not have arisen. While, therefore, we are unwilling to relax the existing rule to accommodate the present conditions of operation of the identification system, we believe that IDC should be afforded an opportunity to make such changes in the system as may be necessary to achieve compliance with the existing rule.

76. Accordingly, we do not find it in the public interest to adopt either the one second—no significant degradation proposal or the six field line rule. We will retain Section 73.693(a)(22) of our rules, as it now stands, for a period of two years, ending November 30, 1975, during which period we expect that intensive efforts will be made to modify the existing identification system so that it will be capable of functioning satisfactorily in accordance with this rule.

77. At the end of this period, the Commission will reevaluate the situation, to determine what further action should then be taken. If IDC has not found it feasible to make the modifications specified, we expect to delete the rule, on the basis of the record in this proceeding, and require, on an orderly basis, the termination of identification transmissions under the present system. On the other hand, if, on or before that time, the IDC system has been converted to operate within the three field line rule, this rule will be retained. In this event, some temporary provision will also have to be made for the retirement of noncomplying identification transmissions. However, the specific schedule for accomplishing this will be decided upon on the basis of the conditions then existing (e.g., the date on which IDC begins to insert three line identification information on recorded material).

78. In requiring adherence to the existing rule, we realize we are, in practical effect, restricting identification transmissions to those recorded on videotape, since it is not to be expected that film recordings of identification signals, even with improvements in the IDC system, can be transmitted consistently within the present rule. This restriction appears inevitable if the present system is to continue to function, without either involving an unnecessary hazard of program degradation, or inflicting an undue burden on the broadcaster (typically, videotaped patterns have not presented a major compliance problem). While we consider the limited applicability to the present system to be a serious deficiency, we believe it is one which must be remedied by some alternative approach to the matter.

79. Therefore, we urge IDC, and others who may be interested in this matter, either individualy, or collectively (for instance, in a competent industry committee), to work toward the development of an identification system of more general utility than the one for which the rule provides, and one which involves less potential impact on broadcast program material. In this connection, the aural systems which are the subject of Docket 18877 should, of course, be given full

consideration. We expect to take further action in this proceeding in the near future.

80. During the two year period specified above, the limited waiver of the requirements of Section 73.693(a)(22) of our rules will be continued, as set forth in our Public Notice of September 17, 1971 (FCC 71-969), which permits the transmission of identification patterns occupying the first and last ten microseconds of the first six and the last six field lines of the active picture.

81. We expect IDC, within 30 days of the date of this Report and Order, to notify the Commission whether it intends to undertake the equipment modifications necessary to permit the identification system to function within the limitations of the existing rule, and, if its response is in the affirmative, to furnish us at successive 6 months intervals, with reports on its progress toward achieving this objective.

82. This action is taken pursuant to authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

83. IT IS ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION.
VINCENT J. MULLINS, *Secretary.*

APPENDIX

COMMENTS

AFC Color Lab
EFX Unlimited, Inc.
ESKAY Film Services
The Film Place
Mini Effects
The Optical Hour, Inc.
Optimum Effects, Inc.
Technicolor, Inc.
Radiant Laboratory, Inc.
The Pepsi-Cola Company
Stokely-Van Camp, Inc.
International Digisonics Corp. (IDC)
National Association of Broadcasters (NAB)
American Broadcasting Companies, Inc. (ABC)
Columbia Broadcasting System, Inc. (CBS)
National Broadcasting Company, Inc. (NBC)
Association of Maximum Service Telecasters, Inc. (AMST)
Cox Broadcasting Corp. (Cox)
WEAL Television, Inc. (WEAL)
WOMETCO Enterprises, Inc. (WOMETCO)
Pennsylvania Association of Broadcasters (PAB)
Taft Broadcasting Company (Taft)
Columbus Broadcast Company, Inc. et al
Broadcast Advertisers Reports, Inc. (BAR)
Screen Actors Guild (SAG)
Association of Cinema Laboratories (ACL)
Eastman Kodak Co. (EKC)
The Hearst Corporation (Hearst)
Ford Motor Company
Champion Spark Plug Company
Block Drug Company
STP Corporation
Vlasic Foods, Inc.
Manley & James Laboratories
Pacific & Southern Co., Inc.
WOWL-TV
WPHL-TV
Mullins Broadcasting Co.
Arizona Television, Inc.
Westinghouse Broadcasting Co., Inc.
Sonna Division, Beatrice Foods Co.
RKO General, Inc.
Storer Broadcasting Co.
Fisher's Blend Station, Inc.
American Federation of Television and Radio Artists (AFTRA)
Van der Veer Photo Effects
Society of Motion Picture and Television Engineers (SMPTE)
Florida Association of Broadcasters, Inc.
Audicom Corp.

REPLY COMMENTS

International Digisonics Corp. (IDC)
Columbus Broadcast Company, Inc. et al
National Association of Broadcasters (NAB)
American Broadcasting Companies, Inc. (ABC)
Columbia Broadcasting System, Inc. (CBS)
Association of Maximum Service Telecasters, Inc. (AMST)
National Broadcasting Company, Inc. (NBC)
Association of Cinema Laboratories (ACL)
Eastman Kodak Company (EKC)
Society of Motion Picture & Television Engineers (SMPTE)

F.C.C. 73-1163

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 21, 89, 91 AND 93 OF THE RULES TO REFLECT THE AVAILABILITY OF LAND MOBILE CHANNELS IN THE 470–512 MHz BAND IN THE TEN LARGEST URBANIZED AREAS OF THE UNITED STATES.	Docket 18261

FOURTH REPORT AND ORDER

(Adopted November 14, 1973; Released November 20, 1973)

BY THE COMMISSION:

1. On May 21, 1973, we issued a notice in this proceeding proposing to re-adjust the frequency allocations in the 470–512 MHz band among the various allocation pools in the New York-Northeastern New Jersey and Washington, D.C.-Maryland-Virginia urbanized areas. (These areas are referred to hereinafter as the New York and Washington areas respectively.)

2. More specifically, in the New York area we proposed to increase the number of the two frequency channels in the public safety pool from 68 to 90 channels, in the taxicab pool from 8 to 12 and in the business pool from 44 to 56 channels. We also proposed to reduce the channels in the motor carrier-railroad-automobile emergency pool from 28 to 14, in the petroleum-forest products-manufacturers pools from 10 to 8, and in the utilities pool from 10 to 4. Additionally, we proposed to create a reserve pool of seven channels and to eliminate the existing two reserve pools.

3. In the Washington area, we proposed to re-structure the present allocations so as to increase the number of channels in the public safety pool from 34 to 45, reduce the number of channels available to special industrial from 9 to 4, taxicab from 4 to 2, motor carrier-railroad-auto emergency from 14 to 7, petroleum-forest products-manufacturers from 8 to 4, and the utilities pool from 4 to 2. The remaining channels would be held in three separate reserve pools located in such a manner as to facilitate future allocations of these frequencies to various categories of radio services.

4. We proposed to make these readjustments in these two areas because we had noted in the 470–512 MHz band relatively heavy licensing activity in some services and little or no activity in others, and we felt that early readjustment would facilitate orderly development of communication systems in the band, at least in those services where immediate need for expansion existed. The Notice was published in the Federal Register on May 25, 1973, 38 F.R. 13749. The period for filing comments and replies has expired. A list of organizations filing com-

ments and reply comments appears hereinafter identified as Appendix A.

5. In general, the comments fell into two categories. Those speaking for services which would receive additional channels favored the proposed action and those representing services which would lose channels opposed it. The case for the latter group was stated most succinctly by SIRSA.

"SIRSA supports long range frequency allocation planning and agrees that it would not be wise to wait until all dedicated frequencies are fully loaded before making reallocations from the 'reserve pools'. However, the plan the Commission has now advanced goes far beyond allocating frequencies from the 'reserve pools', by including proposals for reallocating channels from some services to others." ". . . it appears that the reallocation proposal is based simply on the fact that authorizations have been granted to certain public safety agencies to use all of the frequencies allocated in the band 470–512 MHz to the public safety frequency 'pool'. Some of these agencies have secured multiple frequency authorizations, and it is unclear whether the assignments are now being used, or to what extent they will be utilized in the immediately foreseeable future. If the Commission has not ascertained that the assignments made are actually being used or will be fully loaded within the next 12 to 18 months, it is submitted that the reallocation now proposed is premature . . .".

6. We do not agree that our action is premature, although it is anticipatory to a degree. In the New York area, for example, all of the frequencies allocated in the public safety pool have long been assigned under an area-wide arrangement. Most of the public safety frequencies (55 pairs) have been assigned to the City of New York. They will be used to accommodate a re-structured radio communications system for the New York City Police Department planned for implementation in the next three to four years. Obviously, these frequencies are not now in use, but the assignments were made with the knowledge that their complete implementation will not be accomplished immediately. The frequencies now assigned to the New York City Police Department will be used to accommodate other police and other public safety requirements when they are released. Thus, there are no more frequencies in the 470–512 MHz band for still other public safety requirements in the area. All of the taxicab frequencies in that area are also assigned. In the Business Radio Service, we have authorized sixty-six licensees with a total of 3572 mobile units, and have pending applications from 25 entities requesting a total of 400 mobile units.

7. By contrast, no assignments have been made in the petroleum-forest products-manufacturers pool and we have pending applications from one entity in the utilities pool. Only a small portion of the railroad-motor carrier-automobile emergency frequencies have been authorized to nine licensees.

8. In the Washington, D.C. area, a total of 1350 mobile units have been authorized on the public safety pool frequencies and, although a small margin for growth on these frequencies still exists, the margin is very small. In the remaining services, some licensing has taken place in the Business Radio Service, and the comments have indicated some planned use in other services. However, there are no indications of extensive activity either for the present or in the immediate future, and we feel that the re-structured allocations we have proposed would best meet anticipated requirements.

9. Partly for the purposes of this proceeding and as part of our overall supervision of the assignment and usage of the frequencies in the 470–512 MHz band, we have conducted a survey of licensees who have held assignments for eight months or longer.* The results indicate, as a general matter, that licensees operate fewer transmitters than they are authorized. Adjustments in our records have been made, and corrected authorizations will be issued to those licensees operating substantially fewer units than authorized. Additional assignments will be made on those frequencies in accordance with existing assignment criteria. In sum, our survey showed that in a number of assigned frequencies there is room for additional assignments. However, it did not show that our proposed allocation adjustment was unjustified as some of the comments suggested.

10. In its comments, the American Trucking Association suggested that we review our frequency loading criteria insofar as transit operations are concerned. We have reviewed this matter and based on information we have received through our licensing processes have concluded that it is desirable to change the loading criteria not only for transit operations but also for taxicabs, from 90 mobiles per frequency pair to 150 in the Taxicab Radio Service and from 70 to 150 in the urban passenger carrier subcategory of the Motor Carrier Radio Service.

11. The Notice of Inquiry relative to the use of low power in areas where higher power cannot be used due to UHF TV protection requirements elicited few responses. The comments suggested, among other things, changes in the protection criteria between land mobile and television stations and authorization of fixed operations. These matters require additional study and no action will be taken at this time.

12. In the Third Further Notice we announced that during the pendency of this proceeding the Commission would withhold action on applications involving 470–512 MHz frequencies in the New York and Washington areas. With the release of this Report and Order, we are resuming normal processing of these applications.

13. In view of the foregoing, the Commission concludes that the public interest will be served by amending the Rules to reallocate certain frequencies in the New York-Northeastern New Jersey and Washington, D.C.-Maryland-Virginia urbanized areas.

14. Accordingly, IT IS ORDERED, pursuant to the authority contained in Section 4(i) and 303 of the Communications Act of 1934, as amended, that Parts 89, 91, and 93 of the Commission's Rules are amended effective December 28, 1973, as set forth in the attached Appendix.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

*Sections 89.123, 91.114, and 93.114 as appropriate, require land mobile licensees in the 470–512 MHz band to inform the Commission of the number of mobile units they are operating within eight months after authorization.

APPENDIX A

Comments in response to the Third Further Notice of Proposed Rule Making in Docket 18261 were received from:

American Automobile Association, Inc. (AAA)
American Transit Association
American Trucking Association (ATA)
Associated Public Safety Communications Officers, Inc. (APCO)
Central Committee on Communication Facilities of the American Petroleum Institute (API)
International Taxicab Association (ITA)
New Jersey Hospital Association
Police Department of the City of Chicago
Special Industrial Radio Service Association, Inc. (SIRSA)
Utilities Telecommunications Council (UTC)

Reply comments were received from:

Associated Public Safety Communications Officers, Inc.
International Taxicab Association
National Association of Business and Educational Radio, Inc. (NABER)

APPENDIX B

Parts 89, 91, and 93 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

A. Part 89, Public Safety Radio Services

In Section 89.123, the introductory text of paragraph (c) is amended, and new paragraphs (e) and (f) are added to read as follows:

§ 89.123 Frequencies in the band 470–512 MHz.

* * * * * * *

(c) Except as set forth hereinafter, the following frequencies are available for assignment in the Public Safety Radio Services:

* * * * * * *

(e) Frequencies available for assignment in the New York-N.E. New Jersey urbanized area:

Channel 14		
Public Safety:		
Base	470.3125	471.4125
Mobile	473.3125	474.4125
Reserve Pool[1]:		
Base	472.6875	472.8375
Reserve	475.6875	475.8375
Channel 15		
Public Safety:		
Base	476.3125	477.4125
Mobile	479.3125	480.4125
Reserve Pool[1]:		
Base	478.6875	478.8375
Reserve	481.6875	481.8375

[1] Pending further order by the Commission, frequencies in the reserve pools will be unavailable for assignment.

Note: Footnotes 1, 2, and 3 in paragraph (c), (d), (e), and (f) apply to the appropriate service whose frequencies are listed in paragraphs (h) and (i).

(f) Frequencies available for assignment in the Washington, D.C.-Maryland-Virginia urbanized area:

Channel 18

Public Safety:		
Base	494. 3125	495. 4125
Mobile	497. 3125	498. 4125
Reserve Pool A: [1]		
Base	495. 4375	495. 5625
Mobile	498. 4375	498. 5625
Reserve Pool B: [1]		
Base	496. 2375	496. 3625
Mobile	499. 2375	499. 3625
Reserve Pool C: [1]		
Base	496. 6375	496. 8375
Mobile	499. 6375	499. 8375

[1] Pending further order by the Commission, frequencies in the reserve pools will be unavailable for assignment.

Note: Footnotes 1, 2, and 3 in paragraph (c) apply to frequencies listed in paragraphs (e) and (f).

B. Part 91, Industrial Radio Services

In Section 91.114 the introductory text of paragraphs (c), (d), (e), and (f) are amended and new paragraphs (h) and (i) are added to read as follows:

§ 91.114 Frequencies in the band 470–512 MHz.

* * * * * * *

(c) Except as set forth hereinafter, the following frequencies are available for assignment in the Power and Telephone Maintenance Radio Services:

* * * * * * *

(d) Except as set forth hereinafter, the following frequencies are available for assignment in the Petroleum, Forest Products, and Manufacturers Radio Services:

* * * * * * *

(e) Except as set forth hereinafter, the following frequencies are available for assignment in the Special Industrial Radio Services:

* * * * * * *

(f) Except as set forth hereinafter, the following frequencies are available for assignment in the Business Radio Service:

* * * * * * *

(h) Frequencies available for assignment in the New York-N.E. New Jersey urbanized area:

Channel 14

Power-Telephone Maintenance:		
Base	472. 9625	472. 9875
Mobile	475. 9625	475. 9875
Petrol.-Forest Prod. Manuf.:		
Base	472. 8625	472. 9375
Mobile	475. 8625	475. 9375
Special Industrial:		
Base	471. 4375	471. 6385
Mobile	474. 4375	474. 6375
Business:		
Base	471. 6625	472. 3375
Mobile	474. 6625	475. 3375
Reserve Pool [1]:		
Base	472. 6875	472. 8375
Mobile	475. 6875	475. 8375

[1] Pending further order by the Commission, frequencies in the reserve pools will be unavailable for assignment.

Channel 15

Power-Telephone Maintenance:		
Base	478. 9625	478. 9875
Mobile	481. 9625	481. 9875
Petrol.-Forest Prod.-Manuf.:		
Base	478. 8625	478. 9375
Mobile	481. 8625	481. 9375
Special Industrial:		
Base	477. 4375	477. 6375
Mobile	480. 4375	480. 6375
Business:		
Base	477. 6625	478. 3375
Mobile	480. 6625	481. 3375
Reserve Pool [1]:		
Base	478. 6875	478. 8375
Mobile	481. 6875	481. 8375

[1] Pending further order by the Commission, frequencies in the reserve pools will be unavailable for assignment.

Note: Footnotes 1, 2, and 3 in paragraph (c) (d), (e), and (f) apply to the appropriate services whose frequencies are listed in paragraphs (h) and (i).

* * * * * * *

(i) Frequencies available for assignment in the Washington, D.C.-Maryland-Virginia urbanized area:

Channel 18

Power-Telephone Maintenance:		
Base	496. 9625	496. 9875
Mobile	499. 9625	499. 9875
Petrol.-Forest Prod. Manuf.:		
Base	496. 8625	496. 9375
Mobile	499. 8625	499. 9375
Special Industrial:		
Base	495. 5875	495. 6625
Mobile	498. 5875	498. 6625
Business:		
Base	495. 6875	496. 2125
Mobile	498. 6875	498. 2125
Reserve Pool A [1]:		
Base	495. 4375	495. 5625
Mobile	498. 4375	498. 5625
Reserve Pool B [1]:		
Base	496. 2375	496. 3625
Mobile	499. 2375	499. 3625
Reserve Pool C [1]:		
Base	496. 6375	496. 8375
Mobile	499. 6375	499. 8375

[1] Pending further order by the Commission, frequencies in the reserve pools will be unavailable for assignment.

Note: Footnotes 1, 2, and 3 in paragraph (c) (d), and (e), and (f) apply to the appropriate services whose frequencies are listed in paragraphs (h) and (i).

C. Part 93, Land Transportation Radio Services

In Section 93.114, the introductory text of paragraphs (c) and (d) and the first sentence of each footnote 2, is amended and paragraphs (f) and (g) are added to read as follows:

§ 93.114 Frequencies in the band 470–512 MHz.

* * * * * * *

(c) Except as set forth hereinafter, the following frequencies are available for assignment in the Taxicab Radio Service:

* * * * * * *

Footnote 2. The channel loading is 150 units.

(d) Except as set forth hereinafter, the following frequencies are available for assignment in the Railroad, Motor Carrier, and Automobile Emergency Radio Services:

* * * * * * *

Footnote 2. The channel loading is 70 units in the Railroad, Motor Carrier and Automobile Emergency Radio Services except that in the Intraurban Passenger Carrier sub-category of the Motor Carrier Radio Service the channel loading is 150 units.

(f) Frequencies available for assignment in the New York-N.E. New Jersey urbanized area:

	Channel 14	
Taxicab:		
Base	472. 3625	472. 4375
Mobile	475. 3625	475. 4375
	and	
	472. 6375	472. 6625
	475. 6375	475. 6625
R.R-Motor Carrier Auto. Emer.:		
Base	472. 4625	472. 6125
Mobile	475. 4625	475. 6125
Reserve Pool [1]:		
Base	472. 6875	472. 8375
Mobile	475. 6875	475. 8375
	Channel 15	
Taxicab:		
Base	478. 3625	478. 4875
Mobile	481. 3625	481. 4875
R.R-Carrier Auto. Emer.:		
Base	478. 5125	478. 6625
Mobile	481. 5125	481. 6625
Reserve Pool [1]:		
Base	478. 6875	478. 8375
Mobile	481. 6875	481. 8375

[1] Pending further order by the Commission, frequencies in the reserve pools will be unavailable for assignment.

(g) Frequencies available for assignment in the Washington, D.C.-Maryland-Virginia urbanized area:

	Channel 18	
Taxicab:		
Base	496. 3875	496. 4375
Mobile	499. 3875	499. 4375
R.R-Motor Carrier Auto. Emer.:		
Base	496. 4625	496. 6125
Mobile	499. 4625	499. 6125
Reserve Pool A [1]:		
Base	495. 4375	495. 5625
Mobile	498. 4375	498. 5625
Reserve Pool B [1]:		
Base	496. 2375	496. 3625
Mobile	499. 2375	499. 3625
Reserve Pool C [1]:		
Base	496. 6375	496. 8375
Mobile	499. 6375	499. 8375

[1] Pending further order by the Commission, frequencies in the reserve pools will be unavailable for assignment.

Note: Footnotes 1, 2, and 3 of paragraph (c) and (d) apply to frequencies listed in (f) and (g).

F.C.C. 73-1136

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re R.V. CABLE-VISION, INC., HARRODSBURG, KY. Request for Waiver of Section 76.91 of the Commission's Rules	CSR-71 KY074

MEMORANDUM OPINION AND ORDER

(Adopted October 31, 1973; Released November 6, 1973)

BY THE COMMISSION:

1. On April 17, 1972, R.V. Cable-Vision, Inc., operator of a cable television system at Harrodsburg, Kentucky, filed a "Petition for Waiver of Section 76.93(a) of the Commission's Rules"[1] in which it asks that it not be required to provide simultaneous program exclusivity to Station WLEX-TV *vis-a-vis* Station WAVE-TV. On May 17, 1972, WLEX-TV, Inc., licensee of Station WLEX-TV, Lexington, Kentucky, filed an "Opposition to Petition for Waiver of Section 76.93(a) of the Commission's Rules." And on June 7, 1972, R.V. filed its "Reply to Opposition to Petition for Waiver of Section 76.91(a) of the Commission's Rules."

2. R.V. operates a twelve-channel cable television system, and provides approximately 2,000 subscribers with the following television signals:

WLEX-TV (NBC), Lexington, Kentucky.
WAVE-TV (NBC), Louisville, Kentucky.
WLWT (NBC), Cincinnati, Ohio.
WLKY-TV (ABC), Louisville, Kentucky.
WBLG-TV (ABC), Lexington, Kentucky.
WKRC-TV (ABC), Cincinnati, Ohio.
WKYT-TV (CBS), Lexington, Kentucky.
WCPO-TV (CBS), Cincinnati, Ohio.
WHAS-TV (CBS), Louisville, Kentucky.
WDRB-TV (Ind.), Louisville, Kentucky.
WKLE (Educ.), Lexington, Kentucky.

[1] The parties agree that the reference to Section 76.93 results from a typographical mistake, and that it is Section 76.91 of the Rules which is at issue. Section 76.91 states in pertinent part:

"(a) Any cable television system operating in a community, in whole or in part, within the Grade B contour of any television broadcast station, or within the community of a 100-watt or higher power television translator station, and that carries the signal of such station shall, on request of the station licensee or permittee, maintain the station's exclusivity as an outlet for network programming against lower priority duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in §§ 76.93 and 76.95.

(b) For purposes of this section, the order of priority of television signals carried by a cable television system is as follows:

(1) First, all television broadcast stations within whose principal community contours the community of the system is located, in whole or in part;

(2) Second, all television broadcast stations within whose Grade A contours the community of the system is located, in whole or in part;"

WLEX–TV and WAVE–TV are both NBC affiliates. WLEX–TV places a predicted Grade A contour over Harrodsburg, WAVE–TV a predicted Grade B contour.

3. R.V. argues that it should not be required to accord exclusivity to WLEX–TV on the grounds that WAVE–TV is significantly viewed in Harrodsburg, that deletion of WAVE–TV will reduce local programming as well as discourage potential subscribers, that a thermoelectric generating plant's magnetic field and mountainous terrain make WLEX–TV's signal inferior to WAVE–TV's, that Harrodsburg has no community of interest with Lexington, and that the number of viewers involved is so small that the requested relief is not warranted in view of its impact on R.V. We reject R.V.'s arguments.

4. Neither the rules nor the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, allow a cable television system to deny exclusivity against a significantly viewed television signal. In requiring carriage of significantly viewed stations, we did not alter the policy underlying our exclusivity requirements. Similarly, we require R.V. not to delete WAVE–TV's signal, but merely to black it out when it duplicates WLEX–TV's. In addition, R.V. has neither documented its inability to afford switching equipment nor submitted engineering data to show that WLEX–TV's signal is unsuitable for cable transmission.[2] Next, we reject as irrelevant to the reasons for requiring program exclusivity R.V.'s unsupported contention that Harrodsburg has no community of interest with Lexington. E.g. *TV Cable of Elk City*, FCC 70–1320, 26 FCC 2d 848. Finally, we can not accept the argument that there would be little or no adverse effect on WLEX–TV since the Commission's reasons for requiring exclusivity do not depend on a prior showing of need by the station, *id.*

In view of the foregoing, we find that grant of the requested waiver of Section 76.91 of the Rules would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Waiver of Section 76.93(a) of the Commission's Rules" filed April 17, 1972, by R.V. Cable-Vision IS DENIED.

IT IS FURTHER ORDERED, That R.V. Cable-Vision, Inc., IS DIRECTED to comply with the requirements of Section 76.91 of the Commission's Rules on its cable television system at Harrodsburg, Kentucky, within thirty (30) days of the release date of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[2] Consequently, R.V.'s citation of *Community Service, Inc.* v. *U.S.*, 418 F. 2d 709 (6th Cir., 1969) is readily distinguished since—in that case—engineering showings were before the Commission.

104–017—73——10

F.C.C. 73-1170

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of SIERRA VISTA CATV COMPANY, INC. SIERRA VISTA, ARIZONA For Certificate of Compliance	CAC-943 AZ018

MEMORANDUM OPINION AND ORDER

(Adopted November 14, 1973; Released November 20, 1973)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. Sierra Vista CATV Co., Inc., operates a 4,478-subscriber cable television system at Sierra Vista, Arizona, which is located outside of all major and smaller television markets. The system currently provides its subscribers with the following television broadcast signals:[1]

KPAZ-TV (Ind., Ch. 21), Phoenix, Arizona.
KPHO-TV (Ind., Ch. 5), Phoenix, Arizona.
KVOA-TV (NBC, Ch. 4), Tucson, Arizona.
KGUN-TV (ABC, Ch. 9), Tucson, Arizona.
KOLD-TV (CBS, Ch. 13), Tucson, Arizona.
KUAT-TV (Educ., Ch. 6), Tucson, Arizona.
KZAZ (Ind., Ch. 11), Nogales, Arizona.
KCOP-TV (Ind., Ch. 13), Los Angeles, California.
KTTV (Ind., Ch. 11), Los Angeles, California.
KHJ-TV (Ind., Ch. 9), Los Angeles, California.
KTLA (Ind., Ch. 5), Los Angeles, California.

On July 1, 1972, Sierra Vista filed an application for certificate of compliance, requesting authorization to carry television Station XEPM-TV (Spanish Language), Juarez, Mexico. Carriage of this signal is consistent with Section 76.57 of the Commission's Rules.

2. In an opposition to this application filed on September 25, 1972, Spanish International Communications Corporation, licensee of Station KMEX-TV (Spanish Language), Los Angeles, California, argues that carriage of Mexican stations should be prohibited where domestic Spanish language programming is available on other stations carried by the cable system. It contends that the economic viability of these stations may be threatened by cable importation of Mexican signals because domestic stations rely on Mexican programming and pay substantial charges and duties to obtain that programming which often is not made available until as much as a year or more from the date of its first Mexican transmission.

3. We have previously considered and rejected Spanish Interna-

[1] Sierra Vista has a population of 21,350. The cable system began service in August, 1969, and has a 12-channel capacity. In addition to the broadcast signals, the system offers one channel for automated and non-automated program originations and carries two FM stations.

tional's general arguments in connection with the cable television rulemaking proceeding in Docket 18397 *et al*, and on several subsequent occasions,[2] and we will not repeat our rationale here. Turning to the specifics of Spanish International's present opposition, we note that KMEX–TV is not local to the Sierra Vista system, being some 480 miles distant and thus has no right to carriage. Moreover, the domestic stations allegedly carrying Spanish language programming and the actual number of programming hours involved have not been identified by KMEX–TV. We note that no objection to grant of this application has been filed by any station except KMEX–TV.[3] As in *Santa Fe Cablevision Co., General Communications & Entertainment Co., Inc.*, and *Mickelson Media, Inc., supra*, there is no showing that Spanish International or KMEX–TV will be harmed by the granting of this application. Essentially, Spanish International repeats arguments that we have already rejected. Since Spanish International has not met its substantial burden in attempting to prevent signal carriage consistent with our rules, its opposition will be denied. *Santa Fe Cablevision Co., Mickelson Media, Inc., supra.* We will also deny Spanish International's request that all certificate applications involving the carriage of Mexican signals be consolidated for Commission action. See *Santa Fe Cablevision Co., supra*, and *Mickelson Media, Inc., supra*, at 603 n. 2.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Opposition to Application for Certification" filed September 25, 1972, by Spanish International Communications Corporation, IS DENIED.

IT IS FURTHER ORDERED, That the "Application for Certification" (CAC–943) filed by Sierra Vista CATV Co., Inc., is GRANTED, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[2] See *Reconsideration of Cable Television Report and Order*, para. 23, FCC 72–530, 36 FCC 2d 326, 334–35 (1972); *Cable Television Report and Order*, para. 96, FCC 72–108, 36 FCC 2d 143, 180–81 (1972); *Santa Fe Cablevision Co.*, FCC 73–1022 —, FCC 2d —, (1973); *General Communications & Entertainment Co., Inc.*, FCC 73–632, 41 FCC 2d 501 (1973); *Mickelson Media, Inc.*, FCC 73–119, 39 FCC 2d 602 (1973).

[3] To the extent that Spanish International's arguments are made on behalf of other unidentified Spanish language television licensees, they must be rejected as too vague for consideration in the context of this proceeding.

F.C.C. 73-1188

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of SOUND MEDIA, INC. (WKIK) LEONARDTOWN, MD. HAS: 1370 KHz, 1 KW, DAY REQUESTS: 1370 KHz, 1 KW, DA-N, U For Construction Permit	File No. BP-19398

MEMORANDUM OPINION AND ORDER

(Adopted November 14, 1973; Released November 20, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING.

1. The Commission has before it for consideration (i) the above-captioned application to permit fulltime operation by station WKIK; (ii) a petition to deny or, in the alternative, to designate for consolidated hearing filed June 11, 1973, by Key Broadcasting Corporation, licensee of station WPTX, Lexington Park, Maryland; and an opposition to the petition by the applicant.

2. Petitioner, in addition to being licensee of standard broadcast station WPTX, is also an applicant for a new FM station on channel 249 in Lexington Park. Petitioner's application (File No. BPH-6540) is mutually exclusive with Sound Media's proposal (File No. BPH-6886) for a new FM station on the same channel in Leonardtown and has been designated for comparative hearing in Docket No. 19410. A joint engineering exhibit in that proceeding shows that both FM proposals would serve a nighttime aural unserved area of 70 square miles having a population of 14,678. In addition, petitioner's FM proposal would serve a 56 square mile unserved area, having a population of 8,875, which Sound Media's FM proposal would not serve. Sound Media's FM proposal, in turn, would cover a 52 square mile unserved area which petitioner's proposal would not serve, containing a population of 2,461.

3. Section 73.37(e)(2)(ii) requires a daytime-only AM station seeking unlimited time operation to provide a first primary aural service to at least 25 percent of the area or population within its proposed interference-free nighttime service area. Petitioner asserts that a grant of either of the aforementioned FM applications would eliminate entirely the proposed unserved area coverage which is, allegedly, the sole basis upon which the acceptability of WKIK's application rests. According to petitioner, if it is sound public policy not to accept applications for filing which fail to provide unserved area coverage, it is equally sound policy not to grant one which would not. In the event the Commission decides to give further consideration to WKIK's proposal, however, petitioner urges that the application be consolidated

with the two aforementioned FM proposals already in hearing, since a grant of the AM application would "eliminate important parts of the white and grey areas which form a vital area of comparison" between the mutually FM applicants. Finally, petitioner attached as an exhibit a breakdown of equipment costs and other expenses which it believes the applicant must meet in order to construct both the FM and AM proposals.

4. Petitioner is correct in its assertion that a grant of either FM application would eliminate WKIK's proposed unserved area coverage. Petitioner has overlooked the fact, however, that although WKIK would not meet the unserved area requirement of section 73.37(e)(2)(ii), it would nonetheless meet the alternative criteria set out in section 73.37(e)(2)(iii) by providing Leonardtown with its second aural nighttime service. Thus, a prior grant of either FM application would have no adverse effect on WKIK's AM application. Moreover, since WKIK's entire proposed nighttime service area is enveloped by the proposed service areas of both FM applications, a grant of the AM application prior to a conclusion of the hearing would reduce the unserved area coverage proposed by the FM applicants to the same degree, i.e., 22.3 square miles. That fact, together with the fact that Leonardtown would then no longer be lacking a first local nighttime transmission service, makes it clear that petitioner's situation from a 307(b)-comparative standpoint would not be adversely affected. Thus, we find that WKIK's nighttime proposal conforms to Commission standards and that consolidation would serve no useful purpose.

5. As noted in paragraph 3, above, petitioner questions the applicant's estimated cost figures. Subsequently, the applicant submitted new cost figures, a copy of its most recent FCC Form 324, a letter from the equipment manufacturer, a new bank loan commitment, and a statement to the effect that it will eliminate the need for a separate FM tower by side-mounting the antenna on one of its four AM towers. Based on the latest available data which appear reasonable and have not been challenged by petitioner, we find that the applicant will require no more than $31,717 to construct and operate its FM proposal and $25,287 to construct its nighttime AM proposal. Thus, a total of $57,004 is required. The $25,287 AM total consists of: down payment on equipment, $6,820; one year's installment payments on equipment, including interest, $8,457; payments on bank loan, including interest, $3,600; and miscellaneous expense, $6,900. In order to meet the $57,004 requirement, the applicant has a bank loan commitment for $28,000 cash and/or liquid assets in excess of current liabilities of $29,570,[1] for a total of $67,570. In addition, the applicant has a cash flow from its existing operation of $13,538 (including $4,418 in depreciation) plus $23,911 in payments to principals. Accordingly, we find the applicant financially qualified.[2]

6. In view of the foregoing, we find that the petitioner has failed to raise any substantial and material questions of fact which would

[1] This figure is obtained by offsetting current liabilities ($17,691) against accounts receivable ($23,891), thus allowing the applicant full credit for its bank accounts.

[2] This finding, however, is not dispositive of the financial issue presently under litigation with respect to Sound Media's FM proposal in Docket No. 19410.

warrant a hearing. We further find, upon consideration of the application, that the applicant is qualified to construct and operate as proposed, and that a grant would serve the public interest, convenience, and necessity.

7. Accordingly, IT IS ORDERED, That the petition filed by Key Broadcasting Corporation IS DENIED, and that the application of Sound Media, Inc., IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1173

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of TELEVENTS OF SAN JOAQUIN VALLEY, INC., PATTERSON, CALIFORNIA For Certificate of Compliance	CAC-1230 CA537

MEMORANDUM OPINION AND ORDER

(Adopted November 14, 1973; Released November 20, 1973)

BY THE COMMISSION: COMMISSIONERS H. REX LEE AND WILEY CONCURRING IN THE RESULT.

1. On September 15, 1972, Televents of San Joaquin Valley, Inc., filed the above-captioned application to begin cable television service at Patterson, California, a community located in the Sacramento-Stockton-Modesto, California, television market (#25). This system will be constructed with 27 channels and, prior to amendment, Televents proposed to offer to the approximately 3,013 residents of Patterson the following television broadcast signals:

KCRA-TV (NBC, Ch. 3), Sacramento, California.
KVIE (Educ., Ch. 6), Sacramento, California.
KXTV (CBS, Ch. 10), Sacramento, California.
KTXL (Ind., Ch. 40), Sacramento, California.
KMUV (C.P., Ch. 31), Sacramento, California.
KOVR, (ABC, Ch. 13), Stockton, California.
KLOC-TV (Ind., Ch. 19), Modesto, California.
KTVU (Ind., Ch. 2), Oakland, California.
KBHK-TV (Ind., Ch. 44), San Francisco, California.
KGSC-TV (Ind., Ch. 36), San Jose, California.
KAIL (Ind., Ch. 53), Fresno, California.

Televents originally claimed that carriage of all the above-listed signals was grandfathered pursuant to Section 76.65 of the Rules. Televents' claim to grandfathered status was based on a notification of proposed service filed pursuant to former Section 74.1105 of the Rules on January 26, 1972. Televents asserted that no oppositions to this notification were filed.

2. On October 30, 1972, oppositions to Televents' application were filed by Kelly Broadcasting Company, licensee of Station KCRA-TV, Great Western Broadcasting Corporation, licensee of Station KXTV, and Camellia City Telecasters, Inc., licensee of Television Broadcast Station KTXL, all Sacramento, California. These three stations all claimed that Televents' "1105" notification of January 26, 1972, was not only defective, but was also opposed on February 18, 1972, by Retlaw Enterprises, Inc., licensee of Television Broadcast Station KJEO, Fresno, California, invoking the automatic stay provisions of

former Section 74.1105(c) of the Rules. Consequently, the stations argued, Televents' proposed signal carriage was not grandfathered. Additionally, Great Western Broadcasting urged that any grant of Televents' application be conditioned upon Televents' compliance with "all appropriate program exclusivity requests by local stations".

3. On November 14, 1972, Televents amended its application and no longer requests authority to carry KGSC–TV or KAIL. Additionally, Televents assures the Commission that it intends to comply with the network and syndicated program exclusivity rules. Televents' proposed signal carriage now fully complies with Section 76.61 of the Rules, without regard to the grandfathering provisions of Section 76.65. In response to Televents' amendment, Camellia City Telecasters has requested that its opposition be dismissed as moot. For the same reason, although not requested, the opposition of Kelly Broadcasting will also be dismissed as moot. While no longer objecting to Televents' proposed signal carriage, Great Western Broadcasting argues that Televents' assurance that it will comply with the Commission's exclusivity rules is inadequate, and renews its request that Televents' certificate of compliance be conditioned specifically to require that it give syndicated program exclusivity. However, Great Western's opposition is directed primarily against Televents' existing cable television system at Martinez-Pleasant Hill, California. Great Western claims that the system at Martinez-Pleasant Hill is operating in violation of Section 76.55(b) of the Commission's Rules because it is carrying KXTV on a part-time basis when the station is entitled to full-time carriage.[1] The station manager and its counsel have made informal attempts to secure full-time carriage for KXTV, but without success. Consequently, Great Western argues that Paragraph 112 of the *Cable Television Report and Order*[2] requires resolution of this controversy before the present application can be granted.

4. Great Western merely reargues the position that we have already rejected in *Televents of California*, FCC 73–448, 40 FCC 2d 757 (1973). In that case, we held that the Commission will not take cognizance of a dispute in which the parties have only informally approached each other. The appropriate forum for Great Western's complaint is a proceeding before the Commission in which all the relevant facts are presented. Compare *Television Cable Co., Inc.*, FCC 73–555, 41 FCC 2d 100 (1973). Nor are we persuaded to grant Great Western's request that Televents' certificate of compliance be conditioned to require that it give syndicated program exclusivity. Initially, we note that Televents has already assured the Commission that it will provide such exclusivity. Further, cable television systems are expected to comply with the syndicated program exclusivity requirement of Section 76.151 of the Rules, if applicable; the certificating process does not contain any requirement that cable systems affirmatively agree to comply with these rules. *Paxton Community Antenna System, Inc.*, FCC 72–1168, 38 FCC 2d 904, 906 (1972); *Broken Arrow Cable Tele-*

[1] Section 76.55(b) of the Rules provides:
Where a television broadcast signal is carried by a cable television system, pursuant to the rules in this subpart, the programs broadcast shall be carried in full, without deletion or alteration of any portion except as required by this part.

[2] FCC 72–108, 36 FCC 2d 123, 186 (1972). Therein we said, "Controversies concerning carriage (subpart D) and network program exclusivity (Section 76.91) will be acted on in the certificating process if raised within thirty days of the public notice."

vision, FCC 72–1105, 38 FCC 2d 503 (1972); *Sand Springs Cable Television*, FCC 72–1104, 38 FCC 2d 581 (1972); *Fox Cities Communications*, FCC 72–1107, 38 FCC 2d 536 (1972); *Morgan County Tele-Cable, Inc.*, FCC 73–149, 39 FCC 2d 605 (1973); and *Ceres Cable Co.*, FCC 73–188, 39 FCC 2d 686 (1973). Accordingly, Great Western's opposition will be denied.

5. Although not raised in the objections, we believe it appropriate to note certain variations in Televents' franchise from the standards of Section 76.31 of the Commission's Rules. Televents' franchise for Patterson was awarded by the Patterson City Council on January 18, 1972, after a full public proceeding. The initial term of the franchise is 20 years. Subscriber rates are established which can only be changed with the consent of the City Council. A construction schedule is specified. An annual fee of 5 percent must be paid to the city. Further, Televents commits itself to maintaining a local business office or agent to handle all inquiries or complaints which will be acted upon as soon as possible, but at most within three business days of their receipt. Only substantial compliance with Section 76.31 of the Rules must be demonstrated for franchises granted before March 31, 1972, and, measured by the criteria established by *CATV of Rockford, Inc.*, FCC 72–1105, 38 FCC 2d 10 (1972), *reconsideration denied*, FCC 73–293, 40 FCC 2d 493 (1973), we find that this franchise substantially complies with Section 76.31 of the Rules in a manner sufficient to justify a grant of the above-captioned application until March 31, 1977.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Objection to Application for Certificate of Compliance" filed October 30, 1972, by Camellia City Telecasters, Inc., IS DISMISSED as moot.

IT IS FURTHER ORDERED, That the "Opposition to Application for Certification" filed October 30, 1972, by Kelly Broadcasting Company, IS DISMISSED as moot.

IT IS FURTHER ORDERED, That the "Objection of Great Western Broadcasting Corporation Pursuant to Section 76.27" filed October 30, 1972, IS DENIED.

IT IS FURTHER ORDERED, That the above-captioned application (CAC–1230) filed by Televents of San Joaquin Valley, Inc., IS GRANTED and the appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

F.C.C. 73–1178

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re TYGART VALLEY CABLE CORPORATION, ELKINS, WEST VIRGINIA Request for Special Relief	CSR–447 WV186

MEMORANDUM OPINION AND ORDER

(Adopted November 14, 1973; Released November 21, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. On July 26, 1973, Tygart Valley Cable Corporation, operator of a cable television system at Elkins, West Virginia, filed a "Petition for Waiver" (CSR–447) of Sections 76.91 and 76.93 of the Commission's Rules.[1] On August 23, 1973, Withers Broadcasting Company of West Virginia, licensee of Television Station WDTV, Weston, West Virginia, filed an "Opposition to Petition for Waiver."

2. Elkins, West Virginia is located in the Clarksburg-Weston, West Virginia smaller television market. Tygart Valley operates a twenty-channel cable television system and carries the following television signals:

KDKA–TV (CBS), Pittsburgh, Pennsylvania.
WSVA–TV (ABC/NBC), Harrisonburg, Virginia.
WTAE–TV (ABC), Pittsburgh, Pennsylvania.
WDTV (CBS), Weston, West Virginia.
WTRF–TV (NBC), Wheeling, West Virginia.
WCHS–TV (CBS), Charleston, West Virginia.
WSTV–TV (CBS), Steubenville, Ohio.
WWVU (Educ.), Morgantown, West Virginia.
WIIC–TV (NBC), Pittsburgh, Pennsylvania.
WBOY–TV (NBC/ABC), Clarksburg, West Virginia.

[1] Section 76.91 provides in pertinent part:
(b) For purposes of this section, the order of priority of television signals carried by a cable television system is as follows:
(1) First, all television broadcast stations within whose principal community contours the community of the system is located, in whole or in part;
(2) Second, all television broadcast stations within whose Grade A contours the community of the system is located, in whole or in part;
(3) Third, all television broadcast stations within whose Grade B contours the community of the system is located in whole or in part;
Section 76.93 provides in pertinent part:
(a) Where the network programming of a television station is entitled to program exclusivity, the cable television system shall, on request of the station licensee or permittee, refrain from simultaneously duplicating any network program broadcast by such station, if the cable operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted.

WDTV places a predicted Grade B contour over Elkins; its predicted Grade A contour falls just short of the Community. KDKA–TV and WSTV–TV also are CBS affiliates, but fail to place Grade B contours over Elkins. Tygart Valley argues that it should not be required to accord WDTV exclusivity as against KDKA–TV and WSTV–TV, on the grounds that WDTV provides a signal of poor quality, that the resulting blackout would disrupt the viewing patterns of its subscribers, and that the cost of providing exclusivity would be prohibitive. We reject these arguments.

3. Beyond these assertions, Tygart Valley offers no documentation in support of its contentions. Accordingly, it is impossible to give them any weight. Indeed, its argument that WDTV's signal is so poor that it cannot be properly delivered to its subscribers is very tenuous, since KDKA–TV and WSTV–TV are distant signals which fail to place even a Grade B contour over Elkins. In line with many decisions, and *Television Cable Company*, FCC 73–555, 41 FCC 2d 100, is merely the most recent, such unsubstantiated arguments cannot justify a waiver of our rules.

Accordingly, IT IS ORDERED, That the "Petition for Waiver" (CSR–447) filed by Tygart Valley Cable Corporation is DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 73-1194

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of LIABILITY OF VAN PATRICK BROADCASTING COMPANY, INC. LICENSEE OF RADIO STATIONS WSRF AND WSHE (FM) FORT LAUDERDALE, FLORIDA for Forfeiture	

MEMORANDUM OPINION AND ORDER

(Adopted November 14, 1973; Released November 20, 1973)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Notice of Apparent Liability to the Van Patrick Broadcasting Company, Inc., for forfeiture of $2,000, dated April 18, 1973, and (2) the response of the licensee to the Notice of Apparent Liability dated April 25, 1973, denying liability for the forfeiture proposed.

2. Stations WSRF and WSHE(FM) are licensed to the Van Patrick Broadcasting Company, Inc. (hereinafter Van Patrick). The Notice of Apparent Liability in this matter was issued to Van Patrick for its apparent failure to comply with the sponsorship identification and logging requirements set forth in Section 317 of the Communications Act of 1934, as amended and Sections 73.119, 73.289, 73.112(a)(2)(i) and 73.282(a)(2)(i) of the Commission's Rules in that it willfully or repeatedly failed to broadcast announcements identifying the sponsor of commercial messages and failed to identify the persons who paid for the announcements in the daily program logs.

3. The announcements and station program logs supplied to the Commission in response to an inquiry made prior to the issuance of the Notice of Apparent Liability indicated (1) that a typical announcement consisted of:

> It's Wishbone Ash . . . and street singer extraordinairre, David Peale. A people concert this Sunday, October 15 at the Hollywood Sportatorium . . . An evening of expression with Wishbone Ash . . . David Peale, and other guests. This Sunday. October 15, 7 PM . . . In the Hollywood Sportatorium . . . for McGovern. Donations are $4 Advance . . . $5 at the door. Tickets available at . . . Kicks . . . Callahan's and all McGovern-Shriver offices;

(2) that occasionally variations of this announcement were also aired; (3) that the announcement was broadcast 39 times on WSHE(FM) and 65 times on WSRF during the period October 11 to October 15; (4) that the Broward McGovern-Shriver Committee sponsored the concert and paid for the announcements; (5) that the texts of the announcements failed to state who paid for them; (6) that the announcements were logged as "Wishbone Ash," which was the official

name of the concert; and (7) that the daily program logs did not contain entries identifying the persons who paid for the announcements. In response to this inquiry, Van Patrick explained that "the broadcast of the McGovern concert announcement in violation of the Rules was a result of overriding concern with the unique political overtones of that announcement and the possibility that the stations might incur equal time obligations by the broadcast." From these apparent facts, the Commission determined in its Notice that Van Patrick's concern over the political content of the announcement did not excuse its failure to comply with the sponsorship identification requirements of Sections 73.289 and 73.119, and the logging requirements of Sections 73.112(a)(2)(i) and 73.282(a)(2)(i) and accordingly assessed the licensee a forfeiture of two thousand dollars—one thousand dollars for WSRF's violations and one thousand dollars for WSHE(FM)'s violations.

4. In response to the Commission's Notice of Apparent Liability for forfeiture, Van Patrick states that it "made a good-faith effort" to comply with the sponsorship identification Rules; that although "Wishbone Ash" did not pay for the announcements, they were purchased to advertise a "Wishbone Ash Concert"; and that the text of the announcements is sufficient to give the impression that they were advertising a "Wishbone Ash" rock concert, an incidental purpose of which was to donate funds to the McGovern campaign after all expenses for the concert had been paid. The licensee further states that the manager of the "Wishbone Ash" musical group contacted it regarding these announcements; that Van Patrick advised the manager that it would not accept paid political campaign advertisements in violation of its policy of providing free political time to all bona fide candidates, but that it would accept paid announcements advertising rock concerts; that a Broward McGovern-Shriver Committee representative then requested announcements of a non-political nature; and that it would have been discriminatory to the concert's promoters not to have broadcast the announcements.

5. Van Patrick also contends that it complied with Sections 73.119(e) and 73.289(e) of the Commission's Rules in that the manager of the "Wishbone Ash" musical group first contacted it regarding the announcements and thus it believed that they were purchased on behalf of a "Wishbone Ash Concert." Van Patrick asserts that Sections 73.119(e) and 73.289(d) of the Rules provide that where an agent or other person makes arrangements on behalf of another for an announcement to be broadcast, and such a fact is known by the station, the announcement shall disclose on whose behalf such agent is acting instead of the name of the agent. The licensee also contends that the mention of "Wishbone Ash" as the concert headliner was sufficient to comply with sponsorship identification requirements—particularly rules 73.119(g) and 73.289(g). The licensee asserts that these Rules provide that an announcement stating the sponsor's corporate or trade name, or the name of the sponsor's product, when it is clear that the mention of the name of the product constitutes a sponsorship identification, shall be sufficient for purposes of these sections. Van Patrick concludes that ". . . there was no attempt to deceive, conceal, or withhold information in any way, nor did it even remotely consider that

its actions would be interpreted as being in violation of the Commission's Rules."

6. In response to an additional Commission inquiry of September 11, 1973, Van Patrick states that the contract for the announcements was signed on October 9, 1972. A copy of the contract discloses that the advertiser was listed as the "McGovern for President Committee." A copy of a draft against an account maintained at the First National Bank, Fort Lauderdale, Florida, for the Broward McGovern-Shriver Committee authorizing payment to the licensee discloses that the stated purpose of payment was "to purchase advertising time for Fund Raising Rock Concert." Van Patrick explains that it requested the McGovern representative pay by check in advance of the broadcasts in accordance with its policy regarding advertisements for concerts, but that it received the draft on October 11 and the bookkeeping department "let it run through . . ."

7. Van Patrick states that the announcements' purpose was to advertise a rock concert featuring the musical group "Wishbone Ash," that the text of the announcements was sufficient to give this impression, and that when first contacted regarding the spots it believed that they were purchased on behalf of "Wishbone Ash." However, the facts disclose that the licensee received payment for the announcements from the Broward McGovern-Shriver Committee—not from "Wishbone Ash", and that the text of the announcements included the phrase "for McGovern" and a statement that concert tickets were available at "all McGovern-Shriver offices." Furthermore the contract for the announcements which was signed on October 9—two days before the first broadcast of the announcement—listed the advertiser as the "McGovern for President Committee." The bank draft authorizing payment to the licensee received by the station the day the broadcasts began (October 11) stated that the purpose of payment was "to purchase advertising time for fund raising concert." The bank draft was accepted by Van Patrick although it was not in accordance with the licensee's policy requiring payment by check in advance of broadcasts from concert advertisers. Thus, it is evident that before the announcements were broadcast the licensee was put on notice that the sponsor of the announcements was the Broward McGovern-Shriver Committee and that the purpose of the announcements was not to advertise an ordinary rock concert.

8. Van Patrick asserts that it complied with Sections 73.119(e) and 73.289(e) of the Commission's Rules. These sections provide in part:

> ". . . Where an agent or other person contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known to the station, the announcement shall disclose the identity of the person or persons in whose behalf such agent is acting instead of the name of such agent."

In that the purpose of the "Wishbone Ash" performance was to raise money for the McGovern-Shriver campaign, the manager of "Wishbone Ash" was in effect acting mainly for the benefit of this campaign and only indirectly for his musical group in his negotiations with the licensee for the announcements. In addition, only the initial contract regarding the spots was with the manager of the musical group, other discussions, the contract for the announcements, and pay-

ment itself were by members of the Broward McGovern-Shriver Committee and it should have been clear to Van Patrick that the manager was acting on behalf of the committee. Van Patrick also asserts that it complied with Sections 73.119(g) and 73.289(g) of the Rules. These sections state:

> In the case of broadcast matter advertising commercial products or services, an announcement stating the sponsor's corporate or trade name, or the name of the sponsor's product, when it is clear that the mention of the name of the product constitutes a sponsorship identification, shall be deemed sufficient for the purposes of this section and only one such announcement need be made at any time during the course of the program.

Mention of the name "Wishbone Ash" did not clearly constitute a sponsorship identification. It is apparent from the text of the announcements that "Wishbone Ash" was only one act among several, participating in a concert—"for McGovern." Also as previously stated, the contract for the announcements and the payment voucher indicate that the Broward McGovern-Shriver Committee and not "Wishbone Ash" was the sponsor of the announcements.

9. The basic principle underlying Section 317 of the Communications Act is that "listeners are entitled to know by whom they are being persuaded", *Applicability of Sponsorship Identification Rules*, 40 FCC 141 (1963). Sections 73.119 and 73.289 of the Commission's Rules basically require that a sponsorship announcement "fully and fairly disclose the true identity of the person or persons by whom or in whose behalf payment is made." When a station receives payment for a broadcast it is required to announce who paid for or sponsored the message. Sections 73.112(a)(2)(i) and 73.282(a)(2)(i) require that an entry be made into the daily program logs identifying the person who paid for the announcement. The Broward McGovern-Shriver Committee paid for the announcements and should have been identified as the sponsor in the announcements and in the daily program logs. Although Van Patrick claims to have made "a good faith effort" to comply with the sponsorship identification rules and although the licensee was concerned with the political implications of the announcement, it repeatedly failed to broadcast a proper sponsorship announcement and enter the appropriate notation in the logs. Nothing the licensee has set forth in its response convinces us that it should be excused for so obvious a violation of the Act and Commission Rules.

10. In view of the foregoing, IT IS ORDERED, That the Van Patrick Broadcasting Company, Inc., licensee of Stations WSRF and WSHE(FM), Fort Lauderdale, Florida, FORFEIT to the United States the sum of two thousand dollars ($2,000) for its repeated failure to observe Section 317 of the Communications Act of 1934, as amended, and Sections 73.289, 73.119, 73.282(a)(2)(i) and 73.112(a)(2)(i) of the Commission's Rules and Regulations. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Federal Communications Commission. 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 thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

11. 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 the Van Patrick Broadcasting Company, Inc., licensee of Stations WSRF and WSHE(FM), Fort Lauderdale, Florida.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*