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Reported by the Commission

FEDERAL COMMUNICATIONS COMMISSION

RICHARD E. WILEY, Chairman
ROBERT E. LEE
CHARLOTTE T. REID
BENJAMIN L. HOOKS
JAMES H. QUELLO

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FCC 74-439

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of AMERICAN BROADCASTING COS., INC., SAN FRANCISCO, CALIF. For Modification of Construction Permit	File No. BMPCT-7494
WESTINGHOUSE BROADCASTING CO., INC., SAN FRANCISCO, CALIF. For Construction Permit To Install Auxiliary Transmitter	File No. BPCT-4675

MEMORANDUM OPINION AND ORDER

(Adopted April 17, 1974; Released April 30, 1974)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. The Commission has before it for consideration the applications [1] of American Broadcasting Companies, Inc., licensee of KGO-TV, channel 7, San Francisco, California (hereafter "KGO"), for modification of construction permit BMPCT-7451, and Westinghouse Broadcasting Co., Inc., licensee of KPIX-TV, channel 5, San Francisco (hereafter "KPIX"), for a construction permit to install an auxiliary transmitter at its main transmitter and antenna location. Both stations are presently operating pursuant to program test authority granted by the Commission from the Sutro Tower on Mount Sutro in San Francisco, pending action on tendered applications for licenses to cover outstanding construction permits.

2. The Commission also has before it "petitions to deny" filed by the Community Coalition for Media Change (CCMC) against the above-captioned applications.[2] Since both applications propose minor changes in facilities, as defined by section 1.572(a)(1) of our rules,[3] they are not, pursuant to section 1.580(a)(1), subject to petitions to deny. However, in view of the unique questions raised by CCMC, we will treat these matters as informal objections, as provided in section 1.587 of the rules, and proceed to a discussion of the merits.[4]

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[1] File Nos. BMPCT-7464 and BPCT-4675, respectively.

[2] BMPCT-7464 was filed with the Commission September 13, 1974. CCMC's "Petition to Deny" was filed October 19, 1973; KGO's response on November 1, 1973; and CCMC's reply on November 19, 1973. BPCT-4675 was filed on October 15, 1973; CCMC's petition to deny on December 11, 1973; KPIX's Opposition and Motion to Dismiss on December 21, 1973; and CCMC's Reply on January 7, 1974.

[3] Section 1.572 defines as major changes in facilities those which would result in a change of 50 percent or more of the area within the Grade B contour of the station.

[4] Our decision to treat these matters as informal objections renders unnecessary examination of the claim of both KGO and KPIX that CCMC has not demonstrated standing to oppose a grant of these applications, an issue which we do not decide.

3. CCMC first alleges that the Commission may not grant these applications without prejudicing the outcome of the contested renewal applications of KGO–TV (BRCT–62) and KPIX–TV (BRCT–17). CCMC says further physical improvements or economic investments on the part of the present licensee will sway the Commission's decision on the renewal applications because of the licensees' increased equity in the stations.

4. The amount of money involved in these applications is so small as to be nearly without significance, in comparison with expenses already incurred in construction of the Sutro Tower and the net worth of the licensee corporations.[5] Therefore, we believe that a grant of these applications appropriately conditioned on the outcome of the pending renewal challenges will alleviate CCMC's expressed concerns about possible prejudice and will not materially increase the licensees' "equity" in their stations.

5. Lastly, we treat CCMC's claim that the Commission is obliged to issue a "long over due" Environmental Impact Statement on the Mount Sutro Tower construction project, in accordance with section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4321, 4332 (2)(C)), P.L. 91–190, 83 Stat. 852, eff. January 1, 1970). Concerning the tower and the need for the statement, CCMC says that the Commission has "ignore[d] the matter of public safety, in that the matters of loss of life and destruction of property have not been adequately evaluated in regards unique variables such as earthquake faults and other peculiar environmental factors." In support of this conclusion, CCMC alleges only that the Sutro Tower "reaches 1,670 feet into the sky, [and] sits near or on an earthquake fault in the middle of a densely populated area." [6]

6. The construction permit for the Sutro Tower was issued to KGO–TV (BPCT–2401) on February 10, 1965, well before the January 1, 1970, effective date of the National Environmental Policy Act.[7] The question thus before us is whether, despite the early date of the project's approval and, now, its completion, an environmental impact

[5] KPIX estimates expenses associated with its proposal of approximately $25,000. KGO has not estimated any costs in connection with its application, which contemplates only a "paper" change in the construction permit to bring the permit into conformity with actual operation. CCMC contends that KGO's failure to include the consulting engineer's fee for preparing the amendment renders the application defective. We are not persuaded that it follows *a priori* that because a consulting engineer prepared the modification that there are costs associated with the application not reported in connection with the application for the original construction permit. Nor, in the event that some small fee was involved for this very minor change, are we disposed to call into question the financial qualifications of a corporation such as ABC, whose considerable resources are a matter of public knowledge. We also do not agree with CCMC that the omission which appears to have made this modification necessary reflects adversely on KGO's technical qualifications to be a television broadcast station licensee.

[6] Concerning these allegations, we note that the transmission tower stands 980 feet above ground, 1,670 feet above average terrain, and 1,811 feet above sea level.

[7] Construction permits for the other San Francisco-Oakland television stations to move their transmitters and antennas to the Sutro site were issued as follows: KRON–TV (BPCT–4235), on December 3, 1969; KPIX–TV (BPCT–4230), on June 24, 1969; and KTVU–TV (BPCT–4257), on August 8, 1969.

statement is required to comply with 42 U.S.C. 4332 (2)(C).[8] The Council on Environmental Quality (CEQ), which oversees implementation of NEPA by agencies of the Federal Government, has stated (in guidelines issued to assist in interpreting the Act's provisions):

> The section 102(2)(C) procedure shall be applied to *further major Federal actions* having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of the Act on January 1, 1970. While the status of the work and degree of the completion may be considered in determining whether to proceed with the project, it is essential that the environmental impacts of proceeding are reassessed pursuant to the Act's policies and procedures and, if the project or program is continued, that *further incremental major actions* be shaped so as to avoid or minimize adverse environmental consequences not fully evaluated at the outset of the project or program. (Emphasis added). 40 CFR Pt. 1500.13.

7. In the cases now before us, construction of the Sutro Tower is complete. The instant applications do not propose any further physical construction. KGO's proposed modification (BMPCT–7494) involves only the addition of antenna beam tilt not included in KGO's previous construction permit (BMPCT–7461, to change type of transmitter). KPIX (BPCT–4675) proposes installation of an auxiliary transmitter, but not the erection of any additional physical structures on Mount Sutro. As noted, para. 1, *supra*, the four stations holding construction permits to operate from the Sutro Tower are now doing so pursuant to program test authority granted by the Commission, pending action on applications for licenses to cover the permits.

8. The concern of the CEQ guidelines, in the case of projects approved prior to the effective date of NEPA, as demonstrated by the italicized passages, *supra*, is with action which remains to be taken. Neither the grant of these applications, nor, looking ahead, the grant of licenses to cover the construction permits, is a major action significantly affecting the quality of the human environment. Grant of these applications (for modification of a construction permit and for authority to install an auxiliary transmitter) will have no consequence for the environment whatsoever. Nor will the grant of licenses under section 319(c) of the Communications Act of 1934, as amended, to cover the outstanding construction permits, materially increase the possibility of an adverse impact on the environment. This case is therefore distinguishable from the ruling of the United States Circuit Court of Appeals for the District of Columbia in *Calvert Cliffs Coordinating Committee, Inc.* v. *Atomic Energy Commission*, 1 ELR 20346, 449 F. 2d 1109 (D.C. Cir., 1971).

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[8] Section 102 provides that: "The Congress authorizes and directs that, to the fullest extent possible: * * * (2) all agencies of the Federal Government shall

* * * * * * *

"(c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

"(i) the environmental impact of the proposed action,

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

"(iii) alternatives to the proposed action,

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

In *Calvert Cliffs*, where environmental factors had not been considered prior to the issuance of a construction permit for a nuclear power plant, the AEC was required to prepare and circulate an environmental impact statement before moving on to consideration of an application for an operating license. As the Court said:

> Compliance to the "fullest" possible extent would seem to demand that environmental issues be considered at every important stage of the decision-making process concerning a particular action—at every state where an overall balancing of environmental and nonenvironmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental harm. 449 F. 2d 1109, at 1118.

Unlike a television transmission tower, the very operation of a nuclear power plant may entail intrinsic risks of grave environmental harm. Thus, the decision whether to issue an operating license is an appropriate point at which to pause and consider the environmental consequences of the action. While we do not wish to intimate that the issuance of a license to cover a construction permit for a broadcast antenna tower is not an important stage of the decision-making process, it is not an appropriate stage for balancing environmental and nonenvironmental factors. As illustrated by this case, the harm to the environment, if any, is done. Issuance of a license will not create or increase the likelihood of harm. Preparation of an impact statement at this point in time would serve no practical purpose and "exalt form over substance." *Jircarilla Apache Tribe of Indians* v. *Morton*, 471 F. 2d 1275, 1284 (9th Cir., 1973).

9. Where a project has been approved prior to the effective date of the National Environmental Policy Act, the purpose of an environmental impact statement is to "seek to alter, within proper limits, the aspects of a proposal *which have not yet been completed, and not to undo anything which has already proceeded to final construction.*" (Emphasis supplied.) *Jones* v. *Lynn*, 477 F. 2d 885, 889 (1st Cir., 1973). Here, the situation hypothesized by the First Circuit has been reached where application of NEPA "to a project * * * so far terminated to preclude *any* change in plans" would be "fruitless." *Id.*

10. This is not at odds with *Calvert Cliffs*, *supra*. There the Court stated:

> A total reversal of the basic decision to construct a particular facility or take a particular action may . . . be difficult, since substantial resources may already have been committed to the project. Since NEPA must apply to the project in some fashion, however, it is essential that it apply as effectively as possible—requiring alterations in parts of the project to which resources have not yet been inalterably committed at great expense. 449 F. 2d 1109, at 1121, fn. 28.

This statement by implication leaves open the possibility of some situations where resources have been so completely committed as to make an environmental impact statement totally ineffectual. We believe this is such a case. The commitment to the relocation of the San Francisco television stations to Mount Sutro, measured simply in terms of money is impressive enough (well into eight figures), but also includes the abandonment of other facilities from which the stations have previously been operating, and is certainly "inalterable." Therefore, we conclude that delaying action on those applications for

the purpose of preparing an environmental impact statement would be purposeless and unwarranted, and is not required. On the other hand, we find that amendment of KGO's construction permit in the very limited manner described, and the installation of an auxiliary transmitter for KPIX–TV, will serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That, the informal objections of the Community Coalition for Media Change ARE DENIED, and the above-captioned applications of American Broadcasting Companies, Inc., and Westinghouse Broadcasting Company, Inc., ARE GRANTED, without prejudice, however, to whatever action we may take on the pending license renewal applications of KGO–TV (BRCT–62) and KPIX–TV (BRCT–17).

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

FCC 74-397

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Application of AREA WIDE PAGING SYSTEMS, INC. For Consent to Assignment of Station KQK593, Cleveland, Ohio, to Digital Paging Systems of Cleveland, Inc.	File No. 6636-C2-AL-73

MEMORANDUM OPINION AND ORDER

(Adopted April 16, 1974; Released April 24, 1974)

BY THE COMMISSION:

1. The Commission has for consideration the captioned application for consent to assignment of station license KQK593 from Area Wide Paging Systems, Inc. (Area Wide) to Digital Paging Systems of Cleveland, Inc. (Digital-Cleveland) in the Domestic Public Land Mobile Radio Service (DPLMRS) at Cleveland, Ohio. In conjunction with the application, we are considering a petition to deny filed by Del Mintz, d/b/a National Mobile Radio (NMR or Petitioner); an opposition filed by Digital-Cleveland; and a reply filed by NMR. We are also granting NMR's motion for acceptance of a supplement to its petition to deny, and are thereby considering the parties' pleadings filed with respect to this supplement.

2. NMR has protested the assignment application on the following grounds:

(a) Area Wide's character qualifications are inadequate to allow it to continue as a licensee; and therefore it has no power to assign the license to a buyer.

(b) The assignment application has failed to disclose information which should have been brought to the Commission's attention.

(c) A certain option agreement which amounts to trafficking in radio station licenses exists among Area Wide, Digital-Cleveland's ultimate parent, and another subsidiary of the ultimate parent.

(d) The parties to the option agreement are attempting to evade the Commission's cut-off rules.

3. Area Wide is the present licensee of station KQK593. Through the stations' facilities, low-band paging service is provided to the Cleveland, Ohio area. The company has further applications pending before the Commission which, if granted, would enable it to render service on 158.70 MHz, 454.325 MHz, and 454.175 MHz.

4. NMR is the licensee of station KQC881 which also provides paging to Cleveland. In addition to this facility, NMR has a pending

application to replace its transmitter on 43.58 MHz, and to convert to FM operation. Area Wide has protested this application.

5. Digital-Cleveland, the proposed assignee of station KQK593, is a wholly owned subsidiary of Digital Paging Systems, Inc. which is in turn controlled by Graphic Scanning Corporation (Graphic). Graphic Scanning Corporation of Cleveland, Inc. (Graphic-Cleveland) is another Graphic subsidiary important to the disposition of this case.

6. Petitioner's argument for standing, alleging increased economic competition as a probable result of the proposed assignment, is not impressive. Unlike the situation in *Northern Mobile Telephone Company*, 39 FCC2d 608 (1973), the assignor in the present case is not a licensee with marginal finances. Area Wide's latest FCC Form L shows 453 subscribers using the facilities of Station KQK593, and net income from DPLMRS operation in excess of $14.000.00 (compare *Northern Mobile* where the assignee showed 40 subscribers and a net loss from DPLMRS operation of $1,898.00). We doubt whether Digital's superior financial position, the result of a $3 million public stock offering in order to embark upon a plan of nationwide communications service, justifies a finding that standing has been established by NMR. Although Petitioner's standing argument is questionable, we have nevertheless decided to resolve the case on the merits.

AREA WIDE'S QUALIFICATIONS—NONDISCLOSURE

7. John Kocevar, president and principal stockholder of Area Wide, was convicted of a felony in 1968 pursuant to Ohio's conflict of interest statute. He was later pardoned. NMR contends that this information should have been included in the assignment application, and that nondisclosure thereof, renders Area Wide's business ethics so suspect that an evidentiary hearing is required to determine whether or not the applicant possesses the necessary qualifications to be a licensee, and therefore the assignor of a license.

8. We disagree. Details respecting Kocevar's conviction were supplied on at least two prior occasions before the assignment application was filed—once in 1968 as an exhibit to Area Wide's guardband proposal, and again in 1970 as an amendment to the same application in order to show that the conviction had been affirmed. In 1970 the license for Station KQK593 was renewed. NMR cites *Lexington County Broadcasters, Inc.*, 40 WCC 2d 320 (Review Board 1973) for the proposition that any suit alleging misconduct must be reported in a pending application. It also cites *Southern Broadcasting Company*, 33 FCC 2d 1044 (Review Board, 1972) maintaining that the Commission must be informed of all facts that may be of decisional significance whether or not requested in an application form. Neither case supports Petitioner's argument which is directed at both non-disclosure of the conviction in Area Wide's application for assignment of license and in its last application for renewal. Unlike the *Lexington* case, these two application forms do not specifically require the information in question,

i.e. facts regarding criminal conviction.[1] The *Southern* case dealt with an applicant who had never furnished the Commission with the information that a principal had been charged with a criminal violation. Quite the opposite is true here, for Area Wide has advised the Commission of each major phase in Kocevar's predicament. It should be noted that the conviction in no way arose from the management of Kocevar's communications interests, but at a time ten years ago when he was employed by the Sheriff's department of Cuyahoga County. Upon conviction, he was given a two year suspended sentence, and, in February of 1972, Kocevar was pardoned by the governor of Ohio. The conviction has therefore been mooted by the pardon, and we find no reason to hold that Kocevar should not be precluded from his status as a licensee.

9. We have already noted Digital's nationwide goals, and are cognizant that this has been a matter of public record since the Securities and Exchange Commission authorized the Digital Paging Systems, Inc. public stock offering. Nothing in NMR's petition convinces us that the plans for expansion may be detrimental to future areas where Digital might be licensed to operate; and in any event, no specific information has been provided to demonstrate that the goals would adversely affect the service which Digital proposes to offer in Cleveland. The possibility of anticompetitive actions, which NMR has raised, are general allegations without any supporting facts upon which to base them. For this reason, we find these arguments unconvincing.

10. NMR also maintains that the application fails to reveal the means by which Digital intends to finance the Cleveland assignment. In addition, it questions the managerial responsibility for future Digital subsidiaries. With respect to finances, the attachment to Digital-Cleveland's opposition pleading shows that sufficient assets exist with which to purchase station KQK593. While the applicant may be presently dependent upon its parent, nevertheless the necessary funds are shown to be available and we see no reason to request further information especially since the potential of the station should insure additional cash flows to the licensee. NMR's argument regarding managerial responsibility is not well taken. The details concerning the management of the Cleveland station have been shown to our satisfaction, and if future Digital applications are filed, the management of those stations can be questioned during their individual processing.

TRAFFICKING

11. Until the application was amended for the second time, the most difficult problem lay with certain provisions of the Stock Purchase Agreement executed among Graphic, Graphic-Cleveland, and Rita and John Kocevar. The agreement provided for the simultaneous

[1] *Lexington* involved Broadcast Bureau forms (FCC Form 301—application to construct a new station; FCC Form 303—application for renewal of license) which are considerably more comprehensive than the application forms in issue here. Neither FCC Form 702 (application for consent to assignment of license) nor FCC Form 405 (renewal of license) ask for specific information with respect to legal qualifications of the assignor or renewing licensee that might disclose a criminal conviction.

purchase of 40% of Area Wide's stock with the closing of the Station KQK593 assignment. The agreement also granted an option to Graphic-Cleveland whereby the company could purchase the remaining 60% interest at a later date. The purchase price of the balance of the stock depended upon Commission grants of Area Wide's pending applications.[2] The staff felt that the price was inordinately high, and when they questioned it, the application was amended in such a way that the price was made to reflect the actual cost of prosecuting the pending applications before the Commission. At the same time, an employment agreement for the services of John Kocevar was submitted. His compensation was geared to grants of the pending Area Wide applications, and on this occasion the staff questioned the propriety of the amount to be paid for his services. It is sufficient to say that the Stock Purchase Agreement raised issues regarding the licensee's possible attempt to traffick in radio station licenses. Area Wide, after grant of the pending applications for new facilities, would not have remained the licensee for long if the option were ever exercised. Moreover, its principal stood in a position to profit greatly from the transaction. When further information was requested to justify the employment contract, the application was amended once more. As a result, the option and employment agreements were entirely deleted.

12. The original stock purchase agreement was drafted without the assistance of Communications counsel. While this fact, by itself, does not entirely excuse an option agreement which might be construed as an attempt to traffick in licenses, nevertheless we note that Part 21 of the Commission's Rules does not contain provisions regarding trafficking.[3] There is presently pending a Proposed Rulemaking to amend Part 21 of the Rules which does include a section on trafficking, see *Amendment of Parts 1 and 21 of the Commission's Rules and Regulations Applicable to the Domestic Public Land Mobile Radio Services (other than Maritime Mobile)*, Section 21.34, Docket No. 19905, however the Cleveland assignment was filed well in advance of this Rule Making proceeding. When communications counsel were notified of the difficulties, they were quick to see the problem and swiftly moved to excise the substantial profit included in the original option price. When the new option clause was submitted, the staff found that the ancillary employment contract still contained doubtful provisions, but their rejection of it was in the nature of an advisory admonition to the applicant, so that ultimately all the questionable aspects were deleted. Since the second amendment was filed, NMR has not commented further. Under these circumstances, we find that no additional inquiry into the motives of the applicant for entering into the former agreement is necessary.

13. We are left with the question of whether or not the applicant violated Section 1.65 of the Rules by failing to file the option agree-

[2] The pending applications which were the subject of the option agreement and the employment agreement were for frequency 158.70 MHz (FCC File No. 3063–C2–P–69); frequency 454.175 MHz (FCC File No. 33–C2–P–71); and frequency 454.325 MHz (FCC File No. 1681–C2–P–71).

[3] Subpart D of Part 1 of the Rules does contain trafficking provisions in situations regarding transfers or assignments in Broadcast proceedings, see Section 1.597.

ment as part of the Cleveland assignment application.[4] We conclude that nothing obligated Area Wide to do so. The simultaneous transfer of 40% of Area Wide's stock would not have effected a transfer of control, and therefore no requirement to have filed for Commission consent to the transaction existed.[5] The option agreement, if later exercised, would have brought about a transfer of control, and at the time of its exercise, an appropriate application would have been required. But the option agreement dealt with a future transaction and not with the passage through assignment of Station KQK593. In short, it would have been proper to address any difficulties relating to the option agreement when the necessary transfer application had been filed. Finally since the option agreement no longer exists, NMR's allegation that the parties to the agreement had attempted to evade the Commission's cut-off rules need not be addressed; and the assignment application now stands on its own.

14. Accordingly, IT IS ORDERED that the captioned application of Area Wide Paging Systems, Inc. for consent to assignment of Station KQK593 at Cleveland, Ohio is GRANTED; the Motion for acceptance of a supplement to petition to deny by Del Mintz, d/b/a National Mobile Radio is GRANTED; and the petition to deny is DENIED.

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

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[4] Section 1.65 provides: "Each applicant is responsible for continuing accuracy and completeness of information furnished in a pending application . . . whenever there has been a substantial change as to any . . . matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall . . . submit a statement furnishing such additional or corrected information . . ."

[5] Unlike situations involving contracts that relate to present or future ownerships of broadcast stations (see Section 1.613 of the Rules) the Domestic Public Land Mobile Radio Service does not require such contracts to be filed unless they would result in a transfer of control or assignment of license.

FCC 74-422

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
BATTLEFIELD CABLEVISION, INC., UNINCORPORATED AREAS OF WALKER COUNTY, GA.	CAC-1375 GA067
BATTLEFIELD CABLEVISION, INC., FORT OGLETHORPE, GA.	CAC-1376 GA068
BATTLEFIELD CABLEVISION, INC., CHICKAMAUGA, GA.	CAC-1377 GA088
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted April 17, 1974; Released April 26, 1974)

BY THE COMMISSION:

1. On October 12, 1972, Battlefield Cablevision, Inc., filed the above-captioned applications for certificates of compliance to begin cable television service at Chickamauga, Fort Oglethorpe, and certain unincorporated areas of Walker County, Georgia. These communities are located within the Chattanooga, Tennessee, major television market (#78). Battlefield proposes to carry the following television broadcast signals on its 20-channel systems:

WRCB-TV (NBC, Channel 3) Chattanooga, Tennessee.
WTVC (ABC, Channel 9) Chattanooga, Tennessee.
WDEF-TV (CBS, Channel 12) Chattanooga, Tennessee.
WTCI (Educ., Channel 45) Chattanooga, Tennessee.
WRIP-TV (Ind., Channel 61) Chattanooga, Tennessee.
WCLP-TV (Educ., Channel 18) Chatsworth, Georgia.
WHAE-TV (Ind., Channel 46) Atlanta, Georgia.
WTCG (Ind., Channel 17) Atlanta, Georgia.

Carriage of all the above-listed stations is consistent with Section 76.61 of the Commission's Rules. The franchises are in full compliance with Section 76.31 of the Rules.

2. Section 76.251 of the Commission's Rules requires that every new cable television system in a major television market provide separate channels for public, educational and local government access for each community served. Battlefield requests a partial waiver of Section 76.251 of the Rules so that it may serve the three above-mentioned communities with a common set of access channels from a centrally located studio. In support of its request, Battlefield notes the small subscriber potential of these communities: Chickamauga's 1970 population was 1,880; Fort Oglethorpe's was 3,800; and Walker County's total was 22,900. Moreover, Battlefield argues that Walker County

is a large, primarily agricultural, area with a few widely separated pockets of population. Battlefield's proposed access facility is near to, and approximately equidistant from, Fort Oglethorpe and Chickamauga. It claims this facility will be easily accessible from all the areas that it proposes to serve. In view of the very low population of the communities involved, Battlefield suggests, no demand exists for separate access channels in each community. It does, however, assure the Commission that it will expand its access service commensurate with any growth in demand.

3. We acknowledged in the *Cable Television Report and Order* that our access requirements could impose an "undue burden" on isolated systems located in the major television markets, and we expected to provide relief from these requirements in appropriate situations.[1] We are satisfied that the very small size of the communities here involved justifies the requested partial waiver to allow Battlefield to provide one set of access channels. However, should sufficient demand for these channels develop, we expect Battlefield to make additional access channels available.[2]

In view of the foregoing, the Commission finds that a partial waiver of Section 76.251 of the Rules and a grant of the above-captioned applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That Battlefield Cablevision, Inc., IS GRANTED, a partial waiver of Section 76.251 of the Rules to the extent indicated in paragraph 3 above.

IT IS FURTHER ORDERED, That the applications (CAC–1375, 1376, 1377) for certificates of compliance filed by Battlefield Cablevision, Inc., for Chickamauga, Fort Oglethorpe, and certain unincorporated areas of Walker County, Georgia ARE GRANTED, and appropriate certificates of compliance be issued.

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

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[1] Paragraph 148, *Cable Television Report and Order*, 36 FCC 2d 143, 197 (1972).
[2] *See Stark County Communications, Inc.*, FCC 72–1189, 38 FCC 2d 1147 (1972).

FCC 74-457

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matters of BELL SYSTEM TARIFF OFFERINGS OF LOCAL DISTRIBUTION FACILITIES FOR USE BY OTHER COMMON CARRIERS; AND Letter of Chief, Common Carrier Bureau, Dated October 19, 1973, to Laurence E. Harris, Vice President, MCI Telecommunications Corp.	Docket No. 19896

APPEARANCES

J. Hugh Roff, Jr., *John W. Gray, Jr.*, *H. A. Davenport*, *William L. Leonard*, *Alfred A. Green*, *John P. Fons*, and *Marian Jean Dabney* on behalf of Bell System Companies; *Richard R. Hough*, Vice President AT&T and President of its Long Lines Department also appeared; *Warren E. Baker*, *Richard J. Croker* and *Carolyn C. Hill* on behalf of The United Telephone System; *George E. Shertzer*, *William R. Malone*, *Vincent Gallogly* and *Ruth L. Prokop* on behalf of GTE Service Corporation; *Thomas J. O'Reilly* (Chadbourne, Parke, Whiteside & Wolff) on behalf of United States Independent Telephone Association; *Wm. Warfield Ross*, *William R. Weissman*, *C. Coleman Bird* (Wald, Harkrader & Ross), *Jack Werner* and *Richard C. Hostetler* on behalf of The Western Union Telegraph Company; *Ernest Brod* and *Howard L. Stevens* on behalf of Western Union International, Inc.; *Michael H. Bader*, *Kenneth A. Cox*, *William J. Byrnes* and *John V. Kenny* (Haley, Bader & Potts) on behalf of MCI Telecommunications Corporation and MCI New York West, Inc.; *Laurence E. Harris*, Vice President MCI Telecommunications Corporation also appeared; *W. Theodore Pierson, Sr.*, *W. Theodore Pierson, Jr.* and *Mark J. Tauber* (Pierson, Ball & Dowd) on behalf of CML Satellite Corporation; *Francis J. DeRosa* and *Carl J. Cangelosi* on behalf of RCA Global Communications, Inc.; *Michael L. Glaser*, *Robert M. Silverman* (Glaser & Fletcher), *John M. Scorce* and *Kevin H. Cassidy* on behalf of Data Transmission Company; *Charles H. Helein* and *Arthur R. Perkins* (Dow, Lohnes & Albertson) on behalf of X-Triple-C Inc.; *Thormund A. Miller*, *Richard S. Kopf* and *Herbert E. Forrest* (Steptoe & Johnson) on behalf of Southern Pacific Communications Company; *Richard H. Strodel* (Wheeler & Wheeler) on behalf of Western Tele-Communications, Inc.; *David A. Irwin* and *John D. Jackson* on behalf of American Satellite Corporation; *Joseph J. Jacobs* and *Howard A. White* on behalf of ITT World Communications, Inc.; *Jay E. Ricks* and *Robert R. Bruce* (Hogan & Hartson)

on behalf of Midwestern Relay Company and CPI Microwave, Inc.; *Kelley Griffith*, *James O. Juntilla*, *Ruth V. Reel* and *Adrien R. Auger* on behalf of the Common Carrier Bureau.

DECISION

(Adopted April 23, 1974; Released April 23, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING AND DISSENTING TO PARAGRAPH 31 AND ISSUING A STATEMENT; COMMISSIONER HOOKS CONCURRING IN THE RESULT.

I. BACKGROUND

1. This proceeding was initiated and designated for oral argument by our Memorandum Opinion and Order to Show Cause, FCC 73–1299, 44 FCC 2d 245, released December 13, 1973, and the background facts are therein set forth in detail. Briefly, this case presents for Commission determination the very serious controversy between the Bell System telephone companies [1] and other telephone companies on the one hand and non-Bell, non-telephone company communications common carriers (herein referred to as the specialized common carriers) on the other hand concerning the extent to which the latter or their customers should be permitted to interconnect their facilities with those of the telephone companies. In answer to an inquiry from MCI Telecommunications Corporation (MCI), a specialized common carrier, the Chief of our Common Carrier Bureau advised in a letter dated October 19, 1973 that MCI was entitled to secure from telephone companies various types of interconnection, and Bell applied for Commission review of the Bureau Chief's action. Another issue involved herein relates to the provision of facilities by the Bell System companies to Western Union Telegraph Company. For many years, Bell has provided local distribution facilities to Western Union pursuant to exchange of facilities contracts. Bell now proposes to provide and charge for such facilities pursuant to tariffs filed with state commissions rather than in accordance with the terms of the contracts and Western Union complains that such action is unlawful. Finally, there is presented herein the question of whether Bell has complied with the conditions concerning interconnection facilities attached to the domestic satellite authorizations by our order in *A.T. & T.*, 42 FCC 2d 654, 660, released September 12, 1973.

2. As modified by our Memorandum Opinion and Order, FCC 74–79, 44 FCC 2d 914, released January 25, 1974, our order designating this proceeding for oral argument: (a) Directed the Bell System companies to show cause why they should not be ordered to cease and desist from:

> (1) altering, in any way, the provisions of exchange of facilities contracts with Western Union, except in strict accordance with the terms of such contracts;

[1] The Bell System companies involved in this proceeding are enumerated in paragraph 18 of our designation order. Hereinafter American Telephone and Telegraph Company and the Bell System companies will be referred to jointly as Bell or the Bell System companies.

(2) engaging in any conduct which results in a denial of, or unreasonable delay in establishing, physical connections with MCI and the other carrier parties for their authorized or pending interstate services;

(3) implementing any policy or practice which forecloses the establishment of through routes, and charges, facilities and regulations applicable thereto, in connection with MCI's and the other carrier parties' authorized or pending interstate services;

(4) filing with state commissions tariff schedules of charges and regulations for services and facilities used for communications originating in one state and terminating in another state, or communications between a state and a point outside the United States; and

(5) implementing any policy or practice which results in denying MCI or any other carrier party interconnection privileges similar to those presently provided to AT&T's Long Lines Department in connection with their authorized or pending interstate services.

(b) Directed Bell to show cause:

(1) why filing Bell tariffs for domestic satellite interconnection facilities with state commissions, rather than exclusively with this Commission, should not be considered as non-compliance with a condition in its domestc satellite authorizations that such filings be made pursuant to section 203 of the Act and Part 61 of our Rules; and,

(2) if such filings with the states are found to be non-compliance with said condition, why AT&T's domestic satellite authorizations should not be revoked or modified.

(c) Directed all parties to this proceeding to address themselves at this oral argument to the following questions:

(1) whether the Commission has heretofore ordered the telephone companies, pursuant to Section 201(a) of the Communications Act, to provide interconnection with MCI or whether such interconnection is otherwise required pursuant to rule or regulation within the meaning of Section 312 of the Act;

(2) if so, (a) the scope of that order or rule or regulation with particular reference to interconnection for FX and CCSA services of MCI; (b) whether the telephone companies have complied with such order, rule or regulation and, (c) if they have not complied, the appropriate remedy, whether under Section 312 of the Act or otherwise;

(3) if interconnection has not hitherto been ordered or required by rule or regulation whether it should be and, if so, upon what terms and conditions; and

(4) whether the Commission should affirm, reverse or modify the staff action of October 19, 1973 for which review is here requested.

3. In our designation order, American Telephone and Telegraph Company and the Bell System operating companies were named as

respondents; and MCI Telecommunications Corporation and MCI New York West, Inc. (referred to herein jointly as MCI), Western Union Telegraph Company, and the Chief of the Commission's Common Carriers Bureau were made parties to the proceeding. In addition, the following requested and were granted permission to participate as parties (Memorandum Opinion and Order, FCC 74–44, released January 22, 1974): United Telephone System, United States Independent Telephone Association, GTE Service Corporation, Data Transmission Company, Western Tele-Communications, Inc., N-Triple-C Inc., Southern Pacific Communications Company, Midwestern Relay Company, CPI Microwave, Inc., ITT World Communications, Inc., RCA Global Communications, Inc., Western Union International, Inc., American Satellite Corporation, CML Satellite Corporation, and the New York State Public Service Commission. By letter dated February 14, 1974, the New York State Public Service Commission advised that it was withdrawing from the case. RCA Global Communications, Inc. filed a brief on January 21, 1974 but informed the Commission on February 25, 1974 that it would not appear for oral argument. The briefs filed by the parties to this proceeding are listed in the Appendix to this Decision. On March 4, 1974, the Commission heard oral argument.

II. JURISDICTION

4. As indicated in our designation order, Bell has filed tariffs with state regulatory commissions which relate to the furnishing of local distribution facilities to other common carriers and has taken other action with respect to the provision of interconnection facilities which require our immediate attention. Although tariffs respecting such interconnection were also filed with this Commission, the filings were made under protest. Bell contends that the interconnection facilities are entirely intrastate, that the offerings are strictly of a local nature, and that consequently, the activities involved in this proceeding are local and subject to state and local regulation exclusively. Consequently, it argues, this Commission has no jurisdiction over the matter of interconnection of the specialized carriers or their customers with these local distribution facilities or the tariffs under which they are furnished. A discussion of the nature of the communications transmitted and the interconnection services requested by the specialized common carriers is essential to the resolution of the jurisdictional question raised by Bell.

5. The specialized common carrier parties provide private line services to their subscribers and are engaged in the transmission of communications, voice, data, or both, between a point in one state and a point in another state and/or a foreign country, i.e., interstate or foreign communications. Whether one or more of such carriers may upon occasion carry intrastate communications or propose to do so in the future is irrelevant to the jurisdictional question since we are concerned here solely with interconnection for interstate and foreign communications. Although some of the specialized carriers have indicated an intention to construct local distribution facilities, it appears that at this time all such carriers are dependent upon the local distribution

facilities of the telephone company serving the area to be reached in order to provide end-to-end service to their customers. Thus the interconnection which the specialized carriers seek is an integral part of the interstate or foreign communications which they transmit and the local distribution facilities of the telephone company are an essential link in the interstate and foreign communications services provided by the specialized carriers.

6. The contentions of Bell and the other telephone company parties in support of their position on the jurisdictional question have been considered but we find them to be without merit. Like arguments were advanced and rejected in *Telerent Leasing Corporation, et al.*, FCC 74–109, released February 5, 1974,[2] where the Commission had under consideration its jurisdiction with respect to the interconnection of customer-provided communications equipment to the nationwide switched public telephone network. Therein we held, on the basis of an exhaustive study and analysis of the pertinent legislative history and judicial and administrative precedents, that the Commission has primacy in authority over the terms and conditions governing such interconnection and that no state regulation can preempt the Commission's jurisdiction over interstate communications and the regulation of the terms and conditions governing such communications. For the reasons therein stated we must reject the telephone companies' challenge to our jurisdiction here. See also *The United States Department of Defense, et al.*, 38 FCC 2d 803 (Review Board, 1973), affirmed FCC 73–854, where we asserted exclusive jurisdiction over Dial Restoration Panel (DRP) equipment which is part of a nationwide defense communications system even though the facilities were used in part for the transmission of intrastate communications.[3] We believe that these decisions are controlling here; and we therefore conclude that the terms, conditions, and charges for the interconnection of the private line interstate and foreign communications of the specialized common carriers with the local distribution facilities of Bell or the particular telephone company serving the area for the purpose of enabling the specialized carriers to provide, and their customers to obtain, all essential services for interstate or foreign communications are within the exclusive jurisdiction of the Commission. We further conclude that the offerings of the local telephone company with respect to such interconnection must be covered by a tariff or tariffs filed with the Commission pursuant to Section 203 of the Act and Part 61 of our Rules; and that the charges, terms, and conditions for such interconnection must be pursuant to the tariffs filed with this Commission and not pursuant to the charges, terms, and conditions specified in a tariff filed with a state regulatory body.

III. INTERCONNECTION FOR THE SPECIALIZED COMMON CARRIERS

7. Bell further argues that even if the Commission has jurisdiction over the subject matter of interconnection of the private line services of

[2] A petition for review of the Commission's decision has been filed in the United States Court of Appeals for the Fourth Circuit (Case No. 74–1220).

[3] This decision has been appealed to the United States Court of Appeals for the District of Columbia Circuit by St. Joseph Telephone and Telegraph Company (Case No. 73–1907).

the specialized carriers with the local distribution facilities of the telephone companies, no enforcement order requiring such interconnection is available in this proceeding since the telephone companies have not been accorded a hearing pursuant to Section 201(a) of the Act [4] to determine whether interconnection is in the public interest, and these companies have never been ordered by the Commission to provide the interconnection presently under consideration. Assuming that a hearing has been held and an order issued as to some types of interconnection, Bell further asserts that such hearings and orders did not encompass the provision of facilities for connection into the telephone companies' local exchange facilities for the purpose of furnishing foreign exchange (FX) service or for insertion into telephone company common control switching arrangements (CCSA).[5] Each of these contentions will be considered below as well as the question of whether an order should now issue.

8. In considering Bell's contention that it has not been accorded the "opportunity for hearing" specified in Section 201(a) of the Act to support an interconnection order, we must emphasize that in the determination of policies, procedures and other questions common to a large number of applications, the Commission is not restricted to adjudicatory hearings but may proceed by way of rule making. *California Citizens Band Association, Inc.* v. *United States and Federal Communications Commission*, 375 F. 2d 43, 54 (9th Cir. 1967), *cert. denied* 389 U.S. 844. See also *WBEN, Inc.* v. *United States and Federal Communications Commission*, 396 F. 2d 601, 618 (2d Cir. 1968), *cert. denied* 393 U.S. 914.[6] Section 4(j) of the Act expressly authorizes the Commission to conduct its proceedings "in such manner as will best conduce to the proper dispatch of business and to the ends of justice." Where, as here, there is no statutory requirement that the Commission determination be made on the basis of an evidentiary record, "the choice made between proceeding by general rule or by individual *ad hoc* liti-

[4] Section 201(a) provides as follows: "It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes."

[5] FX and CCSA are terms used by Bell in its tariffs. Certain of the specialized carriers offer comparable services but use other terms. For the purpose of convenience, however, the terms FX and CCSA will be used in this Decision when referring to these service offerings by any of the carriers. These terms may be defined as follows:

"Foreign exchange (FX) is a private line service that is partially "switched". It allows a businessman located in one state to, in effect, maintain a local phone in another state. Under FX, for example, a businessman in Washington can be reached by telephone subscribers in New York City and can himself reach New York City telephone subscribers (through a local loop in Washington, a Washington-New York interchange line, and a business line in the New York City exchange area). However, New York City telephone subscribers could not reach Washington subscribers other than the Washington businessman over FX private line service and the latter would have to maintain a separate telephone in order to tie into the Washington exchange area."

"A Common Control Switching Arrangement (CCSA) is a private line system for linking the various offices of a large company through large switches on a local telephone company's premises instead of through PBX switches on the customer's premises." The private line circuits furnished in CCSA are provided for the exclusive use of the CCSA customer. However, the switching machines are shared with other private line service customers.

[6] For a further discussion of the type of hearing which satisfies the hearing requirements of various provisions of the Communications Act, see *Specialized Common Carriers Services*, 29 FCC 2d 870, 896–900 (1970).

gation is one that lies primarily in the informed discretion of the administrative agency." *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202–203 (1947). See also *United States* v. *Allegheny-Ludlum Steel Corporation*, 406 U.S. 742, 756–757 (1972); *Transcontinent Television Corporation* v. *Federal Communications Commission*, 308 F. 2d 339, 342–343, 113 U.S. App. D.C. 384, 387–388 (1962). A review of all of the proceedings involving the question of interconnection by the specialized carriers with the facilities of Bell demonstrates that Bell has been accorded ample "opportunity for hearing" to meet the requirements of Section 201(a) of the Act.

9. In the original *MCI* case,[7] which was an adjudicatory proceeding involving applications for authorizations to construct facilities to provide a common carrier private line microwave radio service between Chicago, Illinois and St. Louis, Missouri, the applicant stated its intention and desire to utilize the facilities of Bell in order to link its facilities to the premises of its subscribers, such links being referred to therein as loop service. However, at the hearing Bell[8] objected to this provision of loop service, contending that the resultant division of responsibility and difficulty in conducting tests when trouble occurs would make interconnection inadvisable, and that technical problems would be created such as the possibility of high signal levels being introduced into their system by MCI's operations or those of its customers which would damage the telephone company's transmission facilities. Countervailing evidence was introduced on behalf of MCI.

10. The Commission concluded that the public interest would be served by a grant of the authorizations requested by the applicant. With respect to the established carriers' contention that loop service was not technically feasible, the Commission held that the evidence was not sufficient to support a conclusion that this was so. No specific affirmative order of interconnection was issued since the facts and details of the requirements of MCI's customers were not then known. However, since the carriers had indicated that they would not voluntarily provide loop service, the Commission retained jurisdiction to enable MCI to obtain a prompt determination on the matter of interconnection, and the Commission concluded that "absent a significant showing that interconnection is not technically feasible, the issuance of an order requiring the existing carriers to provide loop service is in the public interest" (18 FCC 2d at 965, par. 36).

11. In its petition for reconsideration of the *MCI* Decision, Bell reconsidered its position that loop service was not technically feasible. Therein it stated that the Bell System companies "have connecting arrangements with other common carriers and have a tariff offering of links for connection to customer-provided facilities. There would appear to be no reason for a different policy here." In this Docket No. 19896 proceeding, Bell likewise concedes that loop service poses no significant technical problems and that it is providing such service.

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[7] *Microwave Communications, Inc.*, 18 FCC 2d 953 (1969), reconsideration denied, 21 FCC 2D 190 (1970). Microwave Communications, Inc., like MCI Telecommunications Corporation and MCI New York West, Inc., is a subsidiary of MCI Communications Corporation.

[8] The American Telephone and Telegraph Company and certain of its operating telephone companies, as well as other established carriers, were parties to the proceeding.

However, in the *MCI* case, other carriers included in their petitions for reconsideration the argument that they had been denied a hearing pursuant to Section 201(a) on the matter of interconnection. The Commission rejected this argument as being without merit. After reiterating its findings that a grant of the MCI application would serve the public interest and its view that the issuance of an order requiring the provision of loop service with respect to a particular application "when the facts and details of a customer's needs are known," would likewise be in the public interest unless a significant showing of technical infeasibility was made, the Commission stated (21 FCC 2d at 193, par. 8):

> While the carriers refer vaguely to other considerations which might require a hearing, none is specified. Consequently, on the basis of the pleadings before us, we find no substance to the carrier's complaint that they are being deprived of a hearing as to any significant matters.

12. Thus Bell and the other existing carriers which were parties to the *MCI* proceeding were accorded an "opportunity for hearing" on interconnection for loop service even though no order of interconnection was issued in that proceeding.[9] However, in the *Specialized Common Carrier Services* rulemaking proceeding in Docket No. 18920, not only were the telephone companies and other common carriers afforded a further "opportunity for hearing" but a broad directive was issued to the telephone companies to provide interconnection facilities for the specialized carriers. The Commission undertook in Docket No. 18920 to establish basic policies and procedures for the disposition of numerous applications then pending before it and of the additional applications which were expected to be filed to provide specialized common carrier services in the Domestic Public Point-to-Point Microwave Radio Service. Expressly citing Section 201 of the Act as one of the statutory bases for the institution of the proceeding, the Commission in its *Notice of Inquiry To Formulate Policy, Notice of Proposed Rule Making, and Order*[10] posed a number of questions to which it requested that all interested parties direct their comments. Two are of particular relevance here and they are as follows:

> A. Whether as a general policy the public interest would be served by permitting the entry of new carriers in the specialized communications field; and if so,
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> E. What is the appropriate means for local distribution of the proposed services?

13. In regard to Question E, the Commission stated that the means for local distribution of the proposed services was a matter of concern, that the "local exchange facilities of the Bell System and independent telephone companies presently constitute almost the sole means for local distribution of interstate common carrier services. . . ."; that

[9] We do not hold that the Decision in the *MCI* proceeding specifically dealt with the question of interconnection with respect to FX and CCSA services. But the broad issue of interconnection was considered and the Commission in that proceeding first articulated its policy of requiring the established carriers to furnish facilities to the specialized carriers for interconnection.

[10] *Specialized Common Carrier Services*, 24 FCC 2d 318, 327, 349 (1970).

upon application by the new carriers for access to local distribution of communications, the local carrier would be expected to permit "interconnection or channel arrangements on reasonable terms and conditions"; that the customers of the new carriers likewise should be afforded the option by the local carrier to obtain local distribution facilities under reasonable terms; and that, particularly where a carrier has monopoly control over "essential facilities", the Commission would condone no policy or practice whereby such carrier would discriminate in favor of an affiliated carrier or show favoritism among competitors (24 FCC 2d at 347). The Commission also expressed interest in "the desirability of using the existing local exchange facilities for local distribution of some of the proposed services" of the specialized carriers (24 FCC 2d at 347, par. 68). Pointing out that none of the applicants had applied for local distribution facilities or submitted concrete proposals as to interconnection or the leasing of facilities, the Commission stated (24 FCC 2d at 349):

> Applicants and other interested persons are requested to address this aspect fully in their comments, with particular attention to the technical feasibility and comparative costs of the various alternatives and the effect on charges to subscribers for end-to-end service.

From the above, as well as from a reading of the entire Notice, it is apparent that, although the Commission made reference to loop service, as Bell asserts, it was never intended to limit the scope of the inquiry to loop service. Rather, a broader inquiry into the local distribution of the interstate private line common carrier services proposed by the new carriers was contemplated.

14. Thus, when Bell filed its comments in Docket No. 18920, it was on notice that the proceeding was being conducted in reliance, at least in part, on Section 201 of the Act and that the determination of policies with respect to local distribution facilities was one of the principal matters under consideration and Bell directed some of its remarks to this issue. In its comments Bell argued that the "proposals of the specialized common carriers with respect to local distribution are vague and inadequate" and that it would be in a better position to comment on the subject after it received the specialized carriers' comments as to the appropriate means for achieving local distribution of the proposed services. Nevertheless, Bell acknowledged that there might be situations where it would not be practicable for the specialized carriers to provide their own local distribution and it stated that when the Commission determines that the licensing of additional carriers is in the public interest, "we would be willing to discuss with them the technical arrangements required and the appropriate charges for any connections required of the telephone companies" (page 119 of the comments filed on October 1, 1970). In its reply comments filed on December 2, 1970, Bell asserted that the specialized carriers had submitted little additional information concerning their proposals for local distribution apparently because most of them desired to maintain maximum flexibility by having the "freedom to choose between a telephone company's local distribution plant, their own local distribution, or any other available scheme such as CATV" (page 60). However,

Bell again stated that if the Commission licensed additional intercity carriers, it was "prepared to work cooperatively with them for such connections as may be required". (page 61).

15. After reviewing the extensive comments filed by Bell and the numerous other parties to the Docket No. 18920 proceeding and after hearing oral argument,[11] the Commission enunciated in its *First Report and Order* released June 3, 1971, the policy determinations and conclusions which had been reached. Of particular significance here are the Commission's conclusions with respect to Questions A and E set forth above. As to question A (whether the entry of new specialized carriers is in the public interest), the Commission stated (29 FCC 2d at 920, par. 103):

> We find that: there is a public need and demand for the proposed facilities and services and for new and diverse sources of supply, competition in the specialized communications field is reasonably feasible, there are grounds for a reasonable expectation that new entry will have some beneficial effects, and there is no reason to anticipate that new entry would have any adverse impact on service to the public by existing carriers such as to outweigh the considerations supporting new entry. We further find and conclude that a general policy in favor of the entry of new carriers in the specialized communications field would serve the public interest, convenience, and necessity.

16. As for question E (local distribution), the Commission found and concluded as follows (29 FCC 2d at 940, par. 157):[12]

> We reaffirm the view expressed in the *Notice* (paragraph 67) that established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable terms and conditions to be negotiated with the new carriers, and also afford their customers the option of obtaining local distribution service under reasonable terms set forth in the tariff schedules of the local carrier. Moreover, as there stated, "where a carrier has monopoly control over essential facilities we will not condone any policy or practice whereby such carrier would discriminate in favor of an affiliated carrier or show favoritism among competitors." In view of the representations of AT&T and GT&E in this proceeding, upon which we rely, and the self-interest of other independent telephone companies in not losing potential new business, there appears to be no need to say more on this question at this time. Should any future problem arise, we will act expeditiously to take such measures as are nec-

[11] Oral argument was heard by the Commission on January 21 and 22, 1971.

[12] An analogous situation where questions of what competition should be allowed and the scope of the interconnection which should be required were presented is the *Domestic Satellite* (*Domsat*) proceeding. Docket No. 16495. That proceeding was initiated under authority, *inter alia*, of Section 201 of the Act; and Bell, as well as other parties, filed comments therein. In the *Second Report and Order*, 35 FCC 2d 844, released June 16, 1972, the Commission established a policy favoring multiple entry and competition both among satellite system licensees and between satellite and terrestrial systems; and it directed the existing terrestrial carriers, including Bell, seeking domestic satellite authorizations to submit descriptions of the interconnecton arrangements they will make available to other satellite systems or earth station licensees as a prerequisite to action on their own domestic satellite applications. The Commission asserted that its objective was to insure that all satellite carriers would have access on non-discriminatory terms and conditions to local loop and interexchange facilities required for the purpose of either originating or terminating services for their customers. 35 FCC 2d at 856. In disposing of petitions which were filed for reconsideration of the decision, the Commission stated that, absent a showing by existing carriers that interconnection will be offered in a timely, reasonable, and nondiscriminatory manner, it would withhold any grant of a requested satellite authorization to an existing carrier. 38 FCC 2d 665 at 698–699. Thereafter, Bell applied for satellite facilities. The Commission found that Bell's proposals for interconnection were too restrictive and it conditioned the grant of Bell's authorizations on, *inter alia*, its making available to satellite carrier licensees the necessary terrestrial facilities under lease terms and conditions that will facilitate end-to-end service by those carriers. The Commission further held that interconnection should be governed by tariffs which would "provide timely and effective access arrangements to other satellite carriers on reasonable and nondiscriminatory conditions." *AT&T*, 42 FCC 2d 654.

essary and appropriate in the public interest to implement and enforce the policies and objectives of this Decision. [12]

17. We believe that the proceedings held to date, including the ones reviewed above (*MCI* and the *Specialized Common Carrier Services* proceedings) and the present one, provide an adequate base for the issuance of an interconnection order under Section 201(a). That section does not specify a hearing on the record, and thus does not in terms require an adjudicatory hearing. *United States* v. *Florida East Coast R. Co.*, 410 U.S. 224 (1973). Furthermore, we have not found the existence of material factual disputes which would require an adjudicatory procedure. Thus, we conclude that the claim of a right to such a proceeding is unfounded. Also, in view of the Commission decision in *MCI* and the policy determinations and conclusions set forth in the *Specialized Common Carrier Services* proceeding, we find that our previous orders were broad enough to require the telephone companies to provide interconnection facilities for MCI and other specialized carriers on a non-discriminatory basis for all services provided to an affiliated or other carrier in competition with the authorized services of the new specialized carriers absent a significant showing that such interconnection is not technically feasible. The matter of interconnection again came to the Commission's attention when MCI Telecommunications Corporation and MCI New York West, Inc. complained in a letter dated August 27, 1973, that the local telephone companies were refusing to interconnect for the provision of MCI's interstate service, that AT&T was arbitrary in its decisions as to what type of service the local telephone companies would supply "when they are providing a full range of services to the Long Lines Department and Western Union in direct competition to MCI," and that the telephone companies were wrongfully asserting a need for intrastate regulatory approval. A copy of this letter was sent to Bell by our Common Carrier Bureau with a request for a prompt reply.

18. Although denying any wrongdoing, Bell agreed that negotiations with other carriers for the lease of local distribution facilities were pending but that no agreements had been reached, and that tariffs covering such distribution facilities were being filed with state commissions. Bell further stated its view that the "arrangements described herein will achieve the Commission's objective stated in the *Specialized Common Carrier* case that the specialized carriers be afforded interconnection facility arrangements on reasonable terms and conditions." No claim was advanced of possible damage to Bell's facilities or that a further hearing or further orders pursuant to Section 201(a) were required. Concerning the charge that AT&T was favoring its Long Lines Department in the matter of interconnection, AT&T replied in its letter of September 28, 1973

> With respect to Long Lines, the associated Bell System companies do not furnish it facilities except local and intrastate telecommunications services pro-

[12] The Commission also concluded that the specialized carriers should have the option of constructing their own independent local facilities in order to provide end-to-end service. However, since the use of radio was contemplated for this purpose and insufficient evidence was contained in the record to make possible a determination of what radio frequencies should be made available, a new rule making proceeding was instituted to explore this question. See *Specialized Common Carrier Services*, 30 FCC 2d 280 (1971).

vided under tariff for administrative services. The Bell System companies, including AT&T through its Long Lines Department, are engaged in a joint venture providing nationwide interstate communications service. Neither Western Union, nor MCI, nor any other specialized carrier is involved in that joint venture.

In a previous letter of September 5, 1973, AT&T likewise referred to the "joint provision by the Bell System Associated Companies and the Long Lines Department of their telecommunications services" and asserted that "[c]ertainly the Associated Companies will not participate in a through service with MCI."

19. Pursuant to the directions of the Commission, after its consideration of the comments of MCI and AT&T, Chairman Dean Burch advised AT&T on October 4, 1973, that the proposal to file the tariffs with state commissions was in conflict with the statutory scheme of the Communications Act since the facilities to be offered are to be used for the transmission of interstate communications and are therefore subject to the filing requirements of Section 203 of the Act. AT&T was therefore directed to file tariff schedules with this Commission which "will provide the interconnection facilities *essential to the rendition by the specialized carriers of all their authorized services* on terms and conditions which are just, reasonable and non-discriminatory" (emphasis supplied.) The letter order further directed that, pending the filing of such tariffs, "there should be no delay in honoring requests of specialized carriers for interconnection facilities *required by such carriers to terminate the services they are authorized by the Commission to furnish*" and that the facilities "can be provided under contracts on an interim basis and *we assume that this will be done*" (emphasis supplied). While some doubt might have existed previously as to whether Bell was under an affirmative order of the Commission to provide MCI and other specialized carriers with interconnection facilities for the latters' authorized services, our October 4, 1973 letter order, which was issued after full consideration of Bell's representations, should have gone far to resolve that doubt.

20. Bell further argues, however, that the prior orders of the Commission on the subject of interconnection did not mention FX and CCSA services and consequently that they did not encompass interconnection facilities for such purposes. In considering this contention we must first take into account the nature of the *MCI* and *Specialized Common Carrier Services* proceedings. In the *MCI* case the applicant was seeking authorization to engage in the business of providing interstate private line communications services, and its primary concern at that time insofar as interconnection is concerned was the availability of loop service to connect its facilities with the premises of its customers. It appeared that its prospective customers were not interested in constructing their own facilities and it seemed likely that unless arrangements for loop service could be made with the local telephone company, MCI would not be able to commence operations even if its applications were granted. Understandably, then, it concentrated on the matter of loop service and did not reach the question of what interconnection might subsequently be necessary. The *Specialized Common Carrier Services* proceeding involved rulemaking

for the determination of basic policies with respect to the provision of private line services by the specialized carriers. While FX and CCSA are not specifically mentioned in the *Specialized Common Carrier Services* decision, this is because we were concerned with private line services generally and did not specifically focus on interconnection for FX and CCSA services or any others. It should be noted that the Commission considered the possibility of the "total diversion" of Bell's private line revenues, although the possibility was deemed to be remote. We would not have discussed this remote possibility of a "total diversion" of Bell's private line services if the competition offered by the specialized carriers were not to include FX and CCSA services, which account for a substantial share of Bell's total private line revenues. These services come within the terms of our order, and rightly so, because there is no distinction in principle to separate them from other types of interconnection. In this respect, we note also in Attachment C to the comments filed by Bell on October 1, 1970, Bell listed FX as a private line service and CCSA as equipment available to the private line customers, and in its tariffs and in numerous other documents the carrier consistently lists CCSA and FX as private line services.[14]

21. While the October 4, 1973 letter order similarly did not specifically mention FX or CCSA, no significance should be attached to its failure to do so. The reference therein to all of the authorized services of the specialized carriers and the direction to honor requests for interconnection facilities required by the specialized carriers to terminate the services they are authorized by the Commission to furnish are certainly broad enough to encompass interconnection for FX and CCSA services. In fact, we believe that the circumstances leading up to the issuance of the letter order further demonstrate that Bell knew or should have known that interconnection for the purpose of enabling the specialized carriers to provide FX and CCSA services was covered therein. In MCI's letter of August 27, 1973, it complained that the Bell System companies were arbitrarily deciding what types of service they would supply although they "were providing a full range of services to the Long Lines Department and Western Union in direct competition to MCI." At the oral argument of this Docket No. 19896 proceeding, Bell denied that it had engaged in "negotiations" with MCI for FX and CCSA services but conceded that "it would be fair to say for MCI that they have asked for FX and CCSA connection for some period" (Tr. 222). Manifestly, therefore, Bell has been aware for some time that MCI was seeking FX and CCSA services, but in its answer to the Commission's request for a response to MCI's complaint, although Bell raised a number of objections to the Commission

[14] Bell argues in this proceeding that the Commission's brief in the Ninth Circuit in *Washington Utilities and Transportation Commission* v. *FCC*, No. 71-2119 (argued February 15, 1973), took the position that "only local loops to the premises of the specialized carriers' customers were contemplated in Docket No. 18920." (Bell Br. at 20.) In that case, which is on review of the Commission's *Specialized Common Carrier Services* decision, the Commission's brief did contain language which suggests that local loop service to a customer's premises was at issue there. Such a suggestion does not take fully adequate account of the reach of our decision. The Commission's brief did not address the interconnection issue directly, however, because that issue was not raised in the petitions for review. We hereby instruct our counsel to forward a copy of this order to the Ninth Circuit to dispel any ambiguities that the brief may have created.

action, it made no claim that FX and CCSA required special or different treatment than interconnection for the purpose of providing other private line services. In these circumstances, Bell's failure to make such a claim justifies the inference that it did not consider special or separate treatment to be warranted.

22. Moreover, the interpretation which Bell would place on our previous rulings would be inconsistent with the basic purposes and objectives of the action which we took and with the public interest. In each of the proceedings discussed above, our action was taken to insure that competition in the provision of interstate private line communications services would be on a full, fair, and non-discriminatory basis and that the specialized common carriers would not be excluded from that market by reason of the monopoly control by Bell and other telephone companies over local distribution facilities. Bell presently has arrangements with its Long Lines Department and with numerous independent telephone companies for access to its local distribution facilities for the purpose of enabling Long Lines and the independent telephone companies to provide FX and CCSA services, and the income derived from these types of services represents a very substantial proportion of the carrier's income from private line services. If MCI and other specialized carriers are excluded from this market, they will be at a definite disadvantage in obtaining and holding subscribers to any of their private line services, including those point-to-point services which are not being challenged by Bell. A prospective private line customer who needs FX or CCSA services for part of his communications requirements is likely to be discouraged from obtaining any private line service from a carrier which is unable to supply the local distribution required for all of his needs. Thus, if Bell's contentions are accepted, Long Lines and the independent telephone companies will be in a position to exclude MCI and other specialized carriers from the interstate private line common carrier business, not by reason of their superiority, but because of the telephone companies' control over the local distribution facilities. However, we have held on the basis of extensive hearings in adjudicatory and rule making proceedings that the public will be benefitted by the entry of the specialized carriers into the private line common carrier field and that the public interest will be served by competition on a fair and non-discriminatory basis. Our orders in the several proceedings discussed above were intended to achieve that competitive status and to prevent to the extent possible the unjust or unreasonable discrimination which is prohibited by Section 202(a) of the Act.[15]

23. We therefore hold that our prior orders covered interconnection for the broad range of services which the specialized carriers are authorized to provide and that Bell has been directed to furnish interconnection facilities for the purpose of enabling MCI and the other specialized carriers to provide all such services, including FX and

[15] Section 202(a) of the Act provides as follows: "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

CCSA type services.[16] However, we recognize that our prior orders may not have been perfectly clear. In this proceeding, therefore, we are again reviewing the question of interconnection. We have given careful consideration to the arguments advanced by Bell in its briefs and at oral argument but, as hereinbefore pointed out, we are of the view that achievement of our objective that competition in the provision of interstate private line communications services be on a full, fair and non-discriminatory basis requires the issuance of broad interconnection orders. Our orders herein therefore make clear that Bell is to provide interconnection facilities for all of the authorized services of the specialized carriers, including FX and CCSA.

24. In its pleadings and at oral argument Bell has strenously contended that substantial and significant differences exist between interconnection for FX and CCSA services and interconnection for other private lines services and that, by reason of these differences, an evidentiary hearing is essential before a final determination is made on the subject of interconnection for these services. The question of whether an evidentiary hearing is necessary has been considered twice before. In our Memorandum Opinion and Order to Show Cause which initiated this proceeding we held that there "appears to be no material disputed fact and thus no necessity for designating these matters for an evidentiary hearing" 44 FCC 2d 245 at 250. Bell's petition for reconsideration of this determination was denied by a Memorandum Opinion and Order (FCC 74–140) wherein we held that Bell's allegations were insufficient to justify an evidentiary hearing. However, in view of the carrier's representations at the oral argument, we believe that some additional comments are warranted.

25. First, Bell asserts that, since interconnection for FX and CCSA permit access to its switched telephone network, substantially different and more serious problems are presented than interconnection for other private line services. In this respect we note, as previously discussed in this Decision, that Bell presently provides such interconnection to its own Long Lines Department and to numerous independent telephone companies. Therefore, unless a substantial showing is made that significant differences exist by reason of the different ownership of the private line facilities which justify or necessitate different treatment, Bell must provide comparable interconnection facilities to both in order to avoid the proscription of unreasonable discrimination set forth in Section 202(a) of the Act. As we stated in our order denying reconsideration, a recitation of broad and general areas of inquiry which it desires to have explored in an evidentiary hearing, unsupported by factual allegation which demonstrate a need for such a hearing, is not sufficient. We adhere to that view. The general questions raised by Bell relate primarily to matters which would

[16] In a civil action filed by MCI against Bell, *MCI Communications Corp. et al.* v. *AT&T et al.*, No. 73–2499, decided December 31, 1973, the United States District Court for the Eastern District of Pennsylvania reached the same conclusion we do as to the scope of our interconnection orders. In that case, the Court granted MCI's request for a preliminary injunction requiring AT&T to provide interconnection to MCI for certain services, including FX and CCSA. However, in an order filed April 15, 1974, the Court of Appeals, on the basis of the doctrine of primary jurisdiction, vacated the District Court's preliminary injunction and remanded the case to the District Court with directions that the court proceeding be stayed until the Commission resolves the issues under consideration in this Docket No. 19896 proceeding.

be within the knowledge of Bell or its employees.[17] It was therefore incumbent upon Bell to come forward with specific factual allegations and engineering or other supporting statements to demonstrate that there are significant unresolved factual questions which require a hearing. Since it has not done so, we again reject its contention that exploration of these matters requires an evidentiary hearing.

26. Bell further argues that there is no basis for a claim of discrimination in favor of its Long Lines Department since no comparable situation exists between the arrangements with Long Lines and the provision of interconnection facilities to MCI and other specialized carriers for FX and CCSA. It maintains that interconnection is not provided to Long Lines for these services but rather that Long Lines and the Associated Companies "are partners in the joint provision of interstate services." Asserting that extensive carrier cooperation is required in order to effectuate through services for FX and CCSA and that its switched network is a highly complicated single entity, Bell argues that through services will not be as beneficial to the public if the participating carriers function at arms length as competitors rather than as partners. With respect to its arrangements with the independent telephone companies for FX and CCSA services, Bell states that the independent companies do not operate on parallel routes or duplicate Bell's facilities and are therefore not competitors: that, consequently, a partnership arrangement could likewise be effected with the independent telephone companies. We cannot accept these alleged differences between a partner and a competitor as constituting a valid distinction which justifies Bell's withholding the requested facilities from MCI. Whether the interstate transmission of the communication is performed by MCI, Long Lines or an independent telephone company, access to the distribution facilities of the local telephone company is essential in order to enable the customer to obtain FX and CCSA services and to complete the interstate communication. Thus, the interconnecting facilities from the interstate carrier, whether MCI, Long Lines or an independent telephone company, to the local telephone company is a vital link in the transmission of the interstate communication, and must be provided on a non-discriminatory basis pursuant to Sections 201(b) and 202(a) of the Act. Consequently, unless there are significant technical or other considerations of substance which indicate that interconnection would result in damage to Bell's system or would have an adverse effect upon service to the public, Bell must provide the interconnection facilities requested by the specialized carriers.

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[17] We deem it unnecessary to list all the questions raised by Bell. However, we believe that the three set forth below illustrate the general type of inquiry requested by it. They are as follows:

"(a) The extent to which physical connection with MCI would involve connection into the central offices of the Bell System companies and remove insulation of the network from defective operations in the MCI system.

"(b) The extent to which such physical connection would involve specialized carriers in the network management function of the telephone companies and the effects on the telephone using public.

"(c) The effect of such physical connection as requiring specialized planning, controlled implementation, segmented operation, divided maintenance responsibility and complex administrative procedures."

27. Such technical considerations exist with respect to interconnection for FX and CCSA, it is argued, because allowing access to the local telephone company's switched network for the benefit of a nonpartner makes possible the introduction of incompatible equipment which could cause damage to the switched network. However, the specialized carriers are the ones seeking interconnection and they certainly realize that they are dependent upon the telephone company for the desired local distribution facilities. In the circumstances it is inconceivable that they would utilize incompatible equipment and thus justify the refusal of the services which they need. Furthermore, Bell can include in its tariff any reasonable conditions which are necessary to protect its system as prerequisites to the provision of interconnection. Should a specialized carrier fail or refuse to comply with such a reasonable condition, a denial of interconnection would be justified. When and if a claim or possible damage to the telephone system in a particular case is presented to the Commission by Bell, properly supported by engineering statements or other data, we shall of course determine the question on the basis of the pleadings and evidence submitted. However, Bell concedes that it has established a working arrangement with the independent telephone companies, as well as its own Long Lines Department for access to its switched network without serious damage to its telephone system, and we find no reason to believe that, if a good faith effort is made to do so, like arrangements cannot be agreed upon with the specialized carriers.

28. An evidentiary hearing is required also, Bell asserts, because interconnection to allow competitors access to the local distribution facilities of the telephone company is likely to prejudice seriously the overall management and planning which is essential to the efficient operation of the telephone system. It insists that the matter should be further explored to determine whether interconnection will result in an inadvisable or unacceptable division of responsibility and to determine what additional costs will be incurred by Bell as a result of the increased management and planning required and how it will be reimbursed for such costs.

29. We agree that management and planning are important, but we fail to find any sufficient factual allegations to indicate the existence of unresolved material issues which require a hearing for their resolution. MCI has expressed its willingness to cooperate fully with Bell in the matter of planning and, of course, it is to MCI's benefit to do so. The same is true as to the other specialized carriers which desire such service. We have considered the contentions advanced by Bell in its brief and in its oral argument but are not convinced that the necessity for obtaining sufficient information from a competitor in order to discharge its management and planning functions poses problems of such increased magnitude over obtaining like information from an independent telephone company as to warrant a difference of treatment. As for the costs which may be incurred in the discharge of any additional managerial or planning responsibilities, Bell and the other telephone common carriers may include such costs in their tariffs for the requested services.

30. Other arguments advanced by Bell in support of its request for an evidentiary hearing have been considered but we find them to be without substance. All of the salient facts necessary to a resolution of the issues in this proceeding have been developed fully in the prior adjudicatory and rule making proceedings discussed above and in the pleadings and oral arguments of the parties to this Docket No. 19896 proceeding, and a prompt decision is esssential in the public interest.

IV. THE APPLICATION FOR REVIEW

31. In a letter dated October 19, 1973, the Chief of our Common Carrier Bureau advised MCI that it was entitled to receive from telephone companies various types of interconnection, including connection into the local exchange facilities for furnishing FX and for insertion of its facilities into a telephone company's CCSA. Bell filed an application for review contending that the action was beyond the Bureau Chief's delegated authority and in violation of Bell's right to a hearing under Section 201(a). We deem it unnecessary to determine whether the Bureau Chief acted within the scope of his authority since we have disposed of Bell's other contentions on the merits in the discussion set forth above. We shall therefore dismiss the Application for Review as moot.

V. INTERCONNECTION FOR DOMESTIC SATELLITE CARRIERS

32. In the *Domestic Satellite* proceeding, 42 FCC 2d 654 at 660 (1973), the Commission required as a condition to the authorizations granted Bell for domestic satellite facilities, that the charges and practices with respect to interconnection facilities "shall be set forth in tariff schedules to be filed pursuant to Section 203 of the Act and Part 61 of our Rules . . ." in order to insure that domestic satellite carriers will be able to compete with existing carriers in providing end-to-end service. Bell filed tariffs with this Commission but under protest. It also filed tariffs with various state regulatory commissions, however, claiming that the local distribution facilities involved were intrastate and not subject to Commission jurisdiction. Except for Bell's argument, heretofore rejected, that all local distribution facilities, even if used for the transmission of interstate communications, are intrastate, Bell has not shown any special circumstances which would require state regulation. The domestic satellite carriers contend, and Bell does not deny, that all of their communications are interstate. Thus, all interconnections for domestic satellite carriers to be used for their interstate services must be provided pursuant to tariffs filed with this Commission, and all charges for the services and facilities provided must be made pursuant to such tariffs.

VI. THE WESTERN UNION CONTRACTS

33. Next we turn to Western Union's contracts with Bell for exchange of facilities. For a number of years, Western Union has leased a substantial portion of its local distribution facilities from Bell pursuant to privately negotiated contracts. The contracts currently in

force became effective on January 1, 1970, and were filed with the Commission pursuant to Section 211 of the Communications Act of 1934, as amended. The contracts have no fixed term but are terminable by either party upon the giving of five years written notice. Bell gave Western Union notice of termination of the contracts on September 28, 1973. Thus, by their terms, the contracts will remain in effect until September 28, 1978. Although the contracts are called "exchange of facilities" contracts, it is undisputed that at this time there are no consequential exchanges of facilities, but only the leasing of Bell facilities by Western Union.

34. Bell asserts that the exchange of facilities contracts are not common carrier offerings subject to Commission jurisdiction, that the contracts are superseded by the tariffs, and that in any event, the facilities in question are intrastate and subject to state regulation. It therefore filed tariffs with various state regulatory commissions covering access to its local distribution facilities. After the Commission's letter of October 4, 1973, Bell filed tariffs with the Commission, under protest, for the local distribution facilities used by Western Union.

35. In our view of Bell's dealings with the various specialized, satellite, and international record carriers, we found that access to the local distribution facilities of the telephone company is necessary for the completion of the carriers' interstate or foreign networks and that the requested facilities will be used for the transmission of interstate or foreign communications and are therefore subject to the jurisdiction of this Commission. To the extent that the services and facilities provided to Western Union by Bell are used for the transmission of such interstate communications they likewise are subject to this Commission's jurisdiction. Therefore, nothing more needs to be said with respect to Bell's argument that interconnection with the local distribution facilities is a matter solely for state regulatory action even though the services and facilities are used for the transmission of interstate communications.

36. The further contention advanced by Bell that this Commission has no jurisdiction over the contracts must be rejected. In our view Section 211(a) of the Act, which requires the filing "of all contracts, agreements, or arrangements with other carriers . . . in relation to any traffic affected by the provisions of the Act . . . .", contemplates regulatory supervision by the Commission. Since both Bell and Western Union are fully subject carriers engaging in interstate communications, Section 211(a) required the filing of their exchange of facilities contracts with the Commission, and this has been done. While Section 211(a) does not specifically invest regulatory authority over the contracts, it is reasonable to conclude that the provision which requires the contracts to be filed confers upon the Commission the authority to determine whether the terms and conditions thereof are consistent with the provisions of the Act. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). Other provisions of the Act also support the Commission's regulatory authority over such contracts.

37. Section 214(a) of the Act provides that no carrier can "discontinue, reduce or impair service to a community, or part of a com-

munity, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public interest, convenience or necessity will be adversely affected thereby." It appears from the pleadings before us that Bell proposes to take action which will result in the discontinuance or impairment of services which heretofore have been provided under the contract and there is no basis for distinguishing between services provided pursuant to a contract and services pursuant to a tariff insofar as the coverage of Section 214 is concerned. Manifestly, the regulatory scheme of the Act and the public interest requires that we review any actions taken in alleged violation of a contract or a tariff to insure compliance with Section 214. See also Section 4(i) of the Act.[18]

38. Particularly in the circumstances of this case, Section 202(a), which provides that "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination. . . . by any means or device . . .", requires that we assert jurisdiction. A contract is a "device" within the meaning of the Act (*Cf. Armour Packing Co.* v. *United States*, 209 U.S. 56 (1908)), and, as will be discussed below, the record in this proceeding raises serious questions concerning whether Bell-Western Union contracts involve "unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services."

39. Bell's reliance on the Commission's letter of December 20, 1945 is misplaced. The letter was not a disclaimer of jurisdiction as alleged by Bell. Although the Commission, at that time, did not require the inclusion of Bell's arrangements with Western Union in its tariffs, it did say "that such arrangements are a matter of concern to the Commission under the provisions of the Communications Act, and they will be given consideration by the Commission in appropriate instances." Thus the Commission recognized that circumstances might arise which would require Commission action and it was of the view that it had jurisdiction to take such action. Circumstances now exist which make such action both appropriate and necessary in the public interest. During the more than 25 years which have elapsed since the letter was released, there has been a proliferation of new types of common carrier services, and the decisions in the *Specialized Common Carrier Service*, *Domsat* and *MCI* cases have contributed to the establishment of new specialized carriers which compete not only with Bell's Long Lines Department but also with Western Union. These carriers rely on Bell for interconnection facilities, and the Commission has stated its concern that competition among competing carriers be fair. Accordingly, to the extent that the Bell-Western Union contracts affect competition it is now necessary that the Commission assert its jurisdiction.

40. We also hold that Bell cannot supersede, modify or terminate its contracts with Western Union merely by filing tariffs or taking other unilateral action. In the light of court decisions interpreting comparable legislation, it appears that, except as expressly modified by

[18] In pertinent part, Section 4(i) authorizes the Commission to "perform any and all acts, . . . and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."

statute, Bell's contractual obligations with Western Union are governed by common law and can be changed or modified only in accordance with the procedures set forth in the contracts or the Communications Act. In interpreting the Natural Gas Act, which is similar in several significant respects to the Communications Act,[19] the Supreme Court held that contracts for services could not be abrogated by the filing of new schedules of charges. *United Gas Pipe Line Co.* v. *Mobile Gas Corp.*, 350 U.S. 332 (1956). The Court held that "by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts." *Id* at 338. The Court went on to say that "absent the Act, a unilateral announcement of a change to a contract would of course be a nullity . . ." and there is no basis for finding that imposition of filing and notice requirements for tariffs was intended to make effective action which would otherwise be of no effect. *Id* at 339. In a companion case which interpreted virtually identical provisions of the Federal Power Act, the Court also concluded that contracts cannot be changed by unilateral filings authorized by the Act. *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956). Applying the holdings of the Court to the Communications Act, it is clear that neither common law nor the Act authorizes Bell unilaterally to alter its contracts with Western Union.

41. Bell argues that requiring it to adhere to its contractual obligations would constitute a prescription of rates without a hearing in violation of Section 205(a) of the Act.[20] At this time, however, the Commission is not determining rates but is only considering the effect

[19] The Natural Gas Act requires the filing of contracts with the Federal Power Commission (Section 4(c)); provides for the filing by every natural gas company of schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission. (Section 4(c)); prohibits any change in such rate, charge, classification, or service except after a specified notice to the Commission, unless the Commission otherwise orders (Section 4(d)); after a new schedule is filed, the Commission is authorized in accordance with certain specified procedures to hold a hearing concerning the lawfulness of any changes made by a new schedule, suspend the operation of such schedule and make such orders as are necessary and proper in connection with such suspension (Section 4(e)); and the Commission has authority after a hearing to determine the reasonableness of the rates, charges, or other provisions of the schedules, to make the necessary and appropriate orders with respect thereto, including a determination of just and reasonable rate (section 5(a)).

In comparable provisions, the Communications Act requires the filing of contracts with this Commission (Section 211(a)); requires every common carrier, except connecting carriers, to file with the Commission schedules showing all charges for itself and its connecting carriers for interstate and foreign communications (Section 203(a)); prohibits any change in the charges, classifications, or other matters specified in the schedules except after notice to the Commission and authorizes the Commission to modify the notice requirements (Section 203(b)); prohibits any carrier from engaging or participating in any such communications unless schedules have been filed (Section 203(c)), and authorizes the Commission with respect to any new charges, classification, or other change in a schedule to hold a hearing concerning the lawfulness thereof, suspend the operation of such charges or other matters for a specified period of time, and after hearing make such order with reference thereto as may be necessary and proper including the reasonable charges and practices thereafter to be observed (Sections 204 and 205).

[20] Section 205(a) provides as follows: "Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

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which a tariff filing would have on Bell's contractual obligations and the provision of facilities and services pursuant thereto. Bell's charges to Western Union for such services and facilities were prescribed in their contracts. This construction of the contracts and the Act is consistent with the holding in *United Gas Pipe Line Co.* v. *Mobile Gas Corp., supra*, and is not refuted by the cases relied on by Bell which hold that a Section 205 prescription requires a finding that the rates and terms prescribed are just and reasonable, *AT&T* v. *FCC*, 449 F2d 432 (2nd Cir. 1971), and that the Commission cannot impose a non-statutory prerequisite for the filing of otherwise lawful tariffs, *AT&T* v. *FCC*, 487 F2d 865, 28 RR 2d 1025 (2nd Cir. 1973). Here, Bell has obligated itself by contract to provide certain services and facilities to Western Union on the terms and conditions specified therein and its act of filing tariffs which seek to change and modify the terms of the contract is a nullity. See *Richmond Power and Light, Richmond, Indiana* v. *Federal Power Commission*, 481 F2d 490 (D.C. Cir. 1973). Thus, it is by reason of its contractual obligations that Bell is precluded from changing or modifying the services and facilities heretofore provided to Western Union and the charges therefor, not by reason of any action of the Commission in prescribing rates.

42. In our Memorandum Opinion and Order, *In the Matter of Bell System Tariffs re Entrance, Intercity and Local Distribution Facilities for Other Carriers*, FCC 74-36, released January 11, 1974, we deferred action on requests for rejection of the tariffs specified therein pending a resolution of the issues designated in this show cause proceeding, and certain action is called for at this time. To the extent that Bell's tariffs provide for services and facilities presently furnished to Western Union under the exchange of facilities contracts, controlling judicial precedent requires that the tariffs be rejected insofar as the said services and facilities furnished to Western Union are concerned. *United Pipe Line Co.* v. *Mobile Gas Corp., supra* at 347; *Richmond Power and Light, Richmond, Indiana* v. *Federal Power Commission, supra*. See also, *Municipal Light Boards of Reading and Wakefield, Massachusetts* v. *Federal Power Commission*, 146 U.S. App. D.C. 294, 450 F2d 1341 (1971), *cert. denied*, 405 U.S. 918. While the tariffs are not herein being rejected as to the other carriers, the record in this proceeding raises serious questions as to whether the rates in the contracts or in the tariffs are unreasonably high, unreasonably low, or otherwise discriminatory and therefore unlawful in violation of Sections 201(b) and 202 of the Act. The satellite carriers and others complain that Bell's tariffs are unduly restrictive, and they argue that Western Union is afforded access to facilities which they are denied under tariff, and that it is being afforded preferential rates. Western Union's complaint with respect to Bell's attempt to abrogate its contracts by filing tariffs points up discrepancies between the tariffs and the contracts, alleging that implementation of the tariffs will result not only in a reduction of services but an increase in rates, ranging from 55 percent to 222 percent depending on the state involved, with an average increase of 131 percent. If such a substantial increase in rates is justified, then the contractual rates are unreasonably low and confer an unlawful preference or advantage upon Western Union over its

competitors which likewise must obtain such services from Bell. If, on the other hand, the tariff rates are unreasonably high, all of the carriers which require such facilities from Bell are prejudiced thereby and the tariffs would be unlawful for that reason.

43. While *United Gas Pipe Line Co.* v. *Mobile Gas Corp.*, *supra*, and *Federal Power Commission* v. *Sierra Pacific Power Co.*, *supra*, held that contractual obligations could not be avoided by the unilateral act of filing a tariff, they expressly recognized the authority of the regulatory agency, either on its own motion or on the complaint of an affected party, to investigate the contractual rates and to modify or prohibit any rate which is found to be unreasonable, discriminatory or otherwise unlawful under the terms of the relevant statute. Thus, the Commission has the authority, and indeed an obligation, to determine the propriety of the terms and rates of the contracts as well as those of the tariffs.

44. This proceeding, however, is not the appropriate vehicle for determining the validity of Bell's rates for services to either Western Union or to the other carriers since such an investigation would necessarily involve a thorough exploration of matters and issues which are well beyond the scope of this proceeding. Thus, in order to determine whether the contract or tariff rates are unreasonably high, unreasonably low, or otherwise discriminatory, we must ascertain and compare the nature of the facilities and services provided to Western Union and the other carriers, whether circumstances exist which justify different charges to different carriers, and consider all other facts and circumstances submitted by the parties which are deemed relevant to the resolution of the questions presented. In our aforementioned Memorandum Opinion and Order, FCC 74–36, involving the validity of Bell System tariffs, we stated that further investigation into the lawfulness of the tariffs was warranted, but that we would defer such action pending the conclusion of this Docket No. 19896 proceeding since similar issues are involved. We further stated, however, that an investigation would be instituted with respect to any issues not resolved in this proceeding. Expeditious action by the Commission will therefore be taken to initiate a separate proceeding to determine the validity of Bell's tariffs and its charges to Western Union and the specialized carriers, and to explore all other issues which are deemed necessary to the resolution of any questions relevant to the determination of the lawfulness of Bell's actions and the further remedial action required in the light thereof.

VII. REMEDIAL ACTION

45. We find and conclude that Bell engaged in conduct which has resulted in the denial of, or unreasonable delay in establishing, physical connections with MCI and other specialized common carriers which are parties to this proceeding; that it pursued policies and practices which foreclosed the establishment of through routes, and the charges, facilities and regulations applicable thereto in connection with authorized interstate services of MCI and other specialized carriers; that Bell is unlawfully applying and proposes to continue to apply the tariff schedules of charges and regulations filed with state

regulatory commissions for services and facilities provided to MCI and other specialized common carriers and used by the specialized carriers in the transmission of interstate and foreign communications; and that Bell has discriminated against MCI and other specialized carriers in favor of its own Long Lines Department by denying to MCI and other specialized carriers the interconnection privileges presently provided to the said Long Lines Department in connection with authorized interstate services. We further conclude that the aforementioned conduct and practices are in violation of the Act, and the declared policy of the Commission; and that the public interest requires the issuance of orders requiring Bell to cease and desist from further violations.

46. Bell asserts that the statutory prerequisites to the issuance of cease and desist orders pursuant to Section 312(b) of the Act [21] have not been met and that the issuance of such orders is not permissible in this proceeding under that provision of the Act. However, in view of the possible uncertainity as to the scope of our prior orders, we are not invoking Section 312(b) and we need not decide the applicability thereof. We are proceeding instead under Section 205(a) of the Act [22] which was also cited as a basis for this proceeding and under that Section broad authority to issue cease and desist orders is conferred upon the Commission. In pertinent part Section 205(a) provides that if the Commission determines "after a full opportunity for hearing" that a "charge, classification, regulation, or practice" of a carrier "is or will be in violation" of the Act, the Commission is authorized "to determine and prescribe what will be" an appropriate charge and "what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, . . .". Under these provisions, the Commission is authorized to issue orders not only with respect to past violations but for practices thereafter to be followed, and to issue cease and desist orders for violations which the Commission finds "will exist." We believe that these provisions are applicable here.

47. Bell has been accorded full opportunity for hearing in the several proceedings heretofore held on the subject of interconnection. In addition it was accorded an opportunity for further hearing in this Docket No. 19896 proceeding, and it took advantage of that opportunity by filing extensive pleadings and presenting oral argument before the Commission *en banc*. We have considered its contentions but are persuaded by the representations of Western Union and the specialized carriers in their briefs and at oral argument that affirmative orders must be issued to require Bell to provide interconnection facilities for the authorized interstate and foreign communications services

[21] Section 312(b) of the Act provides as follows: "(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action."

[22] For the full text of Section 205(a), see footnote 20, *supra*.

of the aforementioned carriers and to provide such facilities pursuant to charges, conditions, and terms specified in tariffs filed with this Commission. We further conclude that cease and desist orders pursuant to Section 205 are required in the public interest to insure compliance by Bell with the affirmative interconnection orders issued herein.

48. The show cause order in this proceeding was directed only to American Telephone and Telegraph Company and to the Bell System operating companies. Consequently, cease and desist orders are appropriate only against such companies and will not be issued against any non-Bell companies. However, we wish to place all telephone companies on notice that our policy declarations with respect to interconnection apply to them as well as to the Bell companies. We also emphasize that we expect compliance by all telephone companies with such policy declarations and the orders issued pursuant thereto in the absence of a substantial showing that a particular request for interconnection would result in damage to the telephone system or is otherwise inconsistent with the public interest. Should such compliance not be forthcoming, the offending company will be made the subject of a show cause proceeding or other appropriate remedial action will be taken expeditiously.

49. Bell has filed tariffs with the Commission for interconnection facilities furnished to domestic satellite carriers, and we believe that such filing complies with the condition imposed on its domestic satellite authorizations in 42 FCC 2d at 660. Therefore we do not deem it necessary or appropriate to revoke or modify Bell's authorizations even though the carrier also filed tariffs with state commissions for such interconnection facilities. Neither do we consider it necessary to require the withdrawal of the state tariff filings. Our Decision here and the orders issued pursuant thereto directs Bell to provide interconnection facilities to other carriers for their authorized interstate and foreign communications services and to do so only pursuant to charges, terms and conditions contained in tariffs filed with the Commission. The relief thus provided will afford adequate protection to all of the complaining carriers in this proceeding since the state tariffs cannot be applied to any interconnection facilities furnished for use in the transmission of interstate or foreign communications or the charges therefor.

50. As indicated above, we have rejected the tariffs filed by Bell insofar as they relate to the services and facilities heretofore furnished to Western Union pursuant to the exchange of facilities contracts and we propose to determine in a separate proceeding whether the contract charges and conditions are unreasonable or otherwise unlawful. However, we note that some facilities for which provision is made in the tariffs are not covered by the contracts. To the extent that Western Union utilizes facilities not covered by contract, the tariffs filed with this Commission will apply.

51. Other carriers have alleged that they also have contractual arrangements with Bell which are jeopardized by the filing of tariffs with state commissions and that they are entitled to orders requiring Bell to maintain the status quo. It may be that there is merit to this

contention but we do not believe that this is the proper proceeding in which to make that determination. In the first place, we note that some of the arrangements for the provision of facilities are alleged to be pursuant to unwritten agreements and we would need additional information as to these arrangements before undertaking to take remedial action. Furthermore, our orders herein with respect to the applicability of Federal tariffs to the provision of these interconnection facilities and our determinations as to the force and effect of the Western Union contracts may resolve the controversy between Bell and the other carriers with which it has contractual arrangements so that an amicable solution may be reached. If, however, a solution is not reached, the matter may be submitted for further consideration in a separate proceeding where a determination may be made on the basis of the pleadings of all parties concerned and such hearing as may be necessary to develop fully all the pertinent facts and circumstances.

52. The suggestion has been made that the provision of facilities for the transmission of interstate and foreign communications by one common carrier to another carrier be made pursuant to tariffs filed with this Commission rather than pursuant to contracts between the carriers. While we believe that there is merit to this suggestion we shall not undertake to resolve that matter in this proceeding. Rather, we believe that this question should be deferred for consideration in the proceeding we propose to institute for investigation into the reasonableness of the rates and terms of the Western Union contracts.

53. Accordingly, IT IS ORDERED, that American Telephone and Telegraph Company and the Bell System companies enumerated in paragraph 18 of our Memorandum Opinion and Order to Show Cause, 44 FCC 2d 245 at 251, comply with the following not later than ten days after the release of this Decision:

(a) Furnish to MCI Telecommunications Corporation, MCI New York West, Inc. and other specialized common carriers the interconnection facilities essential to the rendition of all of their presently or hereafter authorized interstate and foreign communications services and to enable the said specialized common carriers to terminate their authorized interstate and foreign communications services, including interconnection by the the specialized carriers into a telephone company's local exchange facilities for the purpose of furnishing Foreign Exchange (FX) service or for insertion into telephone company Common Control Switching Arrangements (CCSA);

(b) Furnish the interconnection facilities specified in subparagraph (a) above on reasonable terms and conditions; and file with the Commission pursuant to Section 203 of the Act and Part 61 of the Commission's Rules, tariff schedules to cover interconnection facilities for all of the authorized interstate and foreign communications services of the specialized common carriers;

(c) The specialized common carriers shall be charged for the interconnection facilities and services furnished by American Telephone and Telegraph Company and the Bell System companies, in connection with the transmission by the specialized car-

riers of authorized interstate and foreign communications and the provision of authorized interstate and foreign communications services, solely and exclusively pursuant to the charges, terms, and conditions specified in tariffs filed with the Commission; and

(d) Furnish to the specialized carriers for their authorized interstate and foreign communications services, interconnection facilities similar to those presently provided to Bell's Long Lines Department on a non-discriminatory basis.

54. IT IS FURTHER ORDERED, pursuant to the authority contained in the provisions of Sections 4(i) and 205(a) of the Communications Act, that American Telephone and Telegraph Company and the Bell System companies shall not later than ten days after the release of this Decision CEASE AND DESIST from:

(a) Engaging in any conduct which results in a denial of, or unreasonable delay in establishing, physical connections with MCI and other specialized common carriers for their presently or hereafter authorized interstate and foreign communications services;

(b) Implementing any policy or practice which forecloses the establishment of through routes, and charges, facilities and regulations applicable thereto, in connection with MCI's and other specialized common carrier parties' presently or hereafter authorized interstate and foreign communications services;

(c) Implementing any policy or practice which results in denying to MCI or any other carrier party reasonable interconnection services similar to those provided to the Long Lines Department of the American Telephone and Telegraph Company in connection with the authorized interstate and foreign communications services of such other carriers; and

(d) Charging MCI or the other specialized common carrier parties for interconnection facilities furnished in connection with the authorized interstate and foreign communications services of the said specialized carriers pursuant to tariffs filed with state regulatory commissions or delaying or refusing to furnish requested interconnection facilities for such purposes pending approval by state regulatory commissions of the furnishing of the aforementioned facilities.

55. IT IS FURTHER ORDERED that:

(a) Insofar as the tariffs filed by Bell include interconnection facilities and services covered by the Bell-Western Union exchange of facilities contracts and used by Western Union in connection with the provisions of its authorized interstate services, they ARE REJECTED; and

(b) With respect to any services and facilities not covered by the abovementioned contracts but which are furnished by the Bell System companies for the use of Western Union in connection with the provision of its authorized interstate communications services, the telephone companies shall furnish the said interconnection facilities on reasonable terms and conditions;

and charge Western Union for the provision of such interconnection facilities solely and exclusively pursuant to tariffs filed with this Commission pursuant to Section 203 of the Communications Act and Part 61 of the Rules.

56. IT IS FURTHER ORDERED, that the Application for Review filed by the American Telephone and Telegraph Company on November 19, 1973, IS DISMISSED as moot.

57. IT IS FURTHER ORDERED, that the unopposed motions to correct the transcript of oral argument in this case filed on March 12, 1974, by Southern Pacific Communications Company; on March 15, 1974, by American Telephone and Telegraph Company; on March 18, 1974, by CML Satellite Corporation and American Satellite Corporation; on March 19, 1974, by Western Union Telegraph Company; on March 20, 1974, by ITT World Communications, Inc., and Western Union International, Inc.; on March 21, 1974, by the Commission's Common Carrier Bureau and jointly by MCI Telecommunications Corporation and MCI New York West, Inc.; and on March 22, 1974, by Western Tele-Communications, Inc. ARE GRANTED.

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

APPENDIX

The pleadings considered by the Commission in this docket are: (1) Briefs filed on January 21, 1974 by:

a. The Bell System Companies
b. United Telephone System
c. GTE Service Corporation
d. United States Independent Telephone Association
e. Western Union Telegraph Company
f. Midwestern Relay Co. and CPI Microwave, Inc.
g. MCI Telecommunications Corporation and MCI New York West, Inc.
h. CML Satellite Corporation
i. RCA Global Communications, Inc.
j. Data Transmission Company
k. N-Triple-C Inc.
l. Southern Pacific Communications Company
m. Western Tele-Communications, Inc.
n. American Satellite Corporation
o. Common Carrier Bureau

(2) Brief, filed January 22, 1974, by Western Union International, Inc.
(3) Reply Comments filed February 1, 1974, by ITT World Communications, Inc.
(4) Reply Briefs, filed February 4, 1974, by:

(a) Bell System Companies
(b) The United Telephone System
(c) United States Independent Telephone Association
(d) Western Union Telegraph Company
(e) Data Transmission Company
(f) N-Triple-C Inc.
(g) American Satellite Corporation
(h) Western Tele-Communications, Inc.
(i) Southern Pacific Communications Company
(j) Common Carrier Bureau

(5) Reply brief, filed February 5, 1974, by MCI Telecommunications Corp. and MCI New York West, Inc.
(6) Further Reply Briefs filed February 11, 1974 by:
(a) MCI Telecommunications Corporation and MCI-New York West, Inc.
(b) ITT World Communications, Inc.
(c) Data Transmission Company
(7) Reply Brief of CML Satellite Corporation, filed February 11, 1974.
(8) Reply Comments of Western Union International, Inc., filed February 12, 1974.

SEPARATE DISSENTING STATEMENT OF COMMISSIONER CHARLOTTE T. REID (DOCKET 19896)

I dissent from the majority's decision as it relates to paragraph 31, Application for Review, filed by AT&T (letter from Chief, Common Carrier Bureau, dated October 19, 1973, to MCI).

I dissent because I do not agree that it is a moot issue, even though we may have decided the matter on the merits.

I have expressed my concern many times that I felt there was a problem with the so-called "delegated authorities" to many of our Bureaus, not just the Common Carrier Bureau, and in this instance I believe that the Bureau Chief went beyond his delegated authority. I believe this to be even more apparent when one considers the fact that there was a reasonable basis for confusion as to what interconnection had been ordered. Therefore, the Bureau Chief to conclude that such was not the case, without inquiry to the Commission, is simply more than I can accept.

Let me hasten to add that our present review of *all* delegations of authority should, I trust, prevent any further such instances from occurring in the future, but I must dissent from the majority's disposition of AT&T's Application for Review.

FCC 74-338

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of BISHOP CABLEVISION CO. OF ASHLAND, LIMITED, PARTNERS, ASHLAND, KY. For Certificate of Compliance and Petition for Special Relief by BISHOP CABLEVISION CO. OF ASHLAND, LIMITED, PARTNERS, ASHLAND, KY. Pursuant to Section 76.7 of the Commission's Rules	CAC-870 KY106 CSR-180 KY106

MEMORANDUM OPINION AND ORDER

(Adopted April 3, 1974; Released April 23, 1974)

BY THE COMMISSION:

1. On July 18, 1972, Bishop Cablevision Company of Ashland, Limited Partners, filed the above-captioned application for certificate of compliance and petition for special relief. Bishop operates a cable television system at Ashland, Kentucky, a community located within the Charleston-Huntington, West Virginia major television market (#36).[1] The system currently provides its 1,851 subscribers with the following signals:

WKAS (Educ., Channel 25) Ashland, Kentucky.
WMUL-TV (Educ., Channel 33) Huntington, West Virginia.
WSAZ-TV (NBC, Channel 3) Huntington, West Virginia.
WHTN-TV (ABC, Channel 13) Huntington, West Virginia.
WCHS-TV (CBS, Channel 8) Charleston, West Virginia.

Bishop has requested authorization to carry the following distant signals:

WLEX-TV (NBC, Channel 18) Lexington, Kentucky.
WKYT-TV (CBS, Channel 27) Lexington, Kentucky.
WBLG-TV (ABC, Channel 62) Lexington, Kentucky.

The latter signals are distant network affiliates for whose carriage Bishop seeks a waiver of the major market carriage rules pursuant to Section 76.7. An opposition to this proposal has been filed by Reeves Telecom Corporation, licensee of Station WHTN-TV, Huntington, West Virginia, and Bishop has replied.

2. Pursuant to the Commission's signal carriage rules a system located in a top-fifty major television market, having filled its minimum

[1] The population of Ashland is 29,393; Bishop's system currently has twelve-channel capacity. Subsequent to the filing of the subject application Bishop was purchased by Tower Cablevision, Inc. Since its application has not been amended to reflect the change in ownership, "Bishop" will denominate the applicant in this opinion although certification will be granted to Tower.

signal complement by carriage of signals as prescribed in Section 76.61 (a) and (b), cannot import distant network stations. Thus, because the Ashland system already carries, pursuant to Section 76.61(a), a primary affiliate of each network, its request for carriage of the Lexington network affiliates is inconsistent with our rules. Bishop states, however, that no commercial in-state Kentucky television stations are available to the citizens of Ashland either off-the-air or by cable, and for this reason requests authorization to carry only the non-network programming of the Lexington network stations. Bishop does not propose carriage of the three in-state independent stations. The nearest such station, WXIX–TV (Channel 19, Newport, Kentucky), is 110 miles from Ashland, and the two other Kentucky independents, WDRB–TV (Channel 41, Louisville) and WDXR–TV (Channel 29, Paducah) are 165 miles and 330 miles away, respectively. Because of the distances involved, the cost of providing microwave facilities to bring in even the closest of these independent stations will of course be high, as would monthly charges for microwave service. Bishop also notes that the Commission has granted waivers to six nearby cable systems permitting carriage of the Lexington station (*C & S TV, Inc.*, et al., 14 FCC 2d 674; *Bishop Cablevision Co., Limited Partners*, 32 FCC 2d 173); these six systems share a common headend with the Ashland system, and receive the Lexington stations off the air. Bishop argues that the seven towns are so economically and socially intertwined as to form one large community.[2] Therefore, Bishop maintains, pursuant to section 76.65 of the Rules, its Ashland system should also be entitled to carry these signals.[3] Bishop notes that since Lexington is located only 25 miles from the state capital, the non-network programming sought would provide a variety of news, public affairs, and sports programs of interest to Kentuckians. In support of its request Bishop has submitted a resolution of the City's Board of Commissioners which avers that the residents of Ashland desire programming "which will advise and inform them of news, sports, weather, and entertainment relating to Kentucky, its government and affairs."

3. In its opposition, Reeves argues that because the six communities in which the Lexington signals are grandfathered are not contiguous to or part of Ashland, Bishop's reliance upon Section 76.65 is misplaced. Moreover, Reeves contends that prior decisions granting waivers to the six nearby communities are not pertinent because the Commission's present rules were not then in effect. Reeves argues that Bishop has not indicated the "essential quality or measured quantity" of the in-state programming sought and suggests that an equally great community of interest exists between Ashland and Huntington, West Virginia. Reeves also submits that Bishop's petition should be

[2] The six communities are Russell, Bellefonte, Flatwoods, Raceland, Worthington, and Kenwood, Kentucky. Each is a separate municipality and they are not contiguous to Ashland. Bellefonte, the community closest to Ashland, is over a mile away; Raceland, the farthest, is over five miles away.

[3] Section 76.65 reads in pertinent part: "If a cable television system in a community is authorized to carry signals, either by virtue of specific Commission authorization or otherwise, any other cable television system already operating or subsequently commencing operations in the same community may carry the same signals."

dismissed for improper service since Bishop failed to serve copies of its petition on the Lexington stations whose carriage is requested.[4]

4. We need not reach the question of whether Ashland and the six neighboring towns form one community within the meaning of our rules. The most important factor to be considered here is that Ashland, the seventh largest city and fourth largest metropolitan area in Kentucky, at present receives only a limited amount of Kentucky news, sports, or public affairs programming. Clearly, resolving such an anomaly is in the public interest. Further, we are persuaded that Bishop has amply justified carriage of the specific signals requested.[5] In its reply to Reeves' opposition Bishop has submitted a listing of programs broadcast by the Lexington stations, which demonstrates that a substantial portion of broadcast time is allotted to non-network programs of special interest to Kentucky residents.[6] Even assuming *arguendo* Reeves' contention that the "essential quality or measured quantity" of such programming should be delineated, we believe Bishop has made a substantial showing.[7] Finally, we note Reeves' argument that Ashland also shares a community of interest with Huntington, West Virginia. We agree, of course, and we note that the Ashland system is properly carrying signals from that market. By granting Bishop the relief requested, we merely recognize the equally important interest of having at least some in-state programming.

5. Bishop indicates that should it receive certification for the limited carriage of the three signals in question, it would provide three access channels pursuant to the provisions of Section 76.251(c). Although three channels are available for access services, one of these is currently being utilized for local origination programming. Bishop therefore requests a waiver of our rules so as to permit the utilization of one channel for both local origination and educational access purposes. We do not believe that a waiver is necessary in this case. We note that, although three signals are nominally certified for carriage, the non-network programming that will actually be carried will only approximate the amount that would otherwise be supplied by the full-time carriage of two independent stations. Therefore, Bishop need provide only one public access and one educational access channel to

[4] With regard to this latter contention, the service requirements of Section 76.7(b), like its predecessor Section 74.1109(b), do not require service on the distant stations whose carriage is sought.

[5] In Paragraph 18, *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, 333 (1972), we envisioned circumstances in which "carriage of syndicated programming from full or partial network stations instead of from independents might be indicated because of inordinate costs involved in obtaining independent signals." We believe that such a situation exists here. We further specified that, "[i]n the event such a system later obtains independent distant signals, it [may] only do so in accordance with the rules and may have to delete carriage of syndicated programs from network stations." *Id.* Thus, if carriage of independent stations consistent with our rules should subsequently become feasible, we shall re-examine the need for the special relief granted today.

[6] Specifically, nearly twelve hours of programming on the three stations during the sample week of August 12–19, 1972, was allotted to programs of particular interest to Kentucky residents; an additional twenty-eight hours of programming was devoted to news, weather, and sports programs, a substantial portion of which is of state-wide importance. Bishop also calls to our attention the fact that this summer sampling does not include locally-produced programs and various local sporting events which are a part of the regular fall-winter television season.

[7] It should be noted that the Commission is making no judgment as to the quality of any programming in this case, nor would it be appropriate to do so. See *In re Faculty Senate of the College of Arts and Sciences of the University of Alabama*, FCC 70–671, 25 FCC 2d 343.

comply with the intent of Section 76.251(c).[8] Bishop's present channel capacity is sufficient to accommodate two access channels; thus, its waiver request is moot.

In view of the foregoing, the Commission finds that the requested waiver of Section 76.61 of the Rules and grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Special Relief" (CSR–180) filed by Bishop Cablevision Company of Ashland, Limited Partners, IS GRANTED to the extent indicated above, and is otherwise DISMISSED as moot.

IT IS FURTHER ORDERED, That the application for certificate of compliance (CAC–870) filed by Bishop Cablevision of Ashland, Limited Partners, IS GRANTED, and an appropriate certificate of compliance will be issued.

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

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[8] We note parenthetically that a literal reading of Section 76.251(c) would seem not to require the provision of any access channels at all, because the signals whose carriage we certify are technically not added pursuant to either Section 76.61(b) or (c). We feel, however, that the nature of the relief granted to Bishop warrants the provision of the access channels described.

FCC 74-433

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 CARRIAGE OF LATE-NIGHT TELEVISION PROGRAMMING BY CABLE TELEVISION SYSTEMS	Docket No. 20028

NOTICE OF PROPOSED RULEMAKING

(Adopted April 17, 1974; Released April 25, 1974)

BY THE COMMISSION:

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

2. We recently have had cause to consider the extent to which cable television systems may carry late-night programming or otherwise unauthorized signals when some or all of the stations which they normally must carry have signed off. Our concern with this problem largely results from the recent increase in television stations broadcasting late at night. While in the past practically all stations signed off by 1:00 or 2:00 a.m., a substantial number now broadcast—and thus make their signals potentially available to cable systems—after 3:00 a.m. Late night broadcasting therefore offers cable systems a new source of programming, when the stations which they must carry are off the air.

3. We currently face the issue of cable carriage of late-night broadcasting in a number of contexts. On November 21, 1973, Davis Communications, Inc., filed a "Request for Rulemaking," which asked that the Commission adopt a rule allowing carriage of "any television stations not otherwise authorized for carriage during the period commencing at sign-off of the last station to do so in the market and terminating at sign-on of the first station to do so in the market." Davis argued that the rule would have no adverse economic impact on local stations which were not on the air, and that the rule would fulfill the public interest in diversity of television programming. Both the National Cable Television Association and a group of cable television systems filed comments in support of Davis's request, making similar arguments but requesting the Commission to broaden the times during which cable systems could carry additional signals.

4. We also have pending before us several requests for special relief to allow carriage of late-night programming. On October 29, 1973, Spectrum Cable Systems, Inc., filed a "Petition for Special Relief—Request to Carry Additional Station on Part-Time Basis" (CSR-486), which asked permission to carry the late-night programming of Tele-

vision Station WCVB, Boston, Massachusetts. Spectrum argued that many local employees worked during the evening and that there was no significant local television broadcasting between 1:00 and 6:00 a.m. And on February 1, 1974, Cable TV Company of York filed a "Petition for Waiver to Authorize Carriage of Distant Signal during Late Evening/Early Morning Hours" (CSR–504), which requested permission to carry WCAU–TV, Philadelphia, Pennsylvania, on similar grounds.

5. Finally, there currently are on file several applications for certificates of compliance which raise similar issues. A number of applicants have requested permission to carry late-night programming in addition to other signals which are consistent with the rules. Accordingly, we must make at least a preliminary resolution of the issue, in order to treat the proceedings which already are before us.

6. In regulating cable television we always have attempted to insure that cable systems can offer the greatest diversity of programming without injuring broadcast television stations. Par. 88 of our *Cable Television Report and Order*, 36 FCC 2d 143, thus noted that "those who are not accommodated as are New York or Los Angeles viewers should be entitled to the degree of choice that will afford them a substantial amount of diversity and the public services rendered by local stations." And more recently, we proposed allowing cable television to import network news programs at times when the programs were not broadcast by local broadcast stations, in order to encourage diversity of news programming and opinion. *Notice of Proposed Rule Making in Docket No. 19859*, FCC 73–1139, 43 FCC 2d 913. We encourage any cable carriage of programming which will not hurt the financial viability of local broadcast stations. Though most television viewers are content with conventional late evening and early night program schedules, a small but significant number have work schedules or personal habits which allow them to watch television only late at night. Accordingly, we believe that limited cable carriage of late-night broadcasting would further the public interest in program diversity.

7. At the same time, we have a continued commitment to preventing cable from becoming a "threat to broadcast television's ability to perform the obligations required in our system of television service." Par. 88, *Cable Television Report and Order*, *supra*. We thus are concerned that unrestricted importation of late-night broadcasting might harm local stations in two ways. First, head-on competition with distant signals might encourage local stations to drop their existing late-night operations, particularly if they operated in an area with high cable penetration. Second, and potentially more important, importation of late-night programming might deter local stations from entering the market for late-night broadcasting.[1] We therefore will proceed in an essentially conservative matter at this point, with an eye to liberalizing our approach in the future if cable carriage of late-night broad-

[1] Indeed, we note that competition from imported late-night stations would be particularly dangerous where only one or two local stations remained on the air, since the potential audience would be more concentrated and thus more likely to fragment. Similar reasons impelled us to limit the number of additional signals in smaller television markets. Par. 90, *Cable Television Report and Order, supra.*

casting proves to have no detrimental effect on present or potential local television operations.

8. The proposed rule thus allows a cable television system to import late-night programming only from the sign-off of the last station which the cable system must carry to the sign-on of the first station which the system must carry. This formulation prevents any harmful impact on existing late-night local broadcasters, since it precludes any head-on competition between them and imported signals. It also removes any potential inhibition on local entry into the late-night broadcasting market, since a local station can terminate importation of competing signals simply by expanding its own broadcast day; indeed, to this extent the rule may even encourage local late-night broadcasting—a result which is not inimical to the interests of cable subscribers.[2] The proposed rule does not, however, extend similar protection to additional signals which a system may carry. These stations need no protection outside of their usual markets, since they are not licensed to serve the cable communities into which they may be imported.[3]

9. A pure sign-on to sign-off rule would create hardship for cable subscribers, however, in terms of overlapping programs. Television station schedules are not mechanistic enough to begin and end precisely on the hour. Allowing a cable system to commence importation of a late-night broadcast only after the last local station had completed its sign-off thus might force cable subscribers to miss the first ten or fifteen minutes of an imported program. And at the other extreme, an imported program often will run past the sign-on of the first local station, particularly if the program is a motion picture. Requiring a cable system to terminate importation precisely when the first local station completed its sign-on thus often would force cable subscribers to miss the last part of a program. Accordingly, we feel that some adjustment of the strict sign-off to sign-on approach is appropriate.

10. The proposed rule thus creates a presumption that a station signs off on the hour if it "terminates operations less than thirty minutes after the hour . . ." This provision will cover situations in which a local station broadcasts public service announcements, devotionals, a formal sign-off and the like after it has presented the last major program of the day. A cable system thus could commence its importation of a late-night program on the hour, without waiting for the anal and often formalistic termination of a local station's broadcast day.[4]

11. Similarly, the rule would allow a cable system to carry a program until completion, even though a local station signed on. As noted before,

[2] To be sure, a local station theoretically could harass a cable system by increasing its broadcast day deliberately in order to prevent importation of late-night stations. Given the cost of operating a television station for additional hours, however, we consider this possibility to be extremely remote. And if a cable system could document such overt harrassment, we would take necessary remedial action.

[3] We never have accorded the same protection to stations which a system may carry as for stations which a system must carry. For example, our rule concerning manner of carriage, Section 76.55, explicitly applies only "where a television broadcast signal is required to be carried by a cable television system, pursuant to the rules in this subpart . . ."

[4] To be sure, we recognize that this might lead part of the viewing public to tune from the local station to the imported station, thus missing a small amount of the public service programming which a station is required to carry. We believe this loss to be so incremental, however, as to be *de minimis*.

requiring a system to cease carriage immediately after the first local station signed on would deprive cable subscribers of programs which already were in progress—an obviously disruptive and undesirable result. We have taken a similar approach in other contexts, where we have deemed the abrupt termination of a program to be inappropriate. Our rules thus provide that "a program substituted may be carried to its completion," where a cable system must delete a program pursuant to our exclusivity rules. Section 76.61(b)(2)(ii). And our rules relating to manner of carriage establish a general policy in favor of carrying a program to completion.[5] The rule would not relieve a cable system of its obligation to carry all the programs of a station which it must carry, however, if the system lacked sufficient channel capacity to carry both the imported and the local signal.

12. The rule would not require cable systems to secure certificates of compliance in order to commence carriage of late-night stations. Since both local and distant stations continually change their program schedules, the certification process would impose an unnecessary burden on cable systems and television stations alike. Moreover, we have dispensed with the certification requirement in similar situations, such as carriage of otherwise unavailable network programs and carriage of stations which a system must carry. Sections 76.61(e)(2), 76.11(a). Accordingly, the rule would require a cable system only to notify the Commission and other interested parties thirty days before it commenced carriage of a late-night broadcast station.[6]

13. As noted before, we have not considered whether the rule should be broader or narrower in scope. Though we favor cable carriage of light-night programming, we are well aware that there are several alternative approaches to the problem. Thus a strict sign-off to sign-on carriage rule might be appropriate, despite its disruptive effects on cable subscribers, in order to give local stations more complete protection. Conversely, it might be appropriate to allow a cable system to commence importation when the program begins, or when one or two local stations still are on the air. These and other questions are appropriate for comments from interested parties.

14. 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.

15. All interested persons are invited to file written comments on the rule making proposals on or before May 31, 1974 and reply comments on or before June 11, 1974. In reaching a decision on this matter, the Commission may take into account any other relevant information before it, in addition to the comments invited by this Notice.

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[5] Section 76.55(b) provides that: "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."

[6] The proposed rule does not provide for the filing of oppositions to notifications, and we do not contemplate considering such. Where a television station can make a compelling showing of economic injury resulting to it from importation of late-night programming, however, we will consider granting special relief. In such a proceeding, however, a station carries a heavy burden of proof. See, e.g., *Mickelson Media, Inc.*, FCC 73–119, 39 FCC 2d 602.

104-036—74——4

16. 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

Part 76 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

"1. In § 76.59 a new subparagraph (d)(4) is added to read as follows:

"§ 76.59 Provisions for smaller television market.

* * * * * * *

"(d) * * *

"(4) Any television station, during the period from sign-off of the last station which the cable television system must carry pursuant to Section 76.59(a) to the sign-on of the first station which the cable television system must carry pursuant to Section 76.59(a); *Provided, however,* That if a station terminates operations less than thirty minutes after the hour, it shall be deemed to have signed off on the prior hour. A cable system may carry a program to its completion. Carriage of such additional stations shall not require prior approval in the certificating process, but shall require service of the information required in Section 76.13(b)(1) on the Commission and the parties named in Section 76.13(a)(6).

"2. In § 76.61 a new subparagraph (e)(4) is added to read as follows:

§ 76.61 Provisions for first 50 major television markets.

* * * * * * *

(d) * * *

(4) Any television station, during the period from sign-off of the last station which the cable television system must carry pursuant to Section 76.61(a) to the sign-on of the first station which the cable television system must carry pursuant to Section 76.61(a); *Provided, however,* That if a station terminates operations less than thirty minutes after the hour, it shall be deemed to have signed off on the prior hour. A cable system may carry a program to its completion. Carriage of such additional stations shall not require prior approval in the certificating process, but shall require service of the information required in Section 76.13(b)(1) on the Commission and the parties named in Section 76.13(a)(6).

* * * * * * *

FCC 74-425

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
C. K. VIDEO, INC., KENOVA, W. VA.	CAC-2683 WV379
C. K. VIDEO, INC., CEREDO, W. VA.	CAC-2684 WV380
C. K. VIDEO, INC., UNINCORPORATED AREAS OF WAYNE COUNTY, W. VA.	CAC-2685 WV381
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted April 17, 1974; Released April 30, 1974)

BY THE COMMISSION:

1. C. K. Video, Inc., has filed the above-captioned applications for certificates of compliance to commence cable television service at Kenova, Ceredo, and the unincorporated areas of Wayne County, West Virginia, communities located in the Charleston-Huntington, West Virginia major television market (#36)[1] C. K. Video proposes to carry the following television broadcast signals:

WSAZ-TV (NBC, Channel 3) Huntington, West Virginia.
WHTN-TV (ABC, Channel 13) Huntington, West Virginia.
WMUL-TV (Educ., Channel 33) Huntington, West Virginia
WKAS (Educ., Channel 25) Ashland, Kentucky.
WKMR (Educ., Channel 38) Morehead, Kentucky.
WCHS-TV (CBS, Channel 8) Charleston, West Virginia.
WXIX-TV (Ind., Channel 19) Cincinnati, Ohio.
WSWP-TV (Educ., Channel 9) Grandview, West Virginia.
WOUB-TV (Educ., Channel 20) Athens, Ohio.

Carriage of these signals is consistent with the provisions of Section 76.61 of the Commission's Rules and the applications are unopposed.

2. Section 76.251 of the Commission's Rules requires that new cable television systems in major television markets provide separate channels for public, educational, local government, and leased access, as well as the facilities necessary for the production of public access programming. C. K. Video requests a partial waiver of Section 76.251 of the Rules to allow sharing of its access channels and production facilities among the three communities in which it intends to operate. In support of its request, C. K. Video asserts the following: (a) its

[1] The population of these communities is as follows: Kenova, 4,860; Ceredo, 1,583; and Wayne County (excluding Kenova and Ceredo), 31,408.

proposed cable systems in Kenova, Ceredo, and the unincorporated areas of Wayne County will be operated from a single headend located at Kenova; (b) Kenova is located less than 5 miles from Ceredo and both communities lie within Wayne County; (c) the population of Wayne County, including Kenova and Ceredo, is approximately 37,851; (d) the schools of Kenova and Ceredo are part of the consolidated school system of Wayne County; (e) a single set of access channels will more than meet the demand for such services in the three communities to be served; and (f) C. K. Video's conglomerate system will have at least 10 channels available to provide access services should sufficient demand develop to warrant their use.

3. We have, upon proper showings, permitted cable systems to construct access studio and production facilities to be shared by more than one community. *Community Television, Inc.*, FCC 73–1208, 43 FCC 2d 1090 (1973). In this case, C. K. Video has adequately demonstrated the need for a partial waiver of Section 76.251 of the Rules. However, should sufficient demand develop, we expect C. K. Video to make additional production facilities and access channels available.

4. C. K. Video's franchise to operate a cable television system in Wayne County was granted on February 28, 1974, and strictly complies with the Commission's Rules. Our certification of C. K. Video's system serving the unincorporated areas of Wayne County will therefore extend to February 28, 1989, the expiration date of its franchise. C. K. Video's franchises for Kenova and Ceredo were granted June 4, 1970, and May 9, 1970, respectively. These franchises need demonstrate only substantial consistency with the provisions of Section 76.31 of the Rules. C. K. Video asserts that its franchises for Kenova and Ceredo are substantially consistent with the Rules, and makes the following assurances: (a) C. K. Video's franchises were approved by the appropriate franchising authorities after full public hearings affording due process at which time its legal, character, technical, financial, and other qualifications, and the adequacy and feasibility of its construction arrangements were fully considered and approved; (b) C. K. Video will have accomplished significant construction of each of its systems within one year after receiving Commission certification for the operation of its proposed cable television systems, and C. K. Video shall thereafter equitably and reasonably extend energized trunk cable to a substantial percentage of its franchise areas each year; (c) although its franchises are for 25 years, C. K. Video is required by the Commission's Rules to submit franchises in strict compliance with the Rules by March 31, 1977; (d) the initial rates to be charged for regular subscriber services were approved by the respective franchising authorities and the rates may be increased only after public hearing pursuant to application to the franchising authorities; (e) C. K. Video will maintain an office at Kenova for the investigation and resolution of subscriber complaints and such office may be reached by any subscriber in Wayne County by placing a local exchange telephone call; (f) C. K. Video will undertake to incorporate into its franchise within one year of any modification of Section 76.31 of the Commission's Rules any changes required by such modification;

and (g) the fees exacted by C. K. Video's franchises are 3 percent of monthly gross receipts. In light of these assurances, we are satisfied that there has been substantial compliance with our franchise requirements and that certificates of compliance for the Kenova and Ceredo systems should be issued until March 31, 1977. *See CATV of Rockford, Inc.*, FCC 72–1005, 38 FCC 2d 10 (1972), *recons. denied*, FCC 73–293, 40 FCC 2d 293 (1973).

In view of the foregoing, the Commission finds that a grant of the subject applications and request for waiver would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the applications for certificates of compliance (CAC–2683–2685), filed by C. K. Video, Inc., ARE GRANTED, and appropriate certificates of compliance will be issued.

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

FCC 74-363

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of COLUMBIA BROADCASTING SYSTEM, INC. (WCAU-TV), PHILADELPHIA, PA. For Renewal of Broadcast License	Docket No. 20010 File No. BRCT-10
FIRST DELAWARE VALLEY CITIZENS TELEVISION, INC., PHILADELPHIA, PA. For Construction Permit for New Television Broadcast Station	Docket No. 20011 File No. BPCT-4540

ORDER

(Adopted April 9, 1974; Released April 24, 1974)

BY THE COMMISSION:

1. The Commission has before it for consideration: (a) the above-captioned applications, one requesting a renewal of license to operate on channel 10, Philadelphia, Pennsylvania, and the other requesting a construction permit for a new television broadcast station to operate on channel 10, Philadelphia, Pennsylvania; (b) motion to dismiss the application of First Delaware Valley Citizens Television, Inc. (First Delaware), filed on April 24, 1973, by Columbia Broadcasting System, Inc. (CBS); (c) an opposition, filed on April 30, 1973, by First Delaware; and (d) a reply, filed on May 14, 1973, by CBS.

2. On April 24, 1973, CBS filed a motion to dismiss First Delaware's application for a construction permit on the grounds that the applicant had failed to timely furnish the Commission with certain financial information which had been requested by the Commission. Specifically, on February 15, 1973, the Commission sent a letter to First Delaware which raised questions concerning its financial plans for the construction and operation of its proposed station. The letter requested, among other things, that First Delaware submit a complete itemization of its first-year cost of operation. The letter also cautioned First Delaware that its failure to respond within thirty days would result in the dismissal of its application. Subsequently, on March 20, 1973, the time within which to respond to the Commission's letter was extended until April 16, 1973, pursuant to First Delaware's request of March 14, 1973. On April 16, 1973, First Delaware filed a financial amendment to its application. The amendment did not include a detailed breakdown of first-year operating costs, but it did refer to the operating breakdown which had been submitted in the

original application.[1] However, First Delaware subsequently filed a detailed operating breakdown on April 30, 1973. Nevertheless, CBS contends that First Delaware's willful failure to provide the requested breakdown by April 16, 1973, warrants the dismissal of its application for failure to respond to Commission correspondence, pursuant to section 1.568(b) of the rules. We do not agree. First Delaware filed an extensive financial amendment on April 16, 1973, in response to the Commission's letter. While that amendment did not include the requested detailed breakdown of first-year operating costs, that information was submitted two weeks later on April 30, 1973. Thus, it is clear that First Delaware intended to continue to prosecute its application and to provide the information requested by the Commission. Moreover, while the Commission expects that replies to its official correspondence will be submitted within the time specified, under the circumstances, we do not believe that the two weeks' delay in furnishing the itemized breakdown resulted in any prejudice to CBS or any undue delay in the processing of First Delaware's application. Therefore, CBS's motion to dismiss First Delaware's application will be denied.

3. The precise amount needed to construct and operate First Delaware's proposed station for three months without revenues[2] cannot be determined. However, cash in the amount of at least $3,736,250 will be needed as follows: down payment on equipment (cost of the antenna system not included)—$641,250; three months' interest payments on bank loan—$85,000; miscellaneous expenses (including grant fee of $45,000)—$710,000; and three months' cost of operation—$2,300,000. While First Delaware states that it will purchase for $428,000 the existing antenna system of the present licensee (CBS), it has failed to furnish the Commission with any information indicating that the equipment can be purchased at the price indicated. In addition, while First Delaware indicates that the station's main studio will be located at a site to be determined in the city of Philadelphia, the applicant has not furnished the Commission with any information as to the costs associated with the construction or lease of its main studio facilities.[3] Accordingly, appropriate financial issues have been specified.

4. To meet its cash-needed requirements, First Delaware relies upon paid-in capital of $103,200, stock subscription agreement of $296,800, and a $4,000,000 bank loan from the Lincoln Bank, Philadelphia, Pennsylvania. The applicant has demonstrated the availability of the

[1] In its original application, First Delaware had submitted an exhibit which set forth a breakdown of first-year operating costs on the basis of four general categories (General and Administrative, Program and Production, Sales, and Engineering and Technical). The operating breakdown did not comply with the provisions of section III, paragraph 1(b) of FCC Form 301 which requires an applicant for a new broadcast station to submit a complete itemization of first-year operating costs.

[2] As in similar cases in the past, we will not apply the standard set forth in *Ultravision Broadcasting Co.*, 1 FCC 2d 544 (1965). Rather, we will apply our former standard which required an applicant to demonstrate that it has sufficient funds to construct and operate the proposed station for three months without revenues. *Orange Nine, Inc.*, 7 FCC 2d 788 (1967). In this connection, it is noted that the Commission's TV Broadcast Financial Data Report for 1972 reveals that the Philadelphia television broadcast stations generated revenues on an average in excess of the applicant's anticipated first-year operating costs ($9,200,000).

[3] The breakdown of first-year operating costs submitted by First Delaware contains a figure of $500,000 for the rental of land and building. However, it is assumed that the figure relates to the rental of the transmitter site and the transmitter building.

$4,000,000 bank loan. In an amendment filed February 22, 1974, the applicant indicated in section II, paragraph II(a), FCC Form 301, that 2,968 shares had been subscribed and that 1,032 shares had been issued, for a total of 4,000 shares. The information contained in the application demonstrates that the stock subscribers can meet their stock subscription commitments to the applicant in the total amount of $296,800. With respect to the stock subscriptions already paid in, since the applicant did not submit a current balance sheet at the time that it filed its February 22, 1974, amendment, the Commission cannot determine the exact amount of paid-in capital which is presently available to the applicant.[4] In the event that the applicant is able to satisfactorily demonstrate the availability of all the funds upon which it relies ($4,400,000), the applicant will still need additional funds.[5] We will, therefore, specify appropriate issues.

5. Columbia Broadcasting System, Inc., is qualified to own and operate television broadcast station WCAU–TV and except as indicated by the issues set forth below, First Delaware Valley Citizens Television, Inc., is qualified to construct, own and operate the proposed new television broadcast station. The applications are, however, mutually exclusive in that operation by the applicants as proposed would result in mutually destructive interference. The Commission is, therefore, unable to make the statutory finding that a grant of the applications would serve the public interest, convenience and necessity, and is of the opinion that they must be designated for hearing in a consolidated proceeding on the issues set forth below.

6. Accordingly, IT IS ORDERED, That pursuant to section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications of Columbia Broadcasting System, Inc., and First Delaware Valley Citizens Television, Inc., ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to the application of First Delaware Valley Citizens Television, Inc.:

a. The amount of paid-in capital available to the applicant.

b. The cost and terms of purchase under which the antenna system will be available to the applicant.

c. The cost of rental or construction of the applicant's main studio facilities.

d. In view of the evidence adduced under issues (b) and (c), the extent to which the applicant's cash requirements will be increased.

e. Assuming that all of the funds upon which the applicant relies will be available to it, how the applicant will obtain sufficient additional funds to be used for the construction and first three months' operation of the station.

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[4] While the application contains a balance sheet for the applicant dated August 31, 1972, the balance sheet does not reflect the applicant's current position with respect to subscribed and issued stock.

[5] The exact amount of additional funds which will be required cannot be determined at this time since the present cash-needed figure of $3,736,250 will have to be increased by the cash required for the purchase of the antenna system and the construction or lease of the main studio facilities.

f. Whether, in view of the evidence adduced under the proceeding issues, the applicant is financially qualified.

2. To determine which of the proposals would better serve the public interest.

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

7. IT IS FURTHER ORDERED, That, the motion to dismiss filed by Columbia Broadcasting System, Inc., IS DENIED.

8. IT IS FURTHER ORDERED, That, in the event of a grant of the license renewal application of Columbia Broadcasting System, Inc., its application will be subject to the following condition:

The grant is conditioned on (1) the outcome of the now-pending civil antitrust action in which Columbia Broadcasting System, Inc., is a party defendant (Civil Action File No. 70 Civ. 4202, U.S. District Court for the Southern District of New York), and (2) that the defendant shall immediately notify the Commission of the final disposition of the case.

9. IT IS FURTHER ORDERED, That, in the event of a grant of the application of First Delaware Valley Citizens Television, Inc., the grant will be made subject to the same AM proximity condition which was attached to the grant of the construction permit (BPCT–4403) for station WCAU–TV, Philadelphia, Pennsylvania.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants herein, pursuant to section 1.221(c) of the Commission's rules, in person or by attorney, shall within twenty (20) days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That, the applicants herein shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission's rules, give notice of the hearing within the time and the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

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

FCC 74-456

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
COLUMBIA BROADCASTING SYSTEM, INC. (WCBS-TV)	File No. BPCT-4280
NATIONAL BROADCASTING CO. (WNBC-TV)	File No. BPCT-4423
AMERICAN BROADCASTING COS., INC. (WABC-TV) (MAIN AND AUXILIARY)	File Nos. BPCT-4425, 4433
EDUCATIONAL BROADCASTING CORP. (WNET (TV))	File No. BPCT-4427
CITY OF NEW YORK MUNICIPAL BROADCASTING SYSTEM (WNYC-TV)	File No. BPCT-4428
METROMEDIA, INC. (WNEW-TV)	File No. BPCT-4434
RKO GENERAL, INC. (WOR-TV) (MAIN AND AUXILIARY)	File Nos. BPCT-4440, 4445
SPANISH INTERNATIONAL COMMUNICATIONS CORP. (WXTV(TV))	File No. BPCT-4483
For Permits To Change Transmitter Location to the World Trade Center Building	

MEMORANDUM OPINION AND ORDER

(Adopted April 18, 1974; Released April 30, 1974)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. Before the Commission for consideration are the captioned applications; objections to grants without hearing filed by the Port of New York Authority; petitions to deny or for alternative relief filed by Taft Television Corporation (Taft) and U.S. Communications Corporation (USCC), licensees of UHF television stations WTAF-TV and WPHL-TV, respectively, in Philadelphia; oppositions and replies thereto; objections from the New York Telephone Company; objections of Association of Maximum Service Telecasters (AMST), and a number of comments and engineering studies filed over the years in connection with the proposed relocation of the captioned stations.[1]

2. The matter before us had its genesis in the first announcements concerning the construction of the twin towers of the World Trade Center (WTC) by the Port of New York Authority (Port Authority), each taller than any previous structure. Because of substantial fears concerning the effect such structure would have upon television reception in the New York metropolitan area, some 24 Congressmen, at the

[1] A listing of all comments, studies and relevant data is attached as an appendix to this document.

urging of their constituents, asked the Commission to conduct public hearings. As a result, this Commission held a public hearing, with Commissioner Robert E. Lee presiding, in Docket No. 17483, *In the Matter of Investigation of Television Interference to be Caused by the Construction of the World Trade Center by the Port of New York Authority*, 10 RR 2d 1769 (1967).[2] At that hearing, there was a general agreement among the experts testifying that interference would result and that relocation on top of the World Trade Center was the best solution.

3. Just prior to the Commission's investigatory hearing, the Committee's then members entered into an agreement with the Port Authority which contemplated the relocation of the New York area television stations from the Empire State Building (ESB) to the WTC and obligated the Port Authority to assume a substantial portion of the costs involved in relocation. The matter of relocation was also presented to the Federal Aviation Agency which issued a determination of no hazard. The matter rested there until the USCC-Taft petition to deny was filed February 12, 1971. Thereafter the Port Authority filed comments with the Commission in which it raised questions concerning the validity of the predictions made in 1967 and whether relocation to the WTC was, in fact, the best solution. In this connection, the Port commissioned further studies, which were filed in August 1971, and concluded that a hearing was necessary to determine whether, in terms of the quality of television reception in the New York metropolitan area, the public interest would be served by relocating the television facilities on the ESB to the WTC. This, in turn, brought comments and studies from the applicants urging and purporting to show that relocation was absolutely necessary. This then is the present posture of the proceeding.[3]

4. The captioned applications seek to relocate their transmission facilities to the World Trade Center some 2.7 miles south of the ESB. Station WXTV (channel 41), and WNYC (channel 1) are each directionalizing their antennas so as to provide a maximum ratio of 17.6 dB and 17.3 dB, respectively, in excess of the 15 dB maximum specified by section 73.685(e)[4] of the rules. This is proposed to suppress the signal over the ocean in order to achieve the most efficient coverage. We are of the view that the waiver is justified, since the deviation is not substantial and it should result in more efficient coverage. WNYC–TV's engineering data also reveals that it will apparently radiate power above the horizontal greater than in the horizontal which is not in accordance with the requirements of section 73.614(b)(4).[5] Because of the unique antenna design and the

[2] The Broadcasters were represented at that hearing by the TV Broadcasters All Industry Committee.

[3] Station WNJU–TV, channel 47, a party to the agreement with the Port has not yet filed its application.

[4] Section 73.685(e) provides in pertinent part: ". . . Stations operating on Channels 14–83 with transmitters delivering a peak visual power output of more than 1 kilowatt may employ directive transmitting antennas with a maximum to minimum radiation in the horizontal plane of not more than 15 decibels. . . ."

[5] Section 73.614(b)(4) provides in pertinent part: "The maximum effective radiated power in any direction above the horizontal plane . . . may not exceed the effective radiated power in the horizontal direction in the same vertical plane."

unavailability of RCA test range data, all calculations are based on theoretical grounds. Thus, the violation may be more apparent than real. This however, should not militate against a grant since an appropriate condition can require compliance prior to licensing. Some of the applicants have specified transmitters which have not yet been type accepted. Here again, this should not bar grant, but would be subject to appropriate conditions which would require type acceptance prior to license.

5. The USCC-Taft petition, in substance, asks that the applications be denied, or in the alternative, that the New York stations be required to suppress radiation in the direction of Philadelphia. The basis for the request is grounded upon allegations that the proposed relocation would cause substantial adverse economic impact upon the operation of their independent UHF operations, which are economically marginal at best, by fragmentation of their audience, and could result in a realignment of the two markets to their detriment. While petitioners allege standing, the pending applications are for minor changes against which petitions do not lie. Accordingly, we are treating the pleading on its merits as an informal objection filed under section 1.587 of the rules. The petition also asserts as grounds for denial a violation of section 73.610 of the rules because stations WCBS–TV and WNET–TV, on channels 2 and 13, respectively, will be 169.1 miles from the co-channel stations in Baltimore instead of the required 170 miles. In addition, they further assert that the present overlap between commonly owned stations WCBS–TV and WCAU–TV will increase, thus violating section 73.636(a)(1) of the rules relating to duopoly. Finally, it is asserted that some loss of television service will occur in the event of a grant.

6. Petitioners are particularly concerned with the impact upon four counties (Mercer and Warren in New Jersey, and Monroe and Northampton in Pennsylvania) which they claim are part of the Philadelphia ADI.[6] It is urged by petitioner that loss of these counties because of the relocation of the New York television stations would decrease the Philadelphia ADI by nine percent and that it is upon the ADI figures that advertisers make their buys. As indicated in footnote 6 Monroe is no longer a part of the Philadelphia ADI, a fact not due to any shift by New York stations but merely because Monroe and the other counties are so far out that they are borderline Philadelphia and New York ADI areas. In any event, it appears that the increase in signal strength throughout the Philadelphia ADI would be on the average, less than 2 db and only in one case as high as 2.7 db, a change, according to TASO reports, which could not be expected to produce an effect which a viewer can recognize and can thus have no effect upon the viewing habits of the audience. The same holds true for the immediate environs of Philadelphia and, therefore, the claim of adverse economic impact is not supported. Concerning the CATV implications it should be noted that the petition was filed in 1971 prior

[6] Area of Dominant Influence—an ARB term which identifies counties which comprise television markets. Where the county is served by more than one market it is allocated to the market which obtains the largest share of the weekly audience. In this connection, Monroe is now part of the New York ADI.

to the Cable Report of 1972 with the new cable rules which set forth the 35 mile plus the significant viewing test as a standard for UHF protection. Thus, this contention has been mooted.

7. Concerning the short-spacing allegations, the Commission has already found that a waiver was warranted when it designated the mutually exclusive applications for channel 11 in New York in Docket Nos. 18711–12, 20 FCC 2d 298, 17 RR 2d 182. In any event, the short-spacings are so small as to be *de minimis*. The alleged loss of service is largely theoretical in view of the fact that there will be no reduction in signal strength level significant enough as to be discernible. In any case, the area of alleged loss is sparsely populated, and in view of the anticipated substantial improvement to other areas such losses, if any, will be outweighed. Finally, regarding the allegations concerning the increased overlap between WCAU–TV and WCBS–TV, we note first that Note 7 to section 73.636 provides that paragraph "(a)(1) does not apply to minor changes." *1964 Multiple Ownership Rules*, 2 RR 2d 1588, 3 RR 2d 1554. We find, in any event that the increase in overlap is so slight as to be *de minimis*.

8. We turn now to the contentions of the Port Authority that the interference due to the WTC, the basis upon which it entered into the agreement to relocate the New York area stations to the WTC, is not as great as originally predicted. The Port Authority contends also that its studies indicate that relocation may result in more serious reception problems and that there is a very strong public interest question raised which requires the matter to be resolved in an evidentiary hearing. The Commission has received a great quantity of data from all the parties concerned, data based on theoretical calculations, public opinion surveys, and conclusions concerning the best possible reception. An evidentiary hearing to resolve disputes based not on facts but on theoretical hypotheses is contradictory by its terms, and futile. However, there is general agreement that the WTC has created reception problems; there is limited measurement data which is supportive of that conclusion; and there is a problem which was anticipated. It was generally agreed in 1967 that relocation to the WTC would be the logical solution. Certainly with respect to station WXTV, which is not at ESB, relocation will result in a substantial improvement. Moreover, operation from the WTC will afford all the stations better line-of-sight to most receivers. In the case of UHF stations, it appears that maximum power can be utilized, standby antennas can be used, and benefits from improvement in their antenna patterns will result which are now precluded by physical conditions at ESB. The Port Authority has suggested that special temporary authority be given to two stations, one VHF and one UHF, to operate from the WTC, to determine the effects on reception and the amount of antenna reorientation required. However, such a proposal would not, in our view, provide the required direct comparison data since it contemplates use of facilities different than those proposed by the applicants and would supply no better information than we have before us in terms of the actual operations. The Committee, in November 1973, asked that the applications be granted unconditionally, or, in the alternative, if the Commission wishes an additional basis for being

assured that the public interest is being served by relocation, the Commission may make conditional grants which would allow relocation but would require testing and measurements to insure the public interest is being served. The Committee asserts that the solution avoids delay, accords with the 1967 agreement, and will provide the empirical data necessary. This alternative is opposed by the Port Authority in a letter dated December 1973, asserting that the public interest question must be resolved before grant. Moreover, the Port Authority urges that such a procedure would place a tremendous burden on the people in terms of antenna orientation. The Port Authority renews its request for an evidentiary hearing and for the two channel operation on the WTC. The Port Authority also asserts there is no legal or public interest basis for a conditional grant.

9. We are of the view that conditional grant of the VHF station applications would be in the public interest. Despite the contrary assertion of the Port Authority, there is sufficient basis to conclude that the WTC has created serious problems. Measurement data supplied confirms this and public reaction in the form of complaints attests to it. We are also persuaded that the service of UHF stations WXTV, channel 41, and WNYC–TV will be improved so substantially that unconditional grants of their operating is warranted. Given its present location one-half mile east of the WTC, at a height 600 feet lower than proposed, it is clear that WXTV's coverage, antenna pattern and line-of-sight will be substantially improved. Moreover, on the WTC the UHF stations can achieve maximum facilities, better radiation patterns, standby antennas for uninterrupted service, all of which is now precluded at the ESB because of physical limitations. The Port Authority's basic position is based upon theoretical assumptions; however, it nowhere refutes the existence of interference. Its original basis for entering into the 1967 agreement was based upon the view that there would be interference and such interference has, in fact, occurred. Because of that fact no measurements were taken prior to the construction of the WTC, we are now presented with the contention that the interference isn't as great as contemplated and that relocation may be no solution but could create a more serious problem. But these contentions are grounded in theoretical calculations, whereas interference is an admitted fact. Our desire is to provide the best quality signal possible and *prima facie* relocation to the WTC appears to be in the public interest. The conditional grant approach provides the only means for direct comparison of regular operations from the two sites. If it develops that reception does not improve for some stations, we are in a position to provide a remedy. In any case, we believe on the basis of the evidence before us that the ultimate result of the relocation to the WTC should be an overall improvement. An evidentiary hearing would only further delay a matter which has been too long delayed already and would serve no useful purpose. It is our view that the Port Authority has failed to raise substantial and material questions of fact which could be resolved via hearing. Therefore, we propose to grant the applications of WXTV and WNYC–TV unconditionally, and propose to grant the other applications subject to appropriate conditions which will require

that existing facilities be maintained at the ESB, that cooperative measurements and observations to determine the quality of reception be undertaken pursuant to a program to be devised by this Commission in consultation with the parties to provide a comparison of reception from both sites. In view of the foregoing, the Commission finds that grant of the captioned applications will serve the public interest, convenience and necessity.

10. The New York Telephone Company's objection is based on its fear that the radiation of high signal intensities from all of the antennas atop the WTC could cause interference to its electronic switching equipment in a nearby building. Although we do not believe that such interference will occur, we are conditioning all of the grants to require that the broadcasters and the New York Telephone Company will take joint and cooperative measures to assure that interference will not occur and the cost of remedial measures, if needed, to be borne by the broadcasters. AMST's objection is directed to the two short spacings (channels 2 and 13) which will occur. We will deny AMST's objection for the reasons stated in paragraph 7, above.

11. Accordingly, IT IS ORDERED, That, with respect to Spanish International Communications Corp., section 73.685(e) of the rules IS WAIVED and the application IS GRANTED; with respect to City of New York Municipal Broadcasting System section 73.685(e) IS WAIVED and the application IS GRANTED subject to the condition that prior to licensing it will demonstrate compliance with section 73.614(b)(4) of the rules.

12. IT IS FURTHER ORDERED, That, the applications of Columbia Broadcasting System, Inc. (WCBS–TV); National Broadcasting Co. (WNBC–TV); American Broadcasting Companies, Inc. (WABC–TV); Educational Broadcasting Corporation (WNET–TV); Metromedia, Inc. (WNEW–TV); and RKO General, Inc. (WOR–TV); ARE GRANTED subject to specifications to be issued and subject to the condition that existing facilities on the Empire State Building be maintained; that cooperative measurements and observations to test the quality of reception be taken from the Empire State Building prior to operation from the World Trade Center and similar measurements from the World Trade Center after commencement of operation based on a measurement program to be designed by the Commission in consultation with the parties to provide for a direct comparison of reception from both sites.

13. IT IS FURTHER ORDERED, That, the objections of the Association of Maximum Service Telecasters; Port of New York Authority; U.S. Communications Corporation; Taft Television Corporation ARE DENIED, and that the objections of the New York Telephone Company ARE GRANTED to the extent provided for below.

14. IT IS FURTHER ORDERED, That, the grants are also subject to the condition that the Broadcasters and The New York Telephone Company will jointly and cooperatively take all necessary measures to assure that no interference to the electronic switching system of the Telephone Company will occur, and that, the cost for reme-

dial measures to eliminate interference, if any, will be borne by the party or parties causing such interference.

15. IT IS FURTHER ORDERED, That, no licenses will be issued for transmitters not yet type accepted.

16. IT IS FURTHER ORDERED, That, the grant to Columbia Broadcasting System, Inc., is subject to the condition that it is without prejudice to any action which the Commission may take as a result of pending civil antitrust action in which it is a party defendant (Civil Action file No. 70 Civ. 4202, U.S. District Court for the Southern District of New York).

17. IT IS FURTHER ORDERED, That, the grant to RKO General, Inc., is without prejudice to such action as the Commission may make as a result of the pending proceedings in Docket Nos. 19991–2.

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

A LISTING OF ALL RELEVANT DOCUMENTS CONSIDERED IS ATTACHED AS APPENDIX TO THIS DOCUMENT

1. Objections of Association of Maximum Service Telecasters, Inc., September 26, 1969.
2. Reply to objections of Association of Maximum Service Telecasters, Inc., October 6, 1969.
3. Petition of U.S. Communications Corporation and Taft Television Corporation to Deny or For Alternative Relief, February 12, 1971.
4. Opposition to Petition to Deny, March 29, 1971.
5. Reply of WPHL–TV, Inc., to Opposition, April 21, 1971.
6. Reply to Opposition to Deny (Taft), April 27, 1971.
7. Comments of The Port of New York Authority, April 29, 1971.
8. Objections of the New York Telephone Company, May 11, 1971.
9. Response of WPHL–TV to Reply of WTAF–TV and Comments of Port of New York Authority, May 13, 1971.
10. Statement of TV Broadcasters All Industry Committee with Respect to Comments of The Port of New York Authority, May 28, 1971, with attachment.
11. Letter by The New York Port Authority, August 16, 1971, with attachments.
12. Comments of TV Broadcasters All Industry Committee in Support of Applications, November 8, 1971, with attachments.
13. Reply of the New York Port Authority to Comments of TV Broadcasters All Industry Committee, January 14, 1972, with attachments.
14. Letter by attorney for TV Broadcasters All Channel Committee, February 29, 1972, with attachment.
15. Letter by Attorney for the Port Authority, April 14, 1973, with attachments.
16. Letter by Attorney for TV Broadcasters All Channel Committee, April 19, 1972, with attachment.
17. Letter from TV Broadcasters All Industry Committee, June 29, 1973, to Port Authority.
18. Reply of Port Authority, July 24, 1973.
19. Letter of TV Broadcasters All Industry Committee, November 16, 1973.
20. Reply of Port Authority, December 7, 1973.
21. Reply of TV Broadcasters All Industry Committee, December 21, 1973.
22. Study submitted by Port Authority on Public Perception of TV Interference, March 27, 1974.

FCC 74-445

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of COMMUNICABLE OF TEXAS, INC. MONAHANS, TEX. KERMIT, TEX. For Certificates of Compliance	CAC-1781, TX219 CAC-1836, TX220

MEMORANDUM OPINION AND ORDER

(Adopted April 18, 1974; Released April 30, 1974)

BY THE COMMISSION:

1. Communicable of Texas, Inc., operates cable television systems at Monahans and Kermit, Texas, communities located in the smaller television market of Odessa-Midland, Texas.[1] Communicable now provides its subscribers with the following television signals:[2]

KMID-TV (NBC, Channel 2) Midland, Texas.
KOSA-TV (CBS, Channel 7) Odessa, Texas.
KMOM-TV (ABC, Channel 9) Monahans, Texas.
KTVT (Ind., Channel 11) Fort Worth, Texas.
KERA-TV (Educ., Channel 13) Dallas, Texas.

In its applications, Communicable requests certification to add the following television signal:

KDTV (Ind., Channel 39) Dallas, Texas.

The applications are opposed by Grayson Enterprises, Inc., licensee of Station KMOM-TV, Monahans, Texas, and Communicable has replied.

2. In its applications, Communicable requests special relief in the form of a waiver of Section 76.59(b) of the Commission's Rules to permit carriage of a second distant independent television signal from the Dallas-Fort Worth market.[3] In support of its request, Communicable asserts that: (a) Monahans and Kermit are small communities (see footnote 1, *supra*) and the carriage of an additional television signal on Communicable's systems would have very little impact upon local broadcast stations; (b) two distant independent television signals are presently carried on cable systems at the neighboring communities of Odessa and Midland without demonstrable

[1] Communicable serves 931 subscribers in Monahans (population 8,333) and 938 subscribers in Kermit (population 7,884). Both cable systems commenced operation in 1973 and are served by a common headend located at Monahans. The systems have a 12-channel capacity, of which 5 are currently employed for television signal carriage and one for automated program origination.

[2] These signals are carried pursuant to Certificates of Compliance (CAC-367 and 368) granted by the Chief, Cable Television Bureau, pursuant to delegated authority, on September 18, 1972.

[3] Section 76.59(b) permits a cable television system located within a smaller television market to carry the signal of no more than one distant independent television station.

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adverse effect on local television stations; (c) there is a lack of entertainment opportunities in the area of Monahans and Kermit and there is a great need for additional and more diverse television programming; (d) Dallas-Fort Worth is the cultural and economic capital of the State of Texas and the independent television programming from this area is of particular interest to the people of Monahans and Kermit, especially in the area of sports coverage; and (e) carriage of UHF Station KDTV on Communicable's cable systems would further the Commission's policy of encouraging the growth of UHF broadcast stations.

3. In support of its opposition to the request for special relief of Communicable, Grayson Enterprises states the following: (a) Communicable failed to support the factual allegations contained in its petition for special relief with affidavits as required by Section 76.7 (c)(1) of the Commission's Rules, and the petition is therefore defective on its face; (b) Communicable failed to present economic or other data in support of the alleged need for additional signal carriage in Monahans and Kermit; (c) the local stations in the Odessa-Midland market provide adequate coverage of statewide news events; (d) Station KDTV would receive little or no benefit from carriage on Communicable's systems and such carriage would necessarily result in erosion of the audience share of local television stations; and (e) the fact that other cable systems in the Odessa-Midland market which do not compete with Communicable carry two distant independent television signals is irrelevant to Communicable's petition for special relief.

4. In its reply, Communicable restates its previous arguments and additionally states that 914 potential subscribers in Monahans and 688 in Kermit have refused its cable service. Furthermore, 195 former subscribers in Kermit have discontinued service. Communicable concludes that lack of sufficient programming is a prime factor in its inability to attract new subscribers. These statements are supported by an affidavit from the manager of Communicable's systems at Monahans and Kermit. Communicable also disputes the allegation of Grayson Enterprises that carriage of KDTV would result in any adverse impact on local television stations. In order to make its own assessment of such impact, Communicable requests the Commission to require Grayson Enterprises to submit specific data regarding the financial situation of KMOM–TV and its satellite station KWAB–TV, Big Spring, Texas.

5. In paragraph 112 of the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 186 (1972), we stated that "the carriage rules reflect our determination of what is, at this time, in the public interest with respect to cable carriage of local and distant signals," and "we have no intention of re-evaluating on requests of cable systems in individual proceedings the general questions settled in our carriage and exclusivity rules." In this case Communicable has presented no evidence to persuade us that its position in the Odessa-Midland television market is different from that of any other cable system located in a smaller television market. The unsupported assumption that additional signal carriage is needed to attract new subscribers to its cable

systems is insufficient to warrant the extraordinary relief requested by Communicable.

In view of the foregoing, the Commission finds that a grant of the above-captioned applications would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the objections filed by Grayson Enterprises, Inc., licensee of Station KMOM–TV, Monahans, Texas, ARE GRANTED.

IT IS FURTHER ORDERED, That the applications (CAC–1781 and 1836) and request for special relief filed by Communicable of Texas, Inc., ARE DENIED.

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

46 F.C.C. 2d

FCC 74-391

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of COMSAT GENERAL CORP.[1]	Files Nos. 17-CSS-P-(3)-73, 130-CSG-P-73, 131-CSG-P-73
ITT WORLD COMMUNICATIONS INC.	Files Nos. 18-CSS-P-(3)-73, 141-CSG-P-73, 142-CSG-P-73
RCA GLOBAL COMMUNICATIONS, INC.	Files Nos. 19-CSS-P-(3)-73, 143-CSG-P-73, 144-CSG-P-73
WESTERN UNION INTERNATIONAL, INC. Applications for Authority To Participate in the Construction and Operation of a Communications Satellite System To Provide Communications Services to the Department of the Navy and to Commercial Maritime Users	Files Nos. 20-CSS-P-(3)-73, 145-CSG-P-73, 146-CSG-P-73

MEMORANDUM OPINION AND ORDER

(Adopted April 16, 1974; Released April 25, 1974)

BY THE COMMISSION:

BACKGROUND

1. By Memorandum Opinion and Order [2] released August 30, 1973, the Commission granted the applications of ITT World Communications Inc. (ITT), RCA Global Communications, Inc. (RCA) and Western Union International, Inc. (WUI) captioned above to the extent that these carriers were made parties to the applications of COMSAT General Corporation (Comsat General) captioned above for authority to construct the space and earth segments of the proposed Navy/Maritime satellite system and were included in the partial waiver of construction permit pursuant to Section 319(d) of the Com-

[1] The applications in this proceeding were originally filed by the Communications Satellite Corporation (Comsat). On February 22, 1974, the Commission issued an Order granting a petition to substitute Comsat General, a wholly-owned subsidiary of Comsat, as the party in interest on these applications.

[2] 42 FCC 2d 533 (1973).

munications Act that had been previously granted with respect to the space segment of this proposed satellite system.[3]

2. Our August 30 decision also ordered the participants in the joint venture to meet promptly to seek agreement on the manner in which the consortium is to operate, reach decisions and implement such decisions, setting out certain guidelines for the agreement. The parties were directed to report back to the Commission on the agreement reached or on the progress of negotiations two weeks from the effective date of that decision. The parties were unable to reach full agreement, disagreeing on several fundamental questions. Consequently, the individual participants submitted for Commission consideration and resolution their respective views on the outstanding issues.

PLEADINGS ON THE DECISIONMAKING PROCESS

3. In its statement of views on unresolved issues, dated October 5, 1973,[4] RCA claims that under our August 30, 1973 decision Comsat General has the right to make all decisions affecting the system, even though such decisions were opposed by all of the other participants, subject only to the right of the other participants to present their views to the Commission in those instances where Commission action is required. It finds this procedure inappropriate for an organization whose sole objective is to provide communication services to the public, contrary to past precedent in the international communications field, and not in the public interest. Moreover, RCA suggests that, in view of the Commission's previous decision requiring that Comsat General allow carriers to join with it in providing maritime satellite service, Comsat General's partners should not be partners in name only, as that would deprive the system of their experience. RCA contrasts this with the procedure used by joint owners of the U.S. earth stations used in connection with the INTELSAT system, which provides for a two-thirds vote to resolve questions affecting all earth stations and a vote of more than fifty percent of a particular station ownership for questions pertaining solely to that station. Under that approach, RCA claims that while Comsat has a 50 percent ownership interest in each earth station, it cannot alone make decisions. RCA also cites the INTELSAT Interim and Definitive Arrangements as examples of where Comsat's voting rights were limited. RCA suggests that at least 85 percent of the weighted vote be required on major items,[5] as it

[3] Memorandum Opinion and Order, released April 16, 1973, 40 FCC 2d 496 (1973). This partial waiver was reinstated by Commission Order released May 15, 1973. The joint applicants have also been granted a partial waiver of construction permit with respect to the earth segment by the Commission's letter adopted March 29, 1974 (FCC 74–317). In addition, RCA's application for Commission review of the decision of the Chief, Common Carrier Bureau to return RCA's September 10, 1973 application for authority to construct an earth station at Point Reyes, California to be associated with this system was denied by the Commission's Memorandum Opinion and Order adopted March 29, 1974 (FCC 74–316).

[4] RCA also filed a petition for clarification and/or reconsideration on September 28, 1973 of our August 30 decision in which it sets forth the same position taken in its October 5 statement of unresolved issues with respect to the decision making process.

[5] RCA suggests that a proviso also be added requiring that at least one party other than the party with the largest vote join in the majority, to cover the situation where one party might achieve 85 percent ownership interest.

would define them.[6] However, if the decision making is to be by a simple majority of the weighted vote cast, RCA suggests that, at a minimum, the implementation of any such decision should be automatically stayed for twenty days upon the request of any dissenting party to permit such party to seek Commission review.

4. WUI shares RCA's concerns that voting solely on a weighted basis would deprive all parties except Comsat General of any effective decision-making capability, and so deny the public the benefits of their experience.[7] It recognizes the equity of adequately reflecting in the voting procedure Comsat General's greater investment share and consequent financial risk, but believes this can be done while avoiding the total disenfranchisement of the minority parties. It does not agree, however, with RCA's suggestion that major items should be subject to an 85% majority vote, because that would mean that RCA would be the only record carrier able to join with Comsat General to reach the required 85% level.[8] Instead, it suggests that on certain "major" items Comsat General should have to have the concurrence of at least one of the record carriers, irrespective of the percentage it holds. WUI opposes RCA's suggestion for an automatic 20-day stay pending Commission review of a consortium decision. Every serious dissent among the parties, WUI claims, would be referred to the Commission and thus delay the exercise of the consortium's actions.

5. ITT claims that the majority vote requirement renders the consortium a meaningless management tier, because it would simply be affirming the actions of the system manager, and argues that the Commission's decision allowing the carriers to participate with Comsat General in the system contemplated a meaningful decision-making role for minority owners. ITT believes that each participant should have an equal vote with the participants deciding on the matters subject to a vote.[9]

6. Comsat General does not think that the minority owners should have a veto power over consortium decisions, a power far out of proportion to their limited financial risk. It maintains that the small ownership held by the record carriers was not the result of any unilateral decision by the Commission, as were the ownership percentages in ESOC, but was a result of voluntary decisions by those carriers to limit their financial outlay and investment risk. Moreover, Comsat General asserts that in ESOC, Comsat's 50 percent ownership was matched by the other participants. With respect to INTELSAT voting, Comsat General maintains that it was a diplomatic necessity to

[6] RCA suggests that the disposition of any major system component, additions or improvements to, or modifications of the system expected to exceed $100,000 and any undecided matters relating to the commercial maritime portion of the system be treated as "major items."

[7] WUI sets forth its position with respect to the decision making process in its statement on unresolved issues as well as in comments it submitted on RCA's petition for clarification and/or reconsideration.

[8] WUI or ITT would have to join with another record carrier and Comsat General in order to reach the 85% level.

[9] ITT suggests that the Commission, in deciding on the voting procedure, not give undue weight to the fact that the minority parties could have avoided this problem by accepting a *pro-rata* share of system investment. It says that they were faced with a choice of either watching Comsat General take whatever little profit potential existed in the maritime business while possibly still having to maintain the existing HF stations; or alternatively, having to invest in a system in which all meaningful decisions as to scope and cost had already been made while having reservations as to its commercial viability.

limit the U.S. entity's (Comsat's) voting power to a far greater degree than would have been appropriate in an ordinary business arrangement. Comsat General thinks RCA's alternative proposal requiring a stay of implementation of a consortium decision upon request of a dissenting party to allow opportunity for review by the Commission is unwise on the grounds that time is crucial in many business decisions and that such a procedure would create an opportunity for mischief.[10]

PLEADINGS ON CAPACITY ALLOCATION AND SYSTEM USAGE

7. In our August 30, 1973 decision, we said that, if feasible, the satellite capacity available for commercial use should be allocated among the joint owners in proportion to their ownership shares in the entire system so that each owner could individually tariff and market its services. However, we provided that, if it were not feasible to make such allocation because of limited capacity, the joint owners should individually submit alternative proposals for the marketing of such capacity and the Commission would then decide how such capacity is ultimately utilized. The carriers were unable to agree on allocation of the available capacity, the services to be provided, and what, if any, constraints should be placed on the use of any such capacity, and have submitted statements of their positions on these issues.

8. Comsat General urges discrete channel allocation, with such channels being allocated on a full-time basis to each party in proportion to its investment. Each party could then use its channels as it chose, subject to the amount of capacity received and physical constraints of the system.[11] Comsat General argues that allocation on a time basis would preclude full-time leased service, from which it planned on deriving a major portion of system revenues.[12] Its system proposal, Comsat General claims, was based on meeting the needs of a new market, which needs can only be served by leasing channels for voice/data use to fleets and groups of ships, on a full-time basis.[13] Thus,

[10] Comsat General also points out that on matters requiring Commission action the interests of dissenting parties could be presented to the Commission; that it has proposed to the parties a capital investment ceiling plus a contingency factor of 20 percent which would insure that unanimity would be required on all capital requirements over this ceiling; and that it agreed in the negotiations that the "system" which was the subject of the consortium agreement, and to which the weighted voting requirement applied, would include only the specific facilities contemplated in Comsat General's applications. A decision going beyond the scope of the agreement, e.g., to build a fourth satellite, Comsat General claims, would necessitate an amendment to the agreement, which would require the consent of all the parties as well as Commission action.

[11] Comsat General believes the parties should be free to voluntarily pool any or all of their capacity if they desire to provide service flexibility, and that time-shared service should not be prohibited. Comsat General notes that each party will have ample capacity to offer time-shared telex and teletype service from the outset.

[12] Comsat General asserts that early economic viability is crucial for this system, as it is being undertaken without prejudice to the institutional structure or nature of the follow-on maritime service. It maintains that the Navy service and contract price for that service were based on anticipated non-Navy maritime revenues throughout the five-year lifetime of the system, and that the extent and manner of providing such service during the first three years is important to obtaining the increased non-Navy revenues in the fourth and fifth years when additional capacity will be available.

[13] Comsat General notes that, for the purpose of determining charges to the Navy, it assumed, as a business risk, that the Navy would exercise all of its contract options. On this basis, the five-year revenue requirement for the excess capacity in the space segment is more than $28 million. Comsat General claims that there is no way in which the total required revenue can be obtained by marketing on a per word or per message basis since the existing maritime structure only generates approximately $4 million per year.

Comsat General states that any allocation that would prohibit it from using its share of the maritime capacity in this manner is not acceptable.[14]

9. Comsat General also maintains that, since the time-sharing allocation approach contemplates each party being free to sell service and obtain revenues beyond its allocated capacity, it would permit a party to limit its investment and risk without considering its marketing or revenue potential. Comsat General maintains that no party should have the unilateral right to make market commitments which require capacity in excess of its share, noting that a user can obtain service from a party with uncommitted capacity.

10. With respect to shipboard terminals, Comsat General claims that the parties must be free to make additional investment in terminals and other facilities to facilitate the timely availability of their service offerings at economic rates. It asserts that, if a party has provided a shipboard terminal [15] as a part of the provision of maritime services under conditions accepted by the customer, other parties should not have an absolute right to use such a terminal.[16] Thus, if Comsat General placed a terminal on a ship as part of a full-time leased service, and then permitted other parties to use it either with or without charge for the time of such use, Comsat General maintains that it would be subsidizing such other parties, since any form of traffic, to or from a ship, in such a case, could be provided within the leased service, at no additional charge to the customer.[17] Comsat General claims that traffic originating on a ship would be handled by the party who provided the full-time service, and that there would be no basis for any other party to obtain revenue for the communications provided between the earth station and the ship, since the ship would be provided full-time service already under the contract with the party who made the prior contractual arrangements with the shipowner.[18]

11. RCA is opposed to discrete channel allocation. It believes that each owner and user class must have reasonable access to all of the available commercial capacity, and that, when an owner uses capacity in excess of its investment, payment for such use should be made to the owner of that capacity. Total commercial capacity, RCA states, should be available to all parties on a time division demand basis, i.e., each party should be allocated, on the basis of its relative system investment, a share in the total capacity assigned to each service offered

[14] Allocation on a time basis, Comsat General states, would force it to subsidize the minority owners by configuring and operating the entire system in a manner which has a reasonable economic potential for a small amount of capacity but no reasonable economic potential for the major portion of the system's capacity.

[15] Comsat General agrees that if a terminal is provided by the shipowner, such ships should have access to the system through any carrier, in accordance with tariffs filed by that carrier, and that, similarly, any customer originating traffic inland should have access to such ships through the carrier of his choice, in accordance with that carrier's tariffs. Moreover, Comsat General agrees that if all carriers offer a common time-shared service, unrouted traffic originating inland and destined for a ship where the shipowner has provided the terminal would be appropriate for sharing between the parties in proportion to investment shares in the system.

[16] Whether other parties can use a terminal, Comsat General asserts, should depend upon the conditions under which it was made available and the tariff provisions for the service involved.

[17] Unrouted traffic, Comsat General maintains, would be transmitted to the ship by the party which provided the full-time leased service and terminal at no additional cost.

[18] In addition, Comsat General maintains that there would not be any basis for another party to use additional capacity to provide such service as the shipowner would already be paying for a full-time service.

through the system, so as to allow each party to participate in each service offering. However, RCA urges that only telex and message telegraph services be initially offered, on the ground that these services represent the principal requirements of the commercial maritime market.[19] RCA thinks that all owners should have unrestricted access to all shipboard terminals and opposes Comsat General's proposal for leased voice and teletype channel service provided with shipboard terminals which would limit the user to Comsat General's services.[20]

12. WUI claims that discrete channel allocation would deprive the minority owners of the ability to provide and market certain essential modern services, e.g., voice and/or broadband data, while the larger owners would have idle capacity. Moreover, Comsat General might be the sole provider of broadband service if this allocation method is used.[21] WUI favors a time-sharing of the entire commercial capacity with appropriate reimbursement by the using carriers to the owning carriers should there be over-utilization.[22] WUI deems it essential that all parties have access to all shipboard terminals and when one member installs a terminal on ship at his own expense, another member using that terminal should pay a carrier-to-carrier charge.

13. WUI suggests a compromise, with at least one voice circuit being available to all parties on a time-shared basis for broadband service, and the remaining channels being allocated on a discrete basis, with any residual capacity allocated on a time-shared basis. WUI would apply this independently to each direction of transmission. Since there is additional capacity in ship-to-shore direction, WUI suggests that about half of the capacity should be time-shared and the other half allocated on a discrete channel basis.[23] WUI points out that this approach permits narrow-band switched and private-line services to be offered on a competitive basis, with all parties offering commercial broadband services on a time-shared basis.[24] It believes that it would be inadvisable to foreclose access to the system by any potential group of users, and that it is advisable to gain experience with a limited private line service offering.

14. ITT does not think discrete channel allocation is consistent with the public interest. It is potentially wasteful of capacity, presents apportionment difficulties and, most importantly, ITT asserts, it would stifle competition among the parties because every carrier, except Comsat General, would be limited to offering only teletype service. Even with teletype, ITT claims, the minority parties could not be ex-

[19] RCA believes that the system should eventually provide all classes of service.

[20] RCA maintains that small shipping interests must be offered use of the system along with large users. It apparently assumes that, under Comsat General's proposal, small users would have a lesser opportunity.

[21] WUI also notes that a proportionate allocation of a discrete number of telegraph channels among the international record carriers is unlikely to yield a round number of telegraph channels to each carrier.

[22] WUI opposes an arrangement which prohibited it from using capacity in excess of its ownership in the system capacity, if that capacity was available. It urges that parties with excess capacity be required to make it available for reasonable compensation to a party with a firm need for it.

[23] WUI proposes that its formula, if adopted, be reviewed if and when the Navy reduces its utilization of satellite capacity.

[24] WUI conditions its proposal, however, on the requirement that, under conditions of maximum Navy usage of satellite capacity, the voice/broadband circuit could not be dedicated exclusively by one of the parties to a private line customer without the agreement of all.

pected to be particularly aggressive with such limited capacity available. On the other hand, ITT maintains that time-sharing would avoid idle capacity, allow for definitive allocations, and permit each party an opportunity, albeit of different magnitudes, to develop and market all modes of the system capability. ITT recommends that each carrier should be able to obtain access to as much of the system as he can effectively market, compensating the carrier or carriers from whom it obtained extra capacity in an amount which would provide a return on the investment used to provide that capacity.[25] ITT thinks that the use should be restricted to common-user services, since leased channel services, if offered, would restrict the already limited capacity for development of the market and would have the effect of cream-skimming by removing the large commercial users from the common-user market, with the probable effect that the carriers would not have sufficient incentive to develop it.

Discussion

DECISIONMAKING PROCESS

15. In our August 30, 1973 decision we said that, should the parties in the consortium be unable to agree on basic policies relating to financial, operational, and technical matters, decision in the consortium should be taken by vote, with the weight of each participant's vote determined by its relative share of total investment. Comsat General, which holds 80.2% of the investment in the proposed system, would thus have voting control in the consortium.[26] The record carriers object to this result on the ground that it gives them little voice in the decision-making process and so denies the system the value of their experience in maritime communications.

16. Initially, the entire question involving the decision-making process should be placed in proper perspective. In our August 30, 1973 decision in this matter, we said that it would be appropriate for the consortium to designate Comsat General as system manager because it was assuming a major share of the financial risk involved in the system. As manager, Comsat General would be expected to handle day-to-day financial, operational, and technical aspects of the system, subject to full and timely disclosure to the joint owners, as agreed to by the parties. Moreover, all parties appear to agree that only major decisions involving the system would be brought to the consortium for consideration, and only when decisions could not be taken unanimously would there be need for a vote on a proposed action. It would also appear that most major decisions will be such as to require the filing of appropriate applications with the Commission and therefore action will be taken by the Commission on those major decisions. In those instances, all parties will have a right to present their views to, and have them considered by, the Commission before it takes final action.

17. The minority owners suggest that it is not proper to give Comsat

[25] By this approach, ITT maintains, capacity might well be used which otherwise would not be sold and the carrier with the extra capacity would then receive its costs plus a return on capacity which would not have been used, thus reducing its risk.

[26] In those instances requiring Commission action, the August 30, 1973 decision provided that dissenting parties could present their views to the Commission.

General the right to exercise its voting power in proportion to its investment and, that we should require the concurrence of one or more of the minority owners. However, to do this would be to give the minority owners voting and decisional power much greater than their investment in the system and would, in fact, give the holders of a small minority of the ownership, either individually or collectively, a veto power over major decisions. Since each of the minority owners was initially given the opportunity to assume a full *pro-rata* share of the ownership and consequent financial risks of the system, and all chose, for whatever reasons, to limit their participation, we are of the opinion that, while they should have an adequate opportunity to present proposals to and have their views fully considered by the consortium, and, on major matters, by the Commission, they should not be given power over consortium decisions wholly out of proportion to the risks that they are assuming in the system. Comsat General's investment percentage is more than four times that of the combined shares of the minority owners and represents a share much greater than a two-thirds majority. Moreover, Comsat General has a far greater proportion of the total investment in this system than Comsat has either in the United States earth stations using the INTELSAT system, where it was limited by Commission decision to 50%, or in INTELSAT itself, where Comsat's voting power was limited as a result of intergovernmental negotiations for reasons of international comity. Consequently, we reject ITT's proposed one-party one-vote procedure, as well as the RCA and WUI proposals which would require the concurrence of at least one minority owner in any position taken by Comsat General.

18. We will require that at least those consortium actions which ultimately are subject to action by the Commission before being implemented, be treated as matters of major significance.[27] For such matters, the Commission will require that all filings made by or on behalf of the consortium contain written documentation that supporting operational, technical, and financial information was made available to all consortium members at least ten days prior to a vote and that all members had an opportunity to present their views on the proposed action and have such views considered by other members of the consortium.

19. We realize that there may be matters of major significance or impact concerning the system which will not be subject to action by the Commission. We believe that the participants should identify, or at least establish criteria for identifying, such major items, and establish appropriate procedures providing for them to be brought before the consortium for discussion and vote in a timely and orderly fashion. Further, while we wish to avoid injecting the Commission into the day-to-day operations of the consortium, we nevertheless believe that in a novel venture such as this it is necessary to provide some procedure for dissenting participants to bring matters to the Commission's attention. Accordingly, we are providing that, after discussion and vote on a major item by the consortium, any dissenting participant, upon notice to the other participants, may file a statement with the Commission setting forth the facts, including those relating to the urgency of

[27] Such matters would include facilities, service offerings and tariffs.

the particular action, and proposing such action as it considers we should take. However, we emphasize that such a filing will not automatically stay action by the consortium,[28] nor will the Commission necessarily issue any ruling on the filing. The parties will be notified, however, of our decision to review or not to review the matter and if review is deemed necessary we will designate appropriate procedures in light of the particular facts and circumstances. In considering whether to impose a stay pending review, we will be guided by the usual criteria for granting such extraordinary relief.

20. Since the consortium agreement itself will necessarily be limited in scope and applicability to the system originally proposed by Comsat General, any activities the consortium wants to undertake that are outside the terms of the agreement would necessarily require the concurrence of all parties in the consortium. We also fully endorse the concept, suggested by Comsat General, that the parties agree to a ceiling on capital expenditures for the proposed system to be incorporated into the consortium agreement. Any proposed change to that ceiling would accordingly require the concurrence of all the parties. Thus, the procedures set forth above should enable the consortium to function in a timely and effective manner, while providing adequate protection for the interests of the minority holders.

21. Finally, we emphasize our view that the success of the decisional process, and, indeed, of this entire unique venture, depends in large part on the willingness of the participants to cooperate in a constructive fashion. We stress particularly the necessity for Comsat General, as the system manager as well as majority investor, to keep the other participants fully and timely informed of all activities. We shall retain jurisdiction to make any changes in the decisional process which may be required in the public interest or to protect the rights of any of the participants.

CAPACITY ALLOCATION AND SYSTEM USAGE

22. In our August 30, 1973 decision, we stated the principle that the system capacity available should, if feasible, be allocated among the joint owners in proportion to their ownership share in the system so that each might individually tariff and market its services. Our review of the entire matter, including the various pleadings submitted by the parties, convinces us that it is indeed feasible to allocate the capacity in proportion to investment. Further, we believe that each carrier should be limited to marketing and using its own proportionate share of the capacity, provided, of course, that any carrier may agree to make additional capacity available to another carrier. This we believe, is the only result consistent both with the fundamental premise underlying our determination to permit other carriers to participate in Comsat General's proposed system and with the decisions voluntarily made by each of the other carriers concerning the extent of their investment. We will, however, retain jurisdiction with respect to this

[28] We believe that an automatic twenty-day stay, as suggested by RCA, would be an unwarranted and impractical interference with the business operations of the consortium and result in unnecessary Commission involvement in the consortium's affairs.

matter so that, after there has been actual operating experience with the system, we will be in a position to make any adjustments as may be necessary in the public interest.

23. Having established this basic principle that capacity be allocated among the parties in proportion to investment, we next note that implementation of this principle to assign each party his specific share of the available capacity is a systems design and operational decision. We believe it is neither appropriate nor necessary for the Commission to make that decision. Rather we believe it is for the joint owners, in the context of the decision-making process set forth above, to decide on a technical design of the communications system and then for each to determine how it will use the capacity available to it. We note that the technical aspects of the allocation method will be reflected to a large extent in the frequency assignments to be made and in the channel derivation equipment to be authorized at the earth stations to be associated with this system. We expect the joint owners to submit, in conformity with the principles stated above, a detailed allocation plan along with the necessary applications for the installation and operation of the ground communications equipment and multiplex equipment at each of the two earth stations. Two or more of the joint owners may wish to pool all or part of their capacity, and it should be made clear that nothing in our decisions concerning this matter would bar such an arrangement.[29] Finally we note in this regard that the capacity available for allocation to commercial services in the initial phase may be affected by whether or not the Navy exercises its option with respect to narrow band channels as well as by the actual in-orbit performance of the satellites. At a later stage, such capacity will be affected by whether or not the Navy exercises its option for a third year of service, and, in addition, it may prove necessary or desirable to modify the operational configuration of the system in light of actual commercial operating experience.

24. With respect to the question regarding carrier access to ship terminals provided by another carrier as part of a full-time leased channel service, we think that any consideration on our part at this time would be premature. In our August 30, 1973 decision, we requested not only that each joint owner submit to the Commission the types of services it proposes to provide to commercial maritime users and the proposed tariffs for each service, but also each owner's proposals for the ownership, maintenance and operation of the shipboard terminals. Pending resolution of the capacity allocation issue, however, the carriers were understandably not in a position to provide this information.[30] However, since we are resolving the capacity allocation question here, we expect each joint owner to file the previously requested information along with its views on access to any shipboard terminals which may be provided by other carriers within thirty days after reaching agreement on the *modus operandi* arrangement for the consortium. We will then be in a position to fully and adequately con-

[29] Should two or more of the carriers wish to pool their respective capacities, we would expect Comsat General, as the system manager, to cooperate to the maximum extent practicable in implementing such an arrangement.

[30] RCA, ITT and WUI did not discuss the question of access to shipboard terminals at any length in their position statements.

sider the ship terminal access question and the tariffs that relate thereto. We do not think that this matter should prevent or delay the carriers from reaching agreement as to the organizational, financial and management arrangements of this consortium.

ORDER

Accordingly, IT IS ORDERED that the joint owners of the Navy/Maritime satellite system are to resume negotiations promptly looking toward reaching a consortium agreement consistent with the policies and positions set forth above and are to report back to the Commission on the agreement reached or on the progress of negotiations six weeks from the effective date of this Order.

IT IS FURTHER ORDERED that within thirty days after reaching such consortium agreement each joint owner is to submit the types of service offerings it is planning to provide, the proposed tariffs for each such service, setting forth, among other things, how it intends to recover its share of system investment and expenses, its proposals for the ownership, maintenance and operation of shipboard terminals and its views on the question of carrier access to shipboard terminals provided by other carriers.

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

FCC 74-398

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of CONTACT-COLORADO SPRINGS, INC., COLORADO SPRINGS, COLO. ROBERT W. FORSYTHE, JR., D.B.A. SPRINGS COMMUNICATIONS CO., COLORADO SPRINGS, COLO. For Construction Permits To Establish New One-Way Signaling Stations in the Domestic Public Land Mobile Radio Service at Colorado Springs, Colo.	File No. 5682-C2-P-(2)-71 File No. 6913-C2-P-71

MEMORANDUM OPINION AND ORDER

(Adopted April 16, 1974; Released April 24, 1974)

BY THE COMMISSION:

1. The Commission has before it for consideration the above-captioned applications to establish new one-way signaling stations in the Domestic Public Land Mobile Radio Service (DPLMRS). The application of Contact-Colorado Springs, Inc. ("Contact") proposes the establishment of new one-way signaling facilities to operate on base station frequencies 152.24 MHz and 158.70 MHz at Colorado Springs, Colorado; and the application of Robert W. Forsythe, Jr., d/b as Springs Communications Company ("Forsythe") proposes the establishment of a new one-way signaling radio station to operate on base station frequency 158.70 MHz at Colorado Springs, also. Since the applications of Contact and Forsythe are partially in conflict (because each proposes to use the 158.70 MHz frequency at Colorado Springs) a determination must be made, either that the applications will be set for a comparative evidentiary hearing or that the public interest, convenience, and necessity would be served by a grant of the Forsythe application and a partial grant of the Contact application. (See FCC Rules and Regulations, Section 21.29.)

2. Contact is a Colorado corporation whose corporate officers and stockholders are Robert A. Bochatey and David W. Brashear. Messrs. Bochatey and Brashear each own 50% of the stock in Contact and both appear to have financial interests in a telephone answering service and MCC[1] Radio Station KQW796 in Denver, Colorado. In addition, Messrs. Bochatey and Brashear each own 50% of the stock of Telephone Answering Bureau, Inc., 619 North Cascade, Colorado Springs. Contact is the licensee of Station KAF241 in the DPLMRS at Colo-

[1] The terms "MCC" (Miscellaneous Common Carrier) and "RCC" (Radio Common Carrier) are used interchangeably in this industry, although the official Commission designation is "Miscellaneous Common Carrier." (See FCC Rules and Regulations, Section 21.1.)

rado Springs. KAF241 is a two-way radiotelephone station operating on base station frequencies 152.03 MHz and 152.18 MHz, with a control point collocated with that of the Telephone Answering Bureau.

3. Contact is seeking both one-way signaling channels in order to provide both tone-only and tone-plus-voice one-way signaling service in the Colorado Springs area (Contact Applic., Exh. 1). Even though one-way signaling is being provided on Contact's presently licensed two-way facilities (Station KAF241) to paging subscribers on a secondary basis, Contact contends that the existing operations of that station are inadequate to take care of the one-way paging needs of existing and proposed customers. (*Ibid.*) In support of its showing of need, Contact contends that the Colorado Springs area has a population in excess of 80,000 persons, and is the center of a metropolitan area well in excess of 160,000 persons in El Paso County (*Ibid.*). In response to a Commission letter, Contact on February 22, 1972 amended its application by providing the results of a need study which it had conducted in November and December 1971. Of the 6,409 business firms contacted, which (according to Contact) represented all of the business telephone subscribers of record, Contact received 148 replies, 64 of which indicated no interest in one-way signaling service. Of the remainder, 36 expressed an interest in tone-only service, and 48 expressed an interest in tone-plus-voice service. By adding the number of those customers now receiving service to those expressing an interest, Contact concludes that it has a need to serve 210 existing and prospective clients (Contact Amendment 22 Feb. 72, p. 4).

4. Contact's financial qualifications to construct and operate the proposed facilities are set out in Exhibit 3 of its application. A "Statement of Financial Condition" dated March 15, 1971 discloses total assets of $77,026.94, including four notes receivable from Messrs. Brashear and Bochatey. Two, each in the amount of $6,000 are due within one year; and two, each in the amount of $23,500, are due in over one year. No current liabilities are listed, and the only long term debt described is that of Telephone Answering Bureau of Denver in the amount of $15,000. Mr. Brashear's Statement of Financial Position of March 15, 1971 lists Total Assets of $114,600, of which $500 is cash in the bank; $35,000 as the market value of a personal residence; $8,000 the estimated value of personal property; and $71,100 is the total value of corporate stocks (Answer, Inc., Denver, Colorado, $39,000; Telephone Answering Bureau of Colorado Springs $1,100; and Contact $31,000). Total Liabilities are stated to be $55,250, of which $21,250 is a home mortgage; $4,500 a personal loan; and $29,500 a note payable to Contact. Brashear's Net Worth is set out at $59,350. Mr. Bochatey's Statement of Financial Position dated March 5, 1971 discloses total assets of $465,326.95, of which $53,127.51 is cash; $7,359.44 notes receivable; $311,840 corporate stocks and bonds (including Contact, $36,000; Telephone Answering Bureau of Colorado Springs, $1,500; and Telephone Secretarial Bureau, $200,000). Fixed assets are said to be $93,000. There appear to be no current liabilities; and total fixed liabilities are stated to be $32,068. Mr. Bochatey's Net Worth is, therefore, $433,258.95. Since the total cost of construction of the station is stated to be $4,232.00, with paging receivers listed at $300 each (Con-

tact Applic., Item 48) and the principals of Contact state that they will provide additional financing, as required (Contact Applic., Exh. 2, Note 1) we find Contact financially qualified to construct its proposed facilities.

5. Contact proposes to operate two Motorola CC–3058 transmitters with emissions of 15F2 and 16F3, and an Input/Output power of 340/150 watts. The antennas would be side-mounted on a 90-foot pole with the base of the lower antenna 31 feet above ground. Maintenance of the equipment would be provided by Rocky Mountain Communications of Colorado Springs twenty-four hours per day seven days a week. Rocky Mountain Communications is said to be an authorized Motorola Service Station dealer, having qualified and licensed personnel. Considering not only the data filed with the application, but also other pertinent data on file with the Commission, there appears to be no substantial question concerning Contact's technical, financial, or legal qualifications.

6. Robert W. Forsythe, Jr. is the sole owner of Springs Communications Company which has its principal office in Colorado Springs. Forsythe proposes to provide a non-interconnected one-way signalling service utilizing a Motorola transmitter Type CC3040 with 15F2 and 16F3 emissions and an Input/Output power of 220/120 watts. Forsythe's antenna would be mounted on a mast 9.5 feet high located on top of a building at 1912 Eastlake Blvd., Colorado Springs. The base of the mast would be 134 feet above ground. The maintenance of the proposed facilities will be performed by a person who holds an FCC Second Class Radio Operator permit, and Forsythe states that an adequate staff of duly-licensed maintenance personnel will be maintained by Rocky Mountain Communication Services, Inc. to perform regular and emergency maintenance on the facilities to be located in Colorado Springs, on a full-time basis. All personnel will have access to the proposed control point and base station facilities. Finally, a reserve of paging units will be maintained to ensure adequate service (Forsythe Applic., Exh. 4).

7. The station proposed by Forsythe will be controlled from 301 S. Weber Street, Colorado Springs, with a dispatching staff under the direct supervision of the owner, Robert W. Forsythe, Jr., who proposes to instruct the staff concerning the requirements of Part 21 of the FCC Rules and Regulations. In addition, Mr. Forsythe states that he will devote 50% of his time to the proposed operation and will be available at all times by telephone to respond to inquiries and complaints received at the station. (Forsythe Applic., Exh. 5).[2] Based upon the foregoing, we find Forsythe to be technically and legally qualified to construct and operate its proposed station.

8. The financial qualifications of Forsythe to construct and operate the proposed facilities are set out in Exhibit 3 to the application. Mr. Forsythe's Balance Sheet dated May 1, 1971 shows total assets of $75,614 with $3,174 in cash. Total liabilities are stated to be $26,199

[2] Mr. Forsythe is an independent sales agent for Petersen Aluminum Corporation, which takes at least 20 hours of his time per week, but permits him a flexible schedule (Forsythe Applic., Item 44).

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with a net worth of $49,415. Total cost of construction (including the cost of 10 pagers) is stated to be $6,350, which is payable under a standard Motorola lease-purchase agreement at 10% down with the balance payable in 60 months. Forsythe appears financially qualified to construct the proposed station and operate it for a one-year period.

9. The population of the area proposed to be served by Forsythe is 125,000, with all shades of the professional spectrum represented. The Forsythe application (Exhibit 6) stated that the applicant "is aware of no other one-way paging facilities licensed for the Colorado Springs, Colorado, area",[3] but based upon the population of the area, he concluded that there is a need for the proposed service, and there would be approximately 100 one-way paging units in service within the first year of commercial operation.

10. On July 14, 1971 Contact filed a Petition to Deny the Forsythe application, contending that both applicants propose to serve the same service area, and that a grant on the Forsythe application would not be in the public interest, because contrary to Forsythe's assertion, Contact was at that time serving approximately 78 paging subscribers; that there is no waiting list for service; and that Contact then had on hand 17 additional paging units available for new subscribers, or for use as spares. "The Forsythe application, therefore, proposes no services which are not presently available in the area by existing carriers" (Contact Pet. to Deny, p. 2).[4] In a word, Contact argues that the need of the Colorado Springs area for one-way signaling service can be adequately met by Contact, with its existing and proposed facilities; but a grant of Forsythe's application "would fracture the market and disserve the public interest" (Contact Petit., p. 3). Contact maintains that the State of Colorado adheres to the doctrine of "Regulated Monopoly", which, in practical effect, means that existing carriers ought to be granted a reasonable opportunity in which to expand their services before a new competing carrier is granted the opportunity to enter the market.[5] Finally, Contact maintains that the entry of Forsythe into the Colorado Springs market "would seriously impair, if not completely defeat." Contact's goal of substantially broadening and improving the services which Station KAF241 now offers. (Contact Petit., p. 6). Contact states that, rather than enter the Colorado Spring's market as a new carrier in 1970 and compete with the then existing carrier, it chose to purchase the assets of that carrier for 156% of their net book value (Contact Petit., p. 5), despite that "[t]hroughout its history, Station KAF241 has been financially distressed, and it is Contact's opinion that had it not purchased the

[3] This assertion was denied by Contact in a Petition to Deny filed July 14, 1971. (See para. 10, *infra*.) We agree with the denial.

[4] Forsythe maintains that Contact has no standing to petition to deny its application; but as an existing carrier providing one-way signaling service in the same general area as that proposed by Forsythe, Contact clearly has standing to petition for the denial of the Forsythe application. *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

[5] Contact Petition, p. 4. The authority cited for the Colorado public policy is a decision of a Colorado State District Court holding that the Colorado Public Utilities Commission (PUC) committed error in granting a certificate of convenience and necessity to a new Miscellaneous Common Carrier (or "RCC") before giving the existing carriers "a reasonable time in which to expand their services to provide that which the Commission, in its finding of fact, deems necessary for the public convenience." (*Answerphone, Inc., et al.* v. *PUC of Colorado, et al.*, Civil Action No. C–16864, Colo. Dist. Ct. for City and County of Denver, Div. 6, Order and Judgment, March 4, 1971, p. 2.)

station, the carrier would have been in or near bankruptcy at this time." (Contact Petit., pp. 5–6) Contact cites the Annual Report (Form L) of its predecessor for the year 1970 disclosing a loss from DPLMRS activities in the amount of $9,629.40, and its final report to the Colorado PUC for the period January 1, 1971 through April 30, 1971 showing a net loss in the amount of $5,321.71 in connection with the operation of the RCC service.[6]

11. The Forsythe Opposition, which was filed August 16, 1971, challenges the showing of need made by Contact contending that Contact has made inconsistent arguments in stating, first, that it needs both one-way signaling channels at the same time that it states that it has 17 paging units available for new subscribers.[7] Forsythe contends that Contact's showing of need is defective in light of the Review's Board's decision in *Long Island Paging*, 30 FCC 2d 405 (1971); *Applic. for Review denied*, 32 FCC 2d 235 (1971). Forsythe, however, suggests that each applicant be granted one channel, consistent with the Commission decision in *Mobile Radio Communications, Inc.*, 29 FCC 2d 62 (1971); and it contends, finally, that the policy of "regulated monopoly" cited by Contact is inapplicable here, because Forsythe's application is for non-interconnected one-way signaling service over which the Colorado PUC does not have jurisdiction.

12. Contact's Reply, filed August 26, 1971, addressing the need question, cites *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953) for the proposition that there is no national policy in favor of competition *per se*, but that the Commission must assess the benefits of competition in the context of the particular industries and proposals under its regulatory aegis, and that it is not logical to limit the doctrine of regulated monopoly to interconnected services. *Mobile Radio Communications, Inc.*, supra, is distinguished on the ground that both applicants there were existing carriers; and Contact contends that Long Island Paging, supra, is not applicable to it because it is an existing licensee seeking to improve service, rather than a mere applicant for new facilities.

13. On November 17, 1971, the Commission in a staff letter to Forsythe requested, *inter alia*, a complete and comprehensive statement which would show how his application would satisfy a specific need for the service proposed. (See Item 52 of FCC Form 401; FCC Rules and Regulations, Section 21–500(c).) In response Forsythe, on January 17, 1972, submitted a Public Need Survey which Mr. Robert Forsythe and his son had made during a five-day period in early January 1972. Of the 108 firms and individuals contacted, six indicated no interest, but 102 indicated a need for a total of 289 pagers. A sample of the Survey form was attached, and the Commission was advised that the individual responses substantiating the need of the 102 prospective customers for the 289 pagers would be made available to the Commission; but for competitive reasons Forsythe did not wish to make them

[6] It is appropriate to note here that Contact's Form L Annual Report for the Calendar year 1971 discloses a net loss from DPLMRS operations in the amount of $1,030.32 for Station KAF241. (Contact-Colorado Springs, Form L, filed March 29, 1972.)

[7] Forsythe also challenged the standing of Contact to petition to deny its application, but as we have already noted above, we find that Contact has such standing. (See Note 4, *supra*.)

available to the public. The Forsythe cover letter states that a copy of the filing was served upon counsel for Contact.

14. We are persuaded, based upon careful consideration of the matters raised by both parties that the public interest, convenience, and necessity would best be served by following the precedent which we set in *Mobile Radio Communications, Inc.*, 29 FCC 2d 62; and by awarding the 152.24 MHz channel to Contact and the 158.70 MHz channel to Forsythe. We would, thus, grant the Contact application in part, and grant the Forsythe application in full. (See FCC Rules and Regulations, Section 21.29.)

15. Contact has argued for application of the Colorado public policy of "regulated monopoly". The argument is easily answered in that the State of Colorado does not require a certificate of public convenience and necessity for the service proposed by Forsythe. If Colorado had chosen to regulate the provision of non-interconnected service by requiring a franchise before such service would be offered, our rules would require that a copy of such franchise accompany the application. 47 C.F.R. § 21.15(c)(4). In the absence of any showing of intent by the State to regulate, non-interconnected one-way signaling service we find no conflict between our decision to license both applicants and the public policy of the State of Colorado.

16. Contact states that it is presently serving 78 paging subscribers and that there is no waiting list for service. It does not show how this statement can be reconciled with: (a) its application for two new frequencies for paging service, (b) its need survey showing an unsatisfied market of 84 additional paging customers and (c) the Forsythe survey showing an unsatisfied demand for 289 paging units. We conclude from the information before us that there is substantial unsatisfied demand for paging service in the Colorado Springs area. Moreover, we find that the demand is sufficient to justify a grant of two frequencies. This is not a case, as is *Long Island Paging*, where the applicant has based his showing of need solely upon presumptions regarding the population of the service area and an alleged propensity of doctors to frequent golf courses. Here both applicants have conducted surveys of possible users and, discovered substantial unsatisfied demand.

17. Before concluding that only one entrepreneur should be permitted to provide one-way signaling service in the Colorado Springs area we are required by Section 309(e) of the Communications Act to conduct a full evidentiary hearing which would necessarily examine into the business structure, practices, and operations of both Contact and Forsythe in determining how the public interest would best be served. In addition, we would consider whether it would be equitable to award two one-way signaling channels to a single applicant, while another qualified applicant receives nothing, with the resultant loss to the public of a choice of service. (See *Mobile Radio Communications, Inc.*, 29 FCC 2d 65 (1971).) We think that such a hearing might be so time-consuming and expensive to all concerned as to be self-defeating. In addition, there is the fact that the public would be de-

prived of the proposed service during the pendency of the hearing.[8] Considering that the population to be served by Forsythe is estimated to be 125,000 and that to be served by Contact is in excess of 160,000 it would appear that the market is not so small as to preclude the possibility of a viable service being provided by both applicants.

18. Accordingly, in view of the foregoing, IT IS ORDERED, That the part of the application of Contact-Colorado Springs, Inc., requesting a construction permit to establish a new one-way signaling station to operate on 152.24 MHz at Colorado Springs, Colorado is GRANTED.

19. IT IS FURTHER ORDERED, That the part of the application of Contact-Colorado Springs, Inc., requesting a construction permit establish a new one-way signaling station to operate on 158.70 MHz at Colorado Springs, Colorado is DENIED.[9]

20. IT IS FURTHER ORDERED, That the application of Robert W. Forsythe, Jr., d/b as Springs Communications Company, for a construction permit to establish a new one-way signaling station to operate on 158.70 MHz at Colorado Springs, Colorado is GRANTED.

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

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[8] These are the principal reasons that we have encouraged qualified applicants to enter into agreements to share the use of one-way signaling channels. (See *Mobile Radio System of Ventura, Inc.*, 30 FCC 2d 660, 666–668 (1971).

[9] Section 21.29 of the FCC Rules and Regulations describes the rights and obligations of applicants who have received partial grants.

FCC 74-436

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
EASTERN SHORE CATV, BERLIN, MD.	CAC-854 MD005
EASTERN SHORE CATV, OCEAN CITY, MD.	CAC-855
For Certificates of Compliance	MD006

MEMORANDUM OPINION AND ORDER

(Adopted April 17, 1974; Released April 30, 1974)

BY THE COMMISSION: COMMISSIONER LEE CONCURRING IN THE RESULT.

1. Eastern Shore CATV operates cable television systems at Berlin (pop. 1,900) and Ocean City (pop. 1,334), Maryland, communities which are located within the Salisbury, Maryland smaller television markets. The systems provide their subscribers with the following television broadcast signals:

WBOC-TV (NBC/ABC/CBS, Ch. 16) Salisbury, Maryland.
WCPB-TV (Educ., Ch. 28) Salisbury, Maryland.
WBAL-TV (NBC, Ch. 11) Baltimore, Maryland.
WJZ-TV (ABC, Ch. 13) Baltimore, Maryland.
WMAR-TV (CBS, Ch. 2) Baltimore, Maryland.
WTTG-TV (Ind., Ch. 5) Washington, D.C.

On July 17, 1972, Eastern Shore filed applications for certificates of compliance to add the following additional television signal:

WDCA-TV (Ind., Ch. 20) Washington, D.C.

Recognizing that the smaller market signal carriage rules in Section 76.59 authorize carriage of only one independent television signal, Eastern Shore also requests special relief for a waiver of Section 76.59 so that it may carry WDCA-TV. WBOC-TV, Inc., licensee of WBOC-TV, Salisbury, Maryland, opposes Eastern Shore's applications and requests for special relief, and Eastern Shore has replied.

2. The subject pleadings incorporate by reference a "Petition for Waiver" (SR-37126), filed on March 30, 1971, in which Eastern Shore sought waiver of former proposed Section 74.1107(d)(3) of the Rules to permit carriage of three independent UHF stations from Washington, D.C.[1] Eastern Shore reiterates its original argument that the Commission has previously recognized the existence of "unique and anoma-

[1] Eastern Shore's petition for waiver requested authorization to carry Station WBFF-TV, Baltimore, Maryland, WFAN-TV and WGSP-TV, Washington, D.C., in addition to WDCA-TV. In its applications for certification, Eastern Shore has deleted its requests for carriage of WBFF-TV, WFAN-TV and WGSP-TV.

lous situation[s] where strict application of the proposed rule would be inappropriate." *Community TV Corp.*, 27 FCC 2d 481 (1971); *Coastal Cable Co.*, 24 FCC 2d 147 (1970).[2] For several reasons, Eastern Shore contends that such a situation exists in the eastern shore of Maryland, where its systems are located. Further, Eastern Shore urges that the Commission's policy, as stated in the *Notice of Proposed Rulemaking and Notice of Inquiry in Docket No. 18397*, 15 FCC 2d 417, 439 (1968), of restricting smaller markets to one independent signal is inapplicable to Berlin and Ocean City. As perceived by Eastern Shore, this policy is designed to preserve the Commission's allocation scheme by maintenance of conditions allowing the establishment of additional stations in the market, stimulate the development of program origination capacity, and prevent loss or deterioration of local broadcast services caused by the presence of many competing signals. Eastern Shore argues that none of these policy factors are present in this situation. In support thereof it notes: (a) WBOC–TV operates the only television channel allocated to the eastern shore region; (b) requiring program origination on systems serving more than 3,500 subscribers eliminates the need for rules merely encouraging origination; and (c) WBOC–TV's affiliation with the three major networks, its exclusivity protection, its monopoly on local and regional advertising, and its financial stability all indicate that WBOC–TV would be unharmed by grant of the applicant's petition. In addition, Eastern Shore urges that a strong community of interest exists between the eastern shore area and Washington, D.C. because of the substantial number of summer residents attracted to the area from the District. To deny carriage of WDCA–TV, Eastern Shore argues, would disrupt the viewing habits of these summer residents and damage the continuity of viewership established by WDCA–TV during the winter months, thereby frustrating the Commission's declared policy of promoting UHF development. Finally, as a *quid pro quo* for the right to carry WDCA–TV, Eastern Shore offers to begin program origination in Ocean City in compliance with Section 76.201 et seq., regardless of whether it has 3500 or more subscribers. Without the requested signal, Eastern Shore suggests that it might not be in a position to undertake cablecasting. In its opposition, WBOC–TV argues that Eastern Shore has not justified its request by any showing of financial hardship, and that *Community TV Corp.* and *Coastal Cable Co.*, *supra.*, are inapposite because in those cases, the Commission's ruling permitted carriage of UHF stations in the same market as the petitioning cable system. In the instant case, WBOC–TV points out, Eastern Shore seeks carriage of a UHF station from a major market different from that in which it operates.

3. Eastern Shore is correct in stating that the Commission has an obligation to consider waiver requests based upon unique situations. In Section 76.7(a) of the current Rules, we made provision for interested parties, specifically including cable television operators, to petition for waiver as follows: On petition by a cable television sys-

[2] Eastern Shore states that the Commission in *Cable Television Report and Order*, 36 FCC 2d 143, (1972) has continued to recognize that such circumstances might warrant special relief.

tem . . . , or by any other interested persons, the Commission may waive any provision of the rules relating to cable television systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

Nevertheless, as we stated in Para. 112, *Cable Television Report and Order*, 36 FCC 2d 143, 187 (1972), the Commission entertains "no intention of reevaluating on request of cable systems in individual proceedings the general questions settled in our carriage and exclusivity rules." We cautioned that in considering petitions for special relief, there must be a substantial showing to warrant deviation from the "go, no-go" concept of the Rules. *Report and Order, supra.* The arguments advanced by Eastern Shore for carriage of WDCA–TV do not significantly vary from the "general questions" considered by the Commission in adopting the signal carriage rules for smaller television markets; [3] therefore, the applicant has not met the special showing necessary for waiver of Section 76.59 of the Rules.

In view of the foregoing, the Commission finds that a grant of the above-captioned applications would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That Eastern Shore CATV's applications for certificates of compliance (CAC–854, CAC–855) and requests for special relief ARE DENIED.

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

[3] These questions were resolved in a manner intended: (1) to assure that "local" stations are carried on cable television systems and are not denied access to the audience they are licensed to serve; (2) to gauge and, where appropriate, to ameliorate the competitive impact of "distant" signal carriage. *Report and Order, supra* at 173.

FCC 74-390

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
ESTABLISHING A BOARD OF COMMISSIONERS

ORDER

(Adopted April 16, 1974; Released April 30, 1974)

BY THE COMMISSION:

1. Between April 19 and June 10, 1974, Commissioner Robert E. Lee will be absent from the country in his capacity as Chairman of the United States Delegation to the World Administrative Radio Conference for Maritime Mobile. In view of the fact that the Commission presently has only four members, we hereby establish a Board of Commissioners, pursuant to Section 5(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(d), consisting of all commissioners present and able to act, which is authorized to act from April 19, 1974 until further order of the Commission upon all matters normally acted upon by the Commission *en banc* except those matters specified in Section 5(d) as being beyond the Commission's delegation authority. This delegation is without prejudice to the reference of appropriate matters to Commissioner Lee during this period for his consideration and vote.

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

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
JOHN CERVASE
Concerning the Fairness Doctrine Involving WNJU–TV, Newark, N.J.

APRIL 19, 1974.

JOHN CERVASE, Esq.,
423 Ridge St.,
Newark, N.J.

DEAR MR. CERVASE: This is in response to your complaint filed February 21, 1974 alleging violations of the fairness doctrine by WNJU–TV, Newark, New Jersey. In particular, you allege that WNJU–TV has failed to present contrasting views on the following topics: Kawaida Towers, the federal government housing policy, a "garbage riot" at City Hall and an attempt to overthrow the government of Portuguese Guinea. You enclosed copies of your correspondence with WNJU–TV.

In your letter to WNJU–TV of October 15, 1973, a copy of which you sent to the Commission, you stated that during the Black New Ark program of October 13, 1973, the program host and guest discussed controversial issues of public importance; that they criticized the present status of Kawaida Towers and stated that white ethnics (Italians) got special treatment there from government and political groups; that they criticized the present and future federal government housing policies because of discrimination of blacks and hispanics; that they blamed the "garbage riot" on the mayor and claimed that the police had no reason to stop the mob from occupying City Hall; that the host urged viewers to support the overthrow of the government of Portuguese Guinea; and that WNJU–TV should fulfill its fairness doctrine obligation to present contrasting views.

In your letter to WNJU–TV of October 31, 1973, you stated that Frank Hutchins, a legally qualified candidate for the 29th District of New Jersey, appeared on the Black New Ark program of October 13, 1973; that you believed that David Barrett and Alphonso Roman, both legally qualified candidates, appeared recently; that equal time must be offered to other legally qualified candidates; that discussion by these candidates of their platforms raised a controversial issue of public importance and conflicting views must be presented; that permitting only those candidates to appear constituted a political editorial; and that WNJU–TV had a commercial agreement with the City of Newark for the use of Symphony Hall and with Baraka for the Black New Ark program.

In its reply to you of November 5, 1973, WNJU–TV stated that it did not have an affirmative duty under Section 73.657(e) to "identify" other legally qualified candidates and offer them equal time; that it

neither endorsed nor opposed any political candidate or granted anyone an exclusive use of the facility; that no candidate requested equal opportunities; that an appearance by a candidate did not create a controversial issue of public importance but that if controversial issues of public importance were discussed on the program, conflicting views would be presented as WNJU–TV previously had advised you; and that while the nature of the lease of space from the City of Newark and the commercial relation with Baraka were confidential financial matters, there was no commercial relationship presently with Baraka.

In your letter to WNJU–TV of December 31, 1973, you stated that WNJU–TV had agreed to notify you when it planned to present conflicting views but was tardy in fulfilling its obligation. In response to Commission inquiry whether it had notified you as it had promised, WNJU–TV stated in its letter to you of February 1, 1974 that contrasting views on the Kawaida Towers controversy had been presented on May 19, 1973; that contrasting views on the federal government housing policy were to be presented on February 9, 1974; that the discussion of the attempted occupation of City Hall, the "so-called 'garbage riot,'" did not raise a controversial issue of public importance; and that the discussion of attempts to overthrow the government of Portuguese Guinea dealt solely with the internal affairs of a foreign government and did not raise a controversial issue of public importance.

In your letter to the Commission of February 18, 1974, in response to WNJU–TV, you stated that nine months had passed between the May 19, 1973 Kawaida Towers program and the date of your letter which interval was too lengthy for compliance with fairness doctrine obligations and that the program host urged the public to vote for the Unity Movement candidates (Hutchins, Barrett and Roman) which created fairness doctrine obligations.

The fairness doctrine requires a station which presents one side of a controversial issue of public importance to afford a reasonable opportunity for the presentation of contrasting views in its overall programming, and the broadcast licensee has an affirmative duty to encourage and implement the broadcast of those contrasting views. However, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, the format and spokesman for presenting contrasting views on the issue. The Commission will review complaints to determine whether the licensee can be said to have acted reasonable and in good faith.

Both the Commission and the courts have held that on a complaint under the fairness doctrine, the burden is on the complainant to specify the particular issue involved and substantiate its controversiality and public importance, and also to show that particular broadcast material has presented one side of the issue in a cognizable fashion and that the licensee has not afforded reasonable opportunity in his overall pro-

gramming for the presentation of contrasting views. See *Allen C. Phelps*, 21 FCC 2d 12 (1969). The Commission's preliminary review of such complaints is confined to a determination as to whether the complainant has set forth sufficient information and argument in accordance with these requirements to establish a *prima facie* case of non-compliance on the part of the licensee.

WNJU–TV stated that it presented anti-Kawaida Tower views six months prior to the Black New Ark program. The station has also stated that it was presenting views in support of the federal government housing policy on February 9, 1974, three and one-half months after the Black New Ark program. Thus you and the station each have cited one program which apparently presented contrasting views on the Kawaida Tower issue, and one program which apparently presented contrasting views on the U.S. government's housing policy. Under the circumstances herein, the three to six-month interval between the presentation of contrasting views on the above issues was not unreasonable. *Robert R. Soltis*, 23 FCC 2d 62 (1970). Therefore, it cannot be concluded that in its overall programming, WNJU–TV has failed to present contrasting views on the Kawaida Towers and the federal government housing policy issues.

As to the appearance of a candidate on Black New Ark, WNJU–TV stated that it received no request for equal opportunities from any candidate. Section 73.657(e) requires that a request for equal opportunities must be made by a candidate within one week of the day of the prior appearance. Further, no Commission rule or regulation places an affirmative duty upon a licensee to notify or to "identify these candidates and offer them free time."

You stated that the appearance of several Unity Movement candidates on the Black New Ark program raised the political editorializing rule, since the candidates were permitted exclusive use of WNJU–TV, and the fairness doctrine since the candidates had discussed their platforms. The political editorializing rule, Section 73.657(e), applies only, "Where a licensee, in an editorial, (1) endorses or (2) opposes a legally qualified candidate or candidates . . .". WNJU–TV stated that it neither endorsed nor opposed any legally qualified candidate or granted any candidate exclusive use of its facility. Thus it does not appear that the political editorializing rule is applicable here to actions or comments of a program host. With respect to the fairness doctrine, you have not supplied specific information concerning what the candidates said and how such constituted controversial issues of public importance.

With respect to the discussion of the "garbage riot" and the attempted overthrow of the government of Portuguese Guinea, WNJU–TV stated that neither topic raised a controversial issue of public importance. You have not shown what was said, what views were expressed or why either topic should be considered a controversial issue of public importance. Under these circumstances it cannot be concluded that the licensee's judgment was unreasonable.

In view of the foregoing, no further Commission action is warranted.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division,
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
DR. PATRICK MICHAELS
Concerning the Fairness Doctrine Involving Station KGO, San Francisco, Calif.

APRIL 24, 1974.

DR. PATRICK MICHAELS,
P.O. Box 832,
Corona del Mar, Calif.

DEAR DR. MICHAELS: This is in reference to your complaint against station KGO–TV and radio station KGO, San Francisco, California, wherein you claim that these stations broadcast a personal attack on you and failed to comply with the Commission's personal attack rule.

You state that the attacks took place on the Jim Dunbar program on KGO–TV and were also carried on Mr. Dunbar's radio program on KGO on the morning of January 29, 1973;[1] that, although the exact wording of the statements could not be determined because of KGO's failure to notify you of the attack and refusal to supply you with a transcript, the personal attack consisted of statements to the effect that you were "dishonest, incapable, a fraud, a charlatan and totally worthless," and of statements made in a fictitious account of an interview with you; that the personal attacks by "various talk program announcers" continued for "several weeks"; that the statements "were the subject of numerous complaints to . . . [you] by residents of the listening area of KGO–TV and KGO radio, including complaints and expressions of outrage by members of the California State Legislature"; that the personal attacks occurred during the discussion of views on an issue of public importance, a "pre-delinquency" behavior modification program, as evidenced by the fact that the California State Legislature had ordered an investigation of the issue; and that the stations did not notify you of the attacks, provide you with a tape, transcript or summary, or offer you a reasonable opportunity to reply as required by Commission rules, in spite of your repeated telephone and written requests.

The Commission requested ABC, Inc., licensee of KGO–TV and KGO to comment on your complaint. In reply to the Commission's inquiry, ABC stated that it was "not convinced that the 'pre-delinquency program' was a controversial issue of public importance in the community at the time of the broadcast on January 30"; that the issue

[1] You first contacted the station by letter of August 25, 1973. Your complaint to the Commission was received October 5, 1973, and our inquiry to the station was sent on October 15, 1973. The last correspondence in this matter was received from you on November 20, 1973.

had been the subject of a few newspaper articles and one editorial on another area radio station, but "was not one widely debated nor sustained for any length of time through various voices in the community"; that "it is difficult to evaluate whether or not the issue was one of public importance inasmuch as it arose and then subsided so quickly that its public impact was virtually impossible to assess"; and that "in that light, it is difficult to clearly characterize the matter as having risen to the level of an 'issue of public importance.'" ABC further stated that, although there was one telephone inquiry on the "pre-delinquency" program on Jim Dunbar's January 29, 1973 "A.M." Show on KGO–TV, there was no "significant discussion" of the issue; that a review of KGO–TV programming records for the seven-day period following January 29, 1974 indicated that no other mention was made of you or the "pre-delinquency" issue during that time span; and that an "exhaustive search" was made of KGO's available programming records "to determine if there was any possible foundation to . . . [your] personal attack allegation."

ABC declared that two members of the KGO news staff had investigated some of the assertions made in your January 25 newspaper article; that one of the newsmen contacted you "not to obtain an interview . . . , but instead to invite . . . [you] to appear on KGO radio to discuss the 'pre-delinquency' program"; that you spoke to the newsman about the article, indicated that you stood by your article, and refused to appear on the show; that on January 30, 1973, the two newsmen appeared on Jim Dunbar's morning show on KGO radio and discussed your article; that at the start of the program Mr. Dunbar outlined the thrust of the article in a "factual and affirmative" manner; that after Mr. Dunbar's outline, the two newsmen, "based on the results of their investigation, challenged a number of factual assumptions inherent in Dr. Michaels' position" and "expressed the view that the Michaels' article was written in a manner which accentuated the sensational impact of its premises and that the article's conclusions suffered from inadequate research and documentation"; and that this discussion did not constitute a personal attack on Dr. Michaels.

According to ABC, immediately following this discussion KGO broadcast five telephone calls with listeners which concerned some of the general issues discussed in your article, but none of these calls "specifically referred either to the article or to Dr. Michaels"; that on the afternoon of January 30, on a KGO newscast, a report was broadcast on the pre-delinquency program criticized by you; that the report was based on the investigation of the two KGO news reporters and it "questioned certain of Dr. Michaels' factual assumptions, the adequacy of his documentation, and the validity of its conclusions," but did not contain a personal attack on you; that KGO checked its station records and "caller logs" for a two-week period following the January 30 program; that the records did not indicate any mention of you or your article during this time period; that "none of the . . . material broadcast by KGO could be interpreted as an attack on Dr. Michaels' character, honesty or integrity"; that "Dr. Michaels is either incorrect or misinformed when he asserts that KGO broadcast statements to the

effect that he was 'dishonest, incapable, a fraud, a charlatan and totally worthless' "; that a review of KGO promotional material aired in May and June "did not disclose any mention either of the issue or Dr. Michaels personally"; and that KGO believes it afforded a reasonable opportunity for the presentation of your thesis in that the station had invited you to appear on the program to present your viewpoint.

In response to ABC's reply you state that, contrary to the licensee's assertion that the issue was not a controversial issue of public importance, the article was carried in over one hundred thirty newspapers; that an article by syndicated columnist Nicholas Von Hoffman on the issue was carried in an additional two hundred newspapers; that the California State Legislature held three special meetings and ordered a special investigation by its Legislative Audit Committee on the issue; that "numerous statements of Federal, state, and local officials" were "published in hundreds of newspapers, with regard to the issue"; that the licensee's investigation of its records was inadequate to prove that the statements complained of were not made, as the "caller logs" are not an accurate record of what is actually broadcast on the station; that "the station does not deny it aired such material, but indicates it has no recollection of them"; and that the attacks by KGO and KGO–TV were heard "by many prominent Californians." In your response you enclosed a copy of a Law Enforcement Assistance Administration bulletin containing a comment on the issue of the "pre-delinquency" program, a copy of Nicholas Von Hoffman's syndicated column, a copy of a letter to you from the office of Senator Alan Cranston expressing concern over the issue, and a letter to you from an assistant psychology professor at California State University at San Diego expressing concern over the "pre-delinquency" program and seeking further information.

When, during the presentation of views on a controversial issue of public importance, an attack is made upon an identified person or group, it is the duty of the licensee to notify the person or group attacked, to send a recording, transcript or as accurate a summary as possible, and to afford an opportunity for response.

You claim that material was broadcast stating that you were "dishonest, incapable, a fraud, a charlatan and totally worthless." However, the licensee denies that any such remarks were broadcast. It states that the broadcast only questioned the research, documentation, assumptions and conclusions of your article and made no reference to your being "dishonest, incapable, a fraud, a charlatan and totally worthless." You allege that these comments were in fact made, "were noted . . . by many prominent Californians," and "were the subject of numerous complaints to (you) by residents of the listening area of KGO–TV and KGO radio." However, you have provided no evidence to support your claim that these words were broadcast other than your own statement which was based on second-hand information. All of the supplementary information provided with your complaint and response dealt with the controversiality and importance of the issue rather than with the wording of the alleged personal attack. In the absence of such evidence it would be unreasonable to require a licensee to disprove unsupported allegations.

Under the fairness doctrine, if a licensee broadcasts one side of a controversial issue of public importance, it must afford a reasonable opportunity for the presentation of contrasting viewpoints. The fairness doctrine does not require that equal time be afforded for each side as would be the case if a political candidate appeared on the air during his campaign. Instead, the licensee has an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming which, of course, includes statements or actions reported on news programs.

Assuming *arguendo* that the matter broadcast herein presented viewpoints on one side of a controversial issue of public importance, you have made no showing that KGO–TV and KGO have failed in their overall programming to afford reasonable opportunity for the presentation of contrasting views. *Allen C. Phelps*, 21 FCC 12 (1969). Therefore no determination can be made as to whether a fairness doctrine violation has occurred.

In view of the above it appears that no further Commission action is warranted at this time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

104 036– 74 ––– 7

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of FAIRNESS IN BROADCASTING COMMITTEE OF THE CITIZENS COUNCIL Concerning the Fairness Doctrine Involving CBS	)

APRIL 24, 1974.

MR. GORDON LEE BAUM,
Fairness in Broadcasting Committee of the Citizens Council, P.O. Box 9683, Kirkwood, Mo.

DEAR MR. BAUM: This is in reference to your letters to the Commission dated February 11, and April 3, 1974, wherein you make a complaint against CBS concerning its broadcast of "The Autobiography of Miss Jane Pittman." In your letter of February 11, 1974 you stated that in the program "the truth and history was grossly distorted and virtually every white . . . was depicted as bad"; that "the program was one-hour of undiluted anti-white racism"; and that this program dealt with "very controversial issues of extraordinarily great public importance." With your letter to the Commission of February 11 you sent a copy of a letter from you to CBS dated February 11, 1974, wherein you stated that "the subject matter of the aforesaid program, the nature of this nation's race problem (and related areas of discrimination, civil rights, desegregation, etc.), as well as its causes and solutions, is a very controversal issue of extraordinarily great public importance"; that an "objective viewing of the . . . program will reveal that it was a deliberate distortion of the truth and historical events stacked with bias[ed] opinions evidently designed to brainwash the public and to instill feelings of guilt in the white population"; that the "South and Southerners were degraded and slandered"; that "all the blacks were depicted as level-headed, hard-working, intelligent, heroic figures"; that the "horrors inflicted upon the whites of the South during Reconstruction were completely ignored and only the Negro view was presented"; and that "[i]njuries suffered by blacks during the 'civil rights' disturbances of the early 1960's were magnified out of proportion, while the much more common problem of injuries inflicted upon innocent whites by black criminals was conveniently ignored."

In reply to your letter of February 11 you were sent a letter dated March 7, 1974 containing detailed directions on the information which a complainant must provide before action can be taken on a fairness doctrine complaint.

In your letter of April 3, 1974 you stated that the information described in the Broadcast Bureau's letter of March 7 had already been

provided in your letter of February 11. With your letter to the Commission of April 3 you enclosed a copy of a letter dated March 21, 1974 to you from CBS, wherein CBS stated that the program "was fiction and was so described repeatedly to the public" and therefore there was "no reason to believe that 'much of the viewing public was deceived into believing that it was a true story depicting actual historical events' "; that CBS "most emphatically [took] exception to your assertion that the broadcast constituted an 'extreme example of anti-white racism' "; and that "this story of a fictional character was designed not to advance a particular point of view on a controversial issue or to "brainwash the public." In reference to these statements by CBS, you stated in your letter of April 3 that an "objective viewing of the program would prove beyond a doubt that the program did, in fact, present one sided views and opinions of controversial issues of . . . public importance" and that "[t]o date, CBS has not afforded an opportunity for the public to be presented opposing views."

As stated in our letter of March 7, when making a fairness doctrine complaint to the Commission a complainant must provide specific detailed information, including, (1) the specific issue of a controversial nature of public importance broadcast (complainant should include an accurate summary of the views presented by the station or network); (2) the basis for the claim that the issue was a controversial issue of public importance, either nationally or in the station's local area at the time of the broadcast; (3) reasonable grounds for the claim that the station or network broadcast only one side of the issue *in its overall programming;* and (4) whether the station or network has afforded, or has expressed an intention to afford, reasonable opportunity for the presentation of contrasting viewpoints on that issue.

You have failed to provide any reasonable basis for your claim that the program about which you complain discussed any controversial issue of public importance. You have not shown that the hardships faced by blacks immediately following the civil war, the "degradation" or "slander" of Southerners, or the "[i]njuries suffered by blacks during the 'civil rights' disturbances of the early 1960's" were controversial issues of public importance, either locally or nationally, at the time of the broadcast. The fact that the program may not have dealt with the "horrors inflicted on the whites of the South during Reconstruction" does not render a portrayal of the hardships of freed slaves or their depiction as "level-headed, hard-working, intelligent, heroic figures" as a controversial issue of public importance. Neither does the failure to deal with the "problem of injuries inflicted on innocent whites by black criminals" make the "[i]njuries suffered by blacks during the 'civil rights' disturbances of the 1960's" a controversial issue of public importance.

The Commission stated in its Public Notice of July 1, 1964, Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance (a copy of which was enclosed in our letter to you of March 7):

> [T]he licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved . . . In passing on any

complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to . . . the above programming [decision], but rather to determine whether the licensee can be said to have acted reasonably and in good faith. 29 Fed. Reg. 10416.

In view of the above it cannot be said that CBS' judgment that the program did not present a controversial issue of public importance was unreasonable.

Assuming, *arguendo*, that a controversial issue of public importance has been presented, you have not made any showing whatever that CBS has failed to afford reasonable opportunity *in its overall programming* for the presentation of contrasting viewpoints. As the Court of Appeals for the District of Columbia has stated:

> On a complaint under the fairness doctrine, the burden is not only on the complainant to define the issue, but also to allege and point specifically to an unfairness and imbalance in the programming of the licensee devoted to this issue. It is not enough for the complainant to allege that there is a controversial issue of public importance on which the complainant wants to be heard on the licensee's station. The essential element in invoking the fairness doctrine is that the licensee has not hitherto provided fair and balanced programming on this particular issue, and therefore, and only therefore, can the complainant assert a right for someone to be heard to rectify the existing imbalance. *Healey* v. *FCC*, 460 F. 2d 917, 921 (D.C. Cir. 1972).

In view of the above it appears that no Commission action is warranted on your complaint.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief*,
for Chief, Broadcast Bureau.
Complaints and Compliance Division

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
DR. GENE INCH
Concerning the Fairness Doctrine Involving Station WNBC, New York

APRIL 25, 1974.

DR. GENE INCH,
National Caucus of Labor Committees,
P.O. Box 1972 GPO, New York, N.Y.

DEAR DR. INCH: This is in response to your complaint of March 6, 1974 wherein you allege that Radio Station WNBC, New York, New York violated both the "equal time provision" of Section 315 of the Communications Act of 1934 and the personal attack corollary to the Commission's fairness doctrine during two of its broadcasts. Specifically, you state that during the "Gordon Hammett Show" on January 18, 1974, in which behavioral modification was to be discussed, two members of the U.S. Labor Party, Tony Chaitkin and Zeke Boyd, both candidates for statewide office in New York, were asked by Hammett "Have you ever been in a mental hospital?" and "Are you on drugs or have you ever been on drugs?". You contend that these questions constituted personal attacks upon both men. You further state that on a February 20, 1974 broadcast over WNBC, both Hammett and Barry Cornet, who is also an employee of the licensee station, remarked that Chaitkin and Boyd, as well as other members of the U.S. Labor Party were under psychiatric treatment; that aside from being totally false, this statement assailed the character of these individuals; and that the licensee never informed the two men of either attack, sent transcripts or summaries of the broadcasts or have ever offered them an opportunity to reply to these statements.

The "equal time provision" of Section 315 of the Communications Act applies when a licensee has afforded a legally qualified candidate an opportunity to use its facilities. Until such "use" takes place, no candidate has a right to request equal opportunities. As your complaint cites no such prior "use" by a legally qualified opponent of either Chaitkin or Boyd, the "equal time provision" is inapplicable.

The personal attack rule was established by the Commission to effectuate important aspects of the fairness doctrine. The fairness doctrine requires a station which presents one side of a controversial issue of public importance to afford reasonable opportunity for the

presentation of contrasting views in its overall programming, which includes news programs, interviews, discussions, debates, speeches, and the like. The personal attack rule is set forth in Section 73.123(a) of the Commission's Rules and states as follows:

> When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonble opportunity to respond over the licensee's facilities.

With regard to the January 18 broadcast, you have stated that Messrs. Chaitkin and Boyd were on the air during, and for approximately ten minutes after, the alleged personal attack. Under these circumstances it would appear that they could have responded to the remarks at that time. You have furnished no information to the contrary. In such a situation, it cannot be concluded that the licensee violated the personal attack rule.

The February 20 comment occurred during a program in which neither Chaitkin nor Boyd was present. Your complaint indicates that it was the licensee's position that no personal attack occurred during that broadcast. The licensee is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance was involved or whether there was a personal attack. The Commission's role is not to substitute its judgment for that of the licensee on these matters, but rather to determine whether the licensee can be said to have acted reasonably and in good faith. *Sidney Willens and Russell Millin*, 33 FCC 2d 304 (1972).

You have provided no information as to whether the comment about which you complain was made during a discussion of a controversial issue of public importance. Accordingly it cannot be concluded that the personal attack rule is applicable. Moreover, the personal attack rule is applicable only if an attack is made upon those personal qualities bearing on the moral rectitude or personal credibility of the named individual or group, and not merely a reflection upon ability, knowledge or like intellectual or motor skills. See *Letter to Rome Hospital and Murphy Memorial Hospital*, 40 FCC 2d 452 (1973). Thus stating that these individuals were under psychiatric care, without more, would not on its face constitute a personal attack. Not every unfavorable reference to an individual or group is a personal attack, *Jack Luskin*, 23 FCC 2d 874 (1970); nor does an attack on a specific person or group constitute, itself, a controversial issue of public importance requiring the invocation of the personal attack rule.

In view of the foregoing no further Commission action appears warranted at this time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days

by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
TOM R. UNDERWOOD
Concerning the Fairness Doctrine Involving Station WLAP, Lexington, Ky.

APRIL 24, 1974.

TOM R. UNDERWOOD, JR., Esq.,
Security Trust Bldg.,
Lexington, Ky.

DEAR MR. UNDERWOOD: This is in reference to your complaint of November 12, 1973 against station WBLG–TV and radio station WLAP, Lexington, Kentucky. In your complaint you stated that "on or about November 3 and November 4, Foster Pettit a candidate for Mayor running for re-election, made certain statements on radio and television commercials, including words to the effect that 'During the past administration Tom Underwood was indicted in several counties and the indictments were justified' "; that you felt that under the fairness doctrine you were entitled to be informed of the exact wording of commercials to that effect; and that the stations had so far refused your request for transcripts. On December 10, 1973, the Commission, by letters to the stations, requested their comments on your complaint.

In a letter dated December 14, 1973, WBLG–TV responded to your complaint. It stated that it "did broadcast the matter in question as part of a paid political program on November 4th", and that the announcement stated in part:

> First of all, I need to perhaps explain why I ran for Mayor two and a half years ago. As a citizen of this community, I was very disturbed about the course of city government, the leadership that was there under Tom Underwood. There were political abuses not only with the public but with the city employees. We were in a terrible financial condition because we couldn't pay our bills. Our credit was bad. There were sewer problems. You know, we were being sued by nearly anybody that could get to the Courthouse. We were indicted, even, by the Grand Jury of an adjoining county. And let me tell you we were found guilty of common law nuisance of polluting the streams of an adjoining county.

WBLG–TV has informed the Commission that it broadcast no other announcement on November 3 or November 4 which made any mention of you. WBLG–TV stated that the announcement it did broadcast "did not constitute an attack upon the 'honesty, character, integrity or like personal qualities' of Mr. Underwood" for the following reasons: (1) the city of Lexington is governed by "a Mayor and four Commissioners," and in "the election of 1971, Mr. Underwood and the two Commissioners associated with him were defeated by Foster Pettit"; (2) "Mr. Pettit's administration replaced Mr. Underwood's

administration and in seeking reelection, Mr. Pettit could be expected to contrast the two"; (3) "the references to Mr. Underwood concern matters which Mr. Pettit attributes to the city government when it was under Mr. Underwood's control"; and (4) "the conclusions reflect a candidate's opinion concerning the city government under a previous city official and in that context, could not be considered a personal attack." WBLG–TV also stated that two replies by Mr. Underwood to previous Pettit ads were broadcast a total of three times despite the fact that WBLG–TV believed that the prior Pettit ads also did not constitute personal attacks on Mr. Underwood.

In a letter dated December 14, 1973, WLAP responded to your complaint. WLAP stated that it did broadcast paid political announcements, but that "there was no political announcement aired on WLAP at any time during the mayoral campaign which made reference to an indictment of Mr. Tom Underwood for any reason whatsoever or anywhere"; that WLAP "was not of the opinion that the statements by Mr. Pettit in his taped announcement constituted an attack upon the 'honesty, character, integrity or like personal qualities' of Mr. Underwood," but that "it appeared that Mr. Pettit's remarks referred only to the events and actions leading up to and following Mr. Underwood's election 'four years ago' and his subsequent service as a public official in Lexington"; that the announcements broadcast on November 3 and November 4 were the same as those broadcast in October; and that, although WLAP did not feel that the announcements constituted a personal attack on Mr. Underwood, the station broadcast Mr. Underwood's reply to those announcements a total of four times on October 29 and 30, 1973. In a covering letter from counsel for WLAP dated December 20, 1973, counsel stated that they had advised radio station WLAP "that because Mr. Pettit's announcement was a 'use' of the station's facilities which could not be censored, no personal attack obligation would be incurred by the station . . . even if Mr. Pettit's remarks could be construed as a personal attack on Mr. Underwood"; and that counsel for WLAP knew "of no prior Commission ruling that the personal attack provision . . . applies to a 'use' by a candidate for public office" and did not "believe that the personal attack rule should be extended to cover such a 'use' " since the "station has no authority to censor such broadcasts and should, consequently, not be required to provide time for response to candidates."

In your reply to the response of WBLG–TV, dated December 20, 1973, you stated that "WBLG did not make a complete disclosure"; that the text included in WBLG's reply, "although an extremely damaging personal attack against me, was a three minute, possibly free, Sunday November 4 showing" but that your complaint was about "a 30 second or 60 second spot that ran on WBLG at least once following the football game on November 3 (Saturday)"; that "the stations apparently are attempting to conceal the scripts"; that you asked for scripts shortly after they were broadcast "on or around the November 4 week-end"; that you had been informed that the announcement about which you complain said, in effect, that "indictments were returned and they were justified," with "indirect reference" to you; that elsewhere in the announcement "Pettit said [you]

left the city on the verge of bankruptcy"; that the words "constituted an attack on [your] honesty, character, integrity and business ability" because your business consists of providing financial advice to municipalities and rural areas and because you were indicted and acquitted of "contrived bribery charges"; that "WBLG newsmen . . . [have] consistently over a period of many months made occasional timely unfair personal attacks" on you, including the use of an "extremely ugly" picture of you in connection with news stories.

In your reply to the response of WLAP, dated December 21, 1973, you stated that WLAP's statement that no announcements run on WLAP referred to an indictment of Mr. Underwood "may be technically correct"; that "Mr. Pettit's spots said *in effect, I have been told:* 'indictments were returned and they were justified' "; that the indictments referred to you since you "got the headlines on the indictments," as described in your reply to WBLG–TV of December 20, 1973; that "the stations . . . now claim that they have no scripts of the 30 or 60 second spots involved which were heard by people all over Lexington"; and that the "indictments script run on or about November 3 is obviously different from the script run during October." In a further reply to the response of WLAP, dated December 26, 1973, you stated that if the person who is attacked is a candidate or a spokesman for a candidate, that person is excluded from the protection of the fairness doctrine, and is fair game under FCC rules," but that you were "neither a candidate nor a spokesmen for a candidate," and, the "attack by candidate Pettit, therefore, was not a 'political use' of the station but was a 'personal use.' " In response to your replies, counsel for WLAP sent a letter to the Commission dated January 14, 1974, stating that your claim that the ad run on November 3, 1973 was different from those aired in October 1973 was "a mistatement of the facts." Counsel enclosed a letter from the president of WLAP which stated that "at no time was there a statement to the effect that Mr. Tom Underwood was 'indicted in several counties and the indictments were justified,' " and that there was only one radio advertisement made by Foster Pettit, the text of which was included in Mr. Underwood's letter to the Commission of October 29, 1973, and in WLAP's response to Commission inquiry dated December 14, 1973; and that that ad was the only political spot broadcast for Foster Pettit during October and November 1973. (That announcement stated that "the financial chaos that followed [your] election [in 1971] brought this city to the brink of bankruptcy" and referred to this as "political irresponsibility." The announcement contained no reference to an indictment of you. The Commission previously had advised you (on October 31, 1973) that these statements did not constitute a personal attack within the meaning of the Commission's Rules.)

Section 73.123(a) of the Commission's Rules states that when, during the presentation of views on a controversial issue of public importance, an attack is made upon an identified person or group, it is the duty of the licensee to notify the person or group attacked, to send a recording, a transcript or as accurate a summary as possible, and to afford a reasonable opportunity to the attacked individual or group for a response. Section 73.123(b) of the Commission's rules, which

contains exceptions to the personal attack rule, reads, in pertinent part, as follows:

> (b) The provisions of paragraph (a) of this section shall not be applicable . . . (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, *on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign* (Emphasis supplied.)

However, the Commission has held that the personal attack rule is applicable to a personal attack made by a candidate during a political broadcast on a person or group not covered by Section 73.123 (b). The Commission stated that the "same public interest reasons supporting the personal attack rule are applicable" to attacks on non-candidates by candidates during political broadcasts, and those public interest reasons "clearly" are not "outweighed by the consideration that the licensee cannot censor the broadcast of the candidate who made the attack," since the only burden on the licensee in such a case is to inform the attacked non-candidate, send him a copy of the attack, and offer a reasonable opportunity to reply. *Capitol Cities Broadcasting Corp.*, 13 FCC 2d 869 (1968). Since you state without contradiction by any of the stations that you are not a candidate or in any way associated with any campaign for public office, a personal attack on you in the course of a political broadcast would come within the Commission's personal attack rule.

In connection with personal attack, the Commission has stated:

> In reviewing personal attack complaints the Commission's function is not to substitute its own judgment for that of the licensee, but to determine whether the licensee has acted reasonably and in good faith at arriving at its decision as to whether a personal attack has been made. *Sidney Willens and Russell Millin*, 33 FCC 2d 304 (1972).

Regarding the statements that you "left the city on the verge of bankruptcy," it cannot be said that the stations were unreasonable in their judgment that this language did not fall within the Commission's definition of a personal attack. WBLG–TV stated that these statements were only comparisons between Mr. Pettit's and your administrations and only reflected "a candidate's opinion concerning the city government under a previous city official." WLAP stated that these statements "referred only to the events and actions leading up to and following Mr. Underwood's election 'four years ago' and his subsequent service as a public official." The Commission has stated:

> Criticism of a public official's wisdom, judgment or actions is not necessarily an attack upon his "honesty, character, integrity or like personal qualities," and we have stated that we shall not impose penalties in this area if the licensee could have had a reasonable doubt whether such an attack had taken place, or indeed in any case which does not involve a flagrant, clear-cut violation. *Letter to WCMP Broadcasting Company*, 41 FCC 2d 201 (1973).

You also complain that "[o]n or about November 3 and November 4" a political advertisement for mayoral candidate Foster Pettit contained the statement to the effect that during the past administration "Tom Underwood was indicted in several counties and the indictments were justified." In response to this claim, radio station WLAP denied ever having broadcast a political advertisement "which made reference to an indictment of Mr. Tom Underwood for any reason

whatsoever or anywhere." Station WBLG–TV stated that on November 4, 1973 it broadcast a paid political announcement which said, in part, in reference to the city's government, "We were indicted, even, by the Grand Jury of an adjoining county. And let me tell you we were found guilty of common law nuisance of polluting the streams of an adjoining county." In reply to these statements you stated that you were not referring to the Novembe 4, 1973 broadcast described by WBLG–TV's response, but to an advertisement run on WBLG–TV after a football game on November 3, which you had been informed stated in reference to you that "indictments were returned and were justified"; that station WBLG–TV and radio station WLAP were not making a full disclosure; and that the text of the November 3 ad was "obviously" different from the ads run in October. You originally claimed that the advertisement of which you complain was broadcast "[o]n or about November 3 and November 4"; yet when WBLG–TV provided the text of an advertisement run on November 4 containing a reference to an indictment, you state that the offending advertisement was broadcast on November 3, not November 4. You state that the statement that "indictments were returned and were justified" was "heard by people all over Lexington." However you provide no evidence to substantiate your claim of the use of this wording on WBLG–TV or WLAP except your own statement, which, itself is based on second-hand information. You have failed to show that WLAP broadcast any statement concerning an indictment of you. In the absence of more specific information and evidence concerning the wording of the "indictment" statement on WBLG–TV it must be assumed that the text included in WBLG–TV's letter of December 18, 1973 is an accurate transcript of the political announcement which was broadcast on WBLG–TV. That text indicated that the city, rather than you in particular, had been indicted, apparently for the "common law nuisance of polluting the streams of an adjoining county." Again, the determination by the stations involved that this did not constitute an attack on your "honesty, character, integrity or like personal qualities" cannot be found to be unreasonable, much less a "flagrant, clear-cut violation." Therefore, the broadcast of this statement does not constitute a personal attack on you within the meaning of the Commission's rules. WBLG–TV has informed the Commission that it broadcast no other announcement which made any mention of you on November 3 or November 4.

In view of the foregoing no further action is warranted on your complaint.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
LILLIAN BAKER
Concerning the Fairness Doctrine Involving Station KNX

APRIL 22, 1974.

MRS. LILLIAN BAKER,
15237 Chanera Ave.,
Gardena, Calif.

DEAR MRS. BAKER: This is in reference to your letter to the Commission dated March 22, 1974. In your letter you stated that radio station KNX, in two separate editorials, incorrectly referred to the "War Relocation Camps" in which Japanese-American citizens were interned during World War II as "concentration camps"; that you recorded a rebuttal to one of those editorials, but it was broadcast by KNX as a rebuttal to the other, distorting its meaning; that by broadcasting the editorials KNX was using "the airways to broadcast dogma which misrepresents, distorts, and belies a Supreme Court decision"; and that the editorials were "a ruthless and irresponsible violation of not only the 'Fairness Doctrine' but a misrepresentation by CBS and its affiliate stations to present a series of indoctrinational programs aimed at influencing the public in accepting an anti-American viewpoint."

The Commission is prohibited by Section 326 of the Communications Act from censoring broadcast matter, and it does not attempt to direct broadcasters in the selection or presentation of specific programming.

However, if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. This policy, known as the fairness doctrine, does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign. Instead, the broadcast licensee has an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming which, of course, includes statements or actions reported on news programs. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if

so, how best to present contrasting views on the issue. The Commission will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith. For your further information, we are enclosing a copy of the Commission's Public Notice of July 1, 1964, entitled "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance."

Where complaint is made to the Commission, the Commission expects a complainant to submit specific information including: (1) the specific issue of a controversial nature of public importance broadcast (complainant should include accurate summary of the views broadcast and presented by the station or network); (2) the basis for the claim that the issue was a controversial issue of public importance, either nationally or in the station's local area at the time of the broadcast; (3) reasonable grounds for the claim that the station or network broadcast only one side of the issue in its overall programming; and (4) whether the station or network has afforded, or has expressed an intention to afford, reasonable opportunity for the presentation of contrasting viewpoints on that issue.

From the information before the Commission it does not appear that KNX has acted unreasonably. You have not shown that the relocation of Japanese-Americans during World War II was a controversial issue of public importance at the time of the broadcast. *Letter to Kilsoo Hahn*, 37 FCC 2d 547; or that the placing of a commemorative plaque at the site of one of the relocation camps involved the discussion of viewpoints on a controversial issue of public importance. Moreover, even if the broadcasts involved a controversial issue of public importance, you have not shown that KNX failed to afford a reasonable opportunity in its overall programming for the presentation of contrasting views, especially in light of your own appearance in rebuttal to one of the editorials.

In view of the above it appears that no Commission action is warranted at this time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
R. W. WEITZENFELD
Concerning the Fairness Doctrine Involving Station WQSA/WQSR(FM), Sarasota, Fla.

APRIL 25, 1974.

Mr. R. W. WEITZENFELD,
Sheriff, Manatee County,
P.O. Box 590,
Bradenton, Fla.

DEAR MR. WEITZENFELD: This is in reference to your letter of April 1, 1974 in which you contend that you were personally attacked during a WQSA/WQSR(FM) editorial broadcast on March 15, 1974. You enclosed a transcript of the editorial entitled "Streaking," which stated in part:

> First of all, I think Sheriff Weitzenfeld is a fuddy duddy. Couldn't he turn the other cheek? He has four you know. And let's face it . . . Sheriff Weitzenfeld himself has a lot to Streak about. His penchant for arresting people in their own houses and yards, the flap over parking at Manatee High School, his love affair with the County's most expensive toy, his helicopter, his Jesse James stance complete with the Stetson hat and mounted Posses. Yes, I'm sure you'll agree, when it comes to Streaking—Sheriff Weitzenfeld is the bees knees . . .

These comments concluded with the announcement, "Organizations or individuals wishing to express opposing views may do so by contacting WQSA at 366–0424 in Sarasota, or you may write in care of Box 7700, Sarasota 33578". You question whether WQSA/WQSR (FM) served the public interest in broadcasting such comments regarding a law enforcement officer.

The Commission is prohibited by Section 326 of the Communications Act from censoring broadcast matter, and it does not attempt to direct broadcasters in the selection or presentation of specific programming.

The personal attack rule was established by the Commission to effectuate important aspects of the fairness doctrine. The fairness doctrine requires a station which presents one side of a controversial issue of public importance to afford reasonable opportunity for the presentation of contrasting views in its overall programming, which includes news programs, interviews, discussions, debates, speeches, and the like. The personal attack rule is set forth in Section 73.123(a) of the Commission's Rules and states as follows:

> When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like per-

sonal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

The licensee is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, whether there is a personal attack, and whether the group or person attacked is identified sufficiently in the context to come within the rules. The Commission's role is not to substitute its judgment for that of the licensee on these matters, but rather to determine whether the licensee can be said to have acted reasonably and in good faith. *Sidney Willens and Russell Millin*, 33 FCC 2d 304 (1972).

The licensee, in a letter dated March 27, 1974, supplied you with a transcript of the editorial and enclosed a copy of "the standard statement aired after every editorial offering an equal amount of air time to parties or individuals with opposing views". This response would indicate an attempt on its part to fulfill what it considers to be a fairness doctrine obligation—that of presenting contrasting opinions regarding a controversial issue of public importance, rather than treating this matter as within the personal attack rule. We are unable to conclude that in so doing the licensee has acted unreasonably. Not every unfavorable reference to an individual is a personal attack. *Jack Luskin*, 23 FCC 2d 874 (1970); *Mrs. Frank Diez*, 27 FCC 2d 859 (1971). Moreover, the statement of a particular view, however strongly or forcefully made, does not necessarily constitute a personal attack. *Pennsylvania CATV Ass'n Inc.*, 1 FCC 2d 1610 (1965).

The Commission has also stated that criticism of a public official's wisdom, judgment or actions is not necessarily an attack upon his honesty, character, integrity or like personal qualities. *Letter to WCMP Broadcasting Company*, 41 FCC 2d 201 (1973). The text and prior interpretation of the personal attack rule clearly indicate that its applicability is predicated upon an attack on those personal qualities bearing on the moral rectitude or personal credibility of the named individual or group, and not merely a reflection upon his judgment, knowledge or like intellectual abilities.

The fairness doctrine may be applicable to your complaint. However, you have not alleged that the station has failed to afford reasonable opportunity for the presentation of contrasting views on the matter herein in its overall programming. *Allen C. Phelps*, 21 FCC 2d 12 (1969), *FCC Procedural Manual*, 37 F.R. 20510, 20512 (1972). An explanation of the fairness doctrine and the procedures for filing fairness doctrine complaints are set forth in the enclosed informational letter.

In view of the foregoing no further Commission action appears warranted at this time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

104-036—74——8

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
GILBERT C. HOLMBERG
Concerning the Fairness Doctrine Involving Station KBRO, Bremerton, Wash.

APRIL 24, 1974.

Mr. GILBERT C. HOLMBERG,
P.O. Box 646,
Bremerton, Wash.

DEAR MR. HOLMBERG: This is in reference to your complaint against radio station KBRO, Bremerton, Washington.

In your complaint you stated that you had been sent a threatening letter by KBRO in an attempt by that station to coerce you into a debate "over the air and through a medium shown to be prejudiced"; that shortly after you filed as a candidate for Public Works Commissioner, you were called by Mr. Fergus Prestbye of the KBRO news department, who asked "Why are you running when you *know* you can't possibly win?"; and that Mr. Prestbye then informed you that your remarks were being taped for broadcasting.

In a response to your complaint filed with the Commission on January 14, 1974, KBRO stated that, as the only radio station in the county, it is "particularly concerned" with broadcasting full coverage of elections and candidates and is "very mindful of the obligation" to be impartial and objective; that your claims of partiality and bias on its part "are simply untrue"; that its extensive correspondence with you was intended to insure your awareness of its invitations to appear on KBRO; that in reference to your telephone conversation with Mr. Prestbye, you were informed at the beginning of the conversation that your comments were being recorded, you made no comment before you were so informed, and your complaint does not allege otherwise; and that your correspondence with KBRO did not indicate any dissatisfaction with your treatment by KBRO, and in fact expressed appreciation for the broadcasting of part of your telephone conversation with Mr. Prestbye. KBRO's response included a statement by Mr. Prestbye that he informed you at the outset that the conversation was being taped, and his questions were "Why did you decide at this late date to file," and whether you thought you had a chance of winning.

In your reply to the response of KBRO filed January 28, 1974, you stated that Mr. Prestbye's question was in fact "Why are you running when you *know*, you can't possibly win"; that your wife also heard the remark, which "friends agreed . . . indicated a biased opinion"; that after your reply Mr. Prestbye then indicated that "he was going to tape [your] statements"; that you thought the statement, "If we do not hear from you, this letter inviting you a second time to appear

on the Quarterdeck Show with your opponents will be aired," contained in the letter to you from KBRO dated September 10, 1973 constituted a threat; and that your letters to KBRO did "express appreciation for the invitations" because you "chose to ignore any derogatory remarks previously made as well as all gossip"; and that you felt that a candidate "should not be goaded into verbal debates which might react to the disadvantage of one or both and even degenerate into character assassination."

In reference to your claim that KBRO is biased in favor of your opponent, Section 73.123(c) of the Commission's rules states that where a licensee endorses or opposes a legally qualified candidate the licensee must, within 24 hours of the editorial, transmit to the legally qualified opponents of the candidate endorsed or to the candidate opposed notification of the date and time of the editorial, the text of the editorial, and an offer of opportunity to respond over the licensee's facilities. You have neither shown nor claimed that an editorial endorsing your opponent was broadcast; nor have you shown how KBRO was biased in its programming.

Section 73.1206 of the Commission's rules requires that before recording a telephone conversation for broadcasting a licensee must inform any party to the call that it is being recorded for broadcast. In your initial complaint you stated that after asking you the question "Why are you running for office when you *know* you can't possibly win," Mr. Prestbye then informed you that your remarks "were being" recorded for broadcasting. You did not indicate whether you made any comments before or after you were informed of the recording. In your reply to KBRO's response you stated that after you replied to Mr. Prestbye's first question, Mr. Prestbye informed you that he "was going" to record your statements. You do not indicate whether any statements were recorded prior to Mr. Prestbye's informing you. KBRO's response states that you were in fact informed of the taping prior to any of your comments being recorded. Therefore, it cannot be concluded on the basis of the available information that KBRO violated Section 73.1206 of the Commission's rules.

The Commission and the federal courts have consistently declared that devoting broadcasting time to coverage of political campaigns and elections is an important part of broadcasting in the public interest. The Commission has stated:

> The presentation of political broadcasts, while only one of many elements of service to the public . . . is an important facet, deserving the licensee's closest attention, because of the contribution broadcasting can thus make to an informed electorate—in turn so vital to the proper functioning of our Republic. *In re Licensee Responsibility as to Political Broadcasting*, 15 FCC 2d 94 (1968).

Indeed, all of the laws and regulations regarding political broadcasting which are administered and enforced by the Commission are intended to facilitate the appearance of candidates for public office on broadcast stations. Section 315 of the Communications Act of 1934 requires a licensee which permits a legally qualified candidate for public office to use its facilities to afford equal opportunities for the use of its facilities to all other legally qualified candidates for the same public office. The Supreme Court has said:

[T]he thrust of section 315 is to facilitate political debate over radio and television. Recognizing this, the Communications Commission considers the carrying of political broadcasts a public service criterion to be considered both in license renewal proceedings, and in comparative contests for a radio or television construction permit. *Farmers Educational and Cooperative Union of America* v. *WDAY, Inc.*, 360 U.S. 525 (1959).

However, while a licensee may state that a candidate did not wish to appear, in light of the licensee's obligation to carry political broadcasts, further obligations may be incurred if a licensee would make unfavorable over-the-air comments on any candidate's refusal of an offer by the licensee to appear.

There appears to have been no actual over-the-air imputation of blame to you, and no effort to force you to waive your 315 "equal time" rights. However, imputing blame to a candidate for refusing to waive his Section 315 rights or threatening to impute such blame, may impose fairness doctrine obligations on a licensee.

In view of all of the circumstances here, it appears that no further Commission action is warranted at this time. A copy of this letter is being sent to KBRO.

We are enclosing for your information copies of the Commission's Public Notices of August 7, 1970 and March 16, 1972, entitled "Use of Broadcast Facilities by Candidates for Public Office." These documents contain the provisions of Section 315 of the Communications Act, amendments enacted by the Congress, the Commission's rules, regulations and guidelines promulgated thereunder, and representative rulings and interpretations. This material should serve to inform you, generally, as to the applicability and requisites of Section 315 in given situations.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

FCC 74-420

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of FLAGLER CABLE CO., INC., FLAGLER BEACH, FLA. For Certificate of Compliance	CAC-2775 FL254

MEMORANDUM OPINION AND ORDER

(Adopted April 17, 1974; Released April 30, 1974)

BY THE COMMISSION:

1. On July 2, 1973, Flagler Cable Co., Inc., filed the above-captioned application for certificate of compliance to add two signals to an existing cable television system at Flagler Beach, Florida, within the Orlando-Daytona Beach, Florida, major television market (#55). Carriage of the following television signals has been authorized:[1]

WESH-TV (NBC, Ch. 2) Daytona Beach, Florida.
WDBO-TV (CBS, Ch. 6) Orlando, Florida.
WFTV (ABC, Ch. 9) Orlando, Florida.
WJXT (CBS, Ch. 4) Jacksonville, Florida.
WJCT (Educ., Ch. 7) Jacksonville, Florida.

Flagler has requested authorization to carry the following distant signals:

WTLV (NBC, Ch. 12) Jacksonville, Florida.
WJKS-TV (ABC, Ch. 17) Jacksonville, Florida.

Recognizing that the applicable signal carriage rules in Section 76.63 do not permit carriage of the proposed signals, Flagler also has requested a waiver of the rules, pursuant to the special relief provisions of Section 76.7. Cowles Florida Broadcasting, Inc., licensee of Station WESH-TV, Daytona Beach, Florida, has filed an objection to the subject application and Rust Craft Broadcasting Co., licensee of Station WJKS-TV, Jacksonville, Florida, has filed a petition in support of Flagler's application.

2. In support of its waiver request, Flagler Cable argues that the Commission's list of significantly viewed signals[2] which excludes

[1] *Flagler Cable Company, Inc.*, FCC 73-241, 39 FCC 2d 930.

[2] Section 76.63 which incorporates by reference Section 76.61(a)(5) of the Rules allows carriage of the signals of: "Commercial television broadcast stations that are significantly viewed in the community of the system. See Section 76.54."

The television signals listed in Section 76.54 as significantly viewed in Flagler County are those of:

WESH-TV Ch. 2 Daytona Beach, Florida.
WDBO-TV Ch. 6 Orlando, Florida.
WFTV Ch. 9 Orlando, Florida.
WJXT Ch. 4 Jacksonville, Florida.

WTLV and WJKS–TV unfairly disadvantages these Jacksonville network affiliates because the high gain directional antennas needed by the viewers in Flagler Beach to receive the signals from either Orlando or Jacksonville are pointed toward Orlando.[3] The applicant admits that the third network affiliate in Jacksonville, Station WJXT(CBS), is listed as significantly viewed but claims that this situation makes the exclusion of the Jacksonville ABC and NBC affiliate stations inequitable.

3. Cowles Florida argues that Section 76.63 does not provide for carriage of either of the proposed signals and a grant of the application would prejudice its Station WESH–TV in the Daytona Beach-Orlando market. In response, Rust Craft and Flagler Cable contend that: (1) the significant viewing standard, by permitting carriage of a second CBS affiliate (VHF Station WJXT), while denying carriage of a second ABC affiliate (UHF Station WJKS–TV), frustrates UHF competition with entrenched VHF network affiliates in the Jacksonville and northeastern Florida region; (2) in keeping with the spirit and intent of the rules to foster UHF development, *Cable Television Report and Order*, 36 FCC 2d 143, 174 (1972), "the Commission should require that when the signals of a UHF's in-market VHF competitors are carried where other in-market network signals are amply available, the signal of the UHF competitor should be similarly expanded;" (3) Flagler Beach's cable subscribers need a second ABC outlet which would bring them a diversity of local and regional programming and strengthen the community of interest which already exists among northeastern Florida communities; (4) notwithstanding the location of Flagler Beach within the 35 mile specified zone of WESH–TV as identified in Section 76.5(f), Flagler Beach is more than 38 air miles from the WESH–TV transmitter site and thus, from a practical standpoint, outside its specified zone; and, (5) grant of the application to such a small community (1970 population 1,018) would not seriously affect the composition of the Orlando-Daytona Beach market.

4. None of the parties mentions a prior Commission decision concerning an application filed by another cable television system which also proposed service for Flagler Beach; therefore, we raise, *sua sponte*, *Coastal Cable Company, Inc.*, 24 FCC 2d 147 (1970), in which we authorized Coastal Cable to carry among other signals, WJKS–TV and WFGA–TV.[4] We note that at the time *Coastal Cable* was pending the *Notice of Proposed Rulemaking in Docket No. 18397*, 15 FCC 2d 417 (1968) proposed prohibiting cable systems located within the specified 35 mile zone of one major market and beyond the zone of all other major markets from carrying any distant commercial signals or any local commercial signals from another major market, in the absence of retransmission consent. Although Flagler Beach was within the 35 mile zone of the Orlando-Daytona Beach major market (then

[3] Flagler Cable suggests several factors which have caused local viewers to orient their antennas toward Orlando. It points out that WJKS–TV is relatively new and is carried on the UHF band for which approximately one third of local television receivers do not have tuners. Since WTLV is on Channel 12 and is twice as far away as its counterpart NBC affiliate on Channel 2, WESH–TV, Flagler Cable reasons that the station does not place as strong a signal over Flagler Beach as WESH–TV.

[4] In 1970, the call letters for WTLV were WFGA–TV.

#65), we held that the proposed rules, even if adopted, should not be applied to Flagler Beach because of the "relatively unique structure of the Orlando-Daytona Beach television market." [5] Our decision in *Coastal Cable* renders effective the grandfathering provisions of Section 76.65 of the Rules:

> If a cable television system in a community is authorized to carry signals, either by virtue of specific Commission authorization or otherwise, any other cable system already operating or subsequently commencing operations in the same community may carry the same signals.

Adoption of Section 76.65 thus permits signals authorized or grandfathered to one system in a community to be carried by other systems in the same community. Although Coastal Cable never commenced operations in Flagler Beach, we have previously decided in *Southern Illinois Cable TV Company*, FCC 73–1274, 44 FCC 2d 460, that the grandfathering provisions vest the right to particular signals in the community, and not the applicant's system. In light of our decision in *Coastal Cable*, we, therefore, conclude that Flagler Cable's carriage of WJKS–TV and WTLV in Flagler Beach is grandfathered under Section 76.65.

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

Accordingly, IT IS ORDERED, That the "Objection to Application for Certificate of Compliance," filed by Cowles Florida Broadcasting, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the application for certificate of compliance (CAC–2775), filed by Flagler Cable Company, Inc., IS GRANTED, and an appropriate certificate of compliance will be issued.

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

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[5] 24 FCC 2d at 148.

FCC 74-409

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. (WEST ALLIS, BERLIN, HARTFORD, NEENAH-MENASHA, SHAWANO, WATERTOWN, AND WAUPUN, WIS.; AND ESCANABA, MICH.; COAL CITY, DWIGHT, OR MARSEILLES, ILL.; ST. CHARLES AND ST. LOUIS, MO.; MUNCIE, IND.; AND CELINA, FOSTORIA, AND LIMA, OHIO; ANAMOSA AND IOWA CITY, IOWA; TERRELL AND CORSICANA, TEX.; SULLIVAN, BEDFORD, AND PAOLI, IND.; ORANGEBURG, S.C.; DANVILLE, IND.; DECATUR OR PARIS, ILL.; MANNING AND KINGSTREE, S.C.; AND BURLINGTON, IOWA	Docket No. 19161, RM-1476, RM-1489, RM-1523, RM-1524, RM-1528, *RM-1540*, RM-1552, RM-1554, RM-1559, RM-1561, RM-1563, RM-1566, RM-1571, RM-1626, RM-1660, *RM-1823*

MEMORANDUM OPINION AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

(Adopted April 16, 1974; Released April 26, 1974)

BY THE COMMISSION:

1. The Commission has under consideration (a) the First [1] and the Third Report and Order in Docket No. 19161 [36 Fed. Reg. 21193, 23 RR 2d 1576 (1971), 32 F.C.C. 2d 191; 37 Fed. Reg. 9999, 24 RR 2d 1790 (1972), 34 F.C.C. 2d 858]; (b) the petition for reconsideration of the Third Report and Order, filed June 12, 1972, by Communicators, Inc. ("Communicators"); (c) the opposition to this petition for reconsideration filed July 7, 1972, by Roy Hodges, d/b as Vivid Music Enterprises ("Hodges"); (d) the reply to Hodges' opposition, filed July 19, 1972, by Communicators; (e) the petition for rule making filed June 16, 1971, by Big Country Broadcasting Corporation ("Big Country"), licensee of AM Station KKUZ, Burlington, Iowa; and (f) the opposition to the Big Country petition filed August 9, 1971, by Communicators.

2. The original proposal before us was to substitute Channel 228A for unoccupied Class C Channel 230 at Iowa City, Iowa, in order to permit the assignment of Channel 232A to Anamosa, Iowa. The result would have been a first assignment for Anamosa and an inter-

[1] The reasons for including the First Report and Order as well as the Third Report and Order will be detailed in the discussion which follows. The Second Report and Order dealt with matters relating to other communities in this group of proposed assignments, and as a result is not pertinent to the matters under consideration in this document.

mixture of channels at Iowa City. The other Iowa City assignment, a Class C channel, was already in use, but no one had yet applied for use of Channel 230. As is the usual practice, the Notice of Proposed Rule Making specified that some form of expression of continuing interest on the part of the petitioner should be submitted, or if it were not, the petition might be denied on this ground alone. In fact, that is precisely what happened. Hodges, the petitioner, did not file comments or reply comments nor did he in any other way manifest any further interest in the proceeding. We took note of this failure in the First Report and Order and refused to grant his proposal.

3. Hodges filed a petition for reconsideration of the First Report and Order, alleging that he was unaware of the need to respond to the Notice of Proposed Rule Making and providing arguments on behalf of the proposal set forth in his petition for rule making. We found these arguments persuasive and adopted the Third Report and Order which reversed the earlier action and adopted the channel changes sought by Hodges. Thereafter, Communicators filed a petition for reconsideration charging error in the Third Report and Order. As detailed below, a reversal of the Third Report and Order is required.

4. Rather than set forth the discussion of the Third Report and Order in its entirety, followed by the arguments of the parties, we shall discuss the salient points treated in that document and the arguments they occasioned on an issue-by-issue basis. Because of the confusion which resulted from that document's treatment of several of these points, our discussion of them must extend beyond that which normally would be required. In part, we shall restate long held views, indicating their continuing applicability, and in part we shall discuss matters which have not been treated before at length or perhaps at all.

5. The first issue to consider is that of the significance that attaches to a petitioner's failure to provide a response to a Notice of Proposed Rule Making. In the Third Report and Order we agreed that Hodges had slept on his rights but found overriding public interest reasons for acting favorably on his proposal anyway. Communicators insists that the result of our decision is to sanction wanton disregard of our procedural requirements and to invite similar problems in the future.

6. The statement in the Third Report and Order that the ultimate test is that of the public interest is indeed true. Nevertheless, we need to be concerned with procedure as well as substance in determining what best serves the public interest. Unless applicable procedural requirements are observed, we would face difficulties in exercising our regulatory responsibilities, hardly a situation to benefit the public. On the other hand, fairness dictates that we not proceed in Procrustean fashion either. On occasion, deviations can be warranted, but request for such special relief must adequately demonstrate the presence of an overriding public interest justification and adequately explain the failure to observe the applicable procedural requirements. It may well be that Hodges' explanation for his failure to respond to the Notice of Proposed Rule Making was inadequate. Hodges relied on his lack of an attorney. Can this fact relieve him of the responsibility to follow the requirements of the Notice which was sent to him by the Commis-

sion,[2] especially since Hodges is experienced in broadcasting and able to prepare and file his petition without legal assistance? Although there is some basis for questioning the adequacy of Hodges' request, it is not necessary to resolve this point as there are substantive grounds on which to reverse our previous action as will be discussed in the succeeding paragraphs.

7. One of the reasons we gave for again considering Hodges' proposal was the impact of the filing of Big Country's petition seeking the reassignment of Channel 230 from Iowa City to Burlington, Iowa. Although we stated that this petition would not be considered in this proceeding on the merits because of its late filing, we nonetheless took "judicial notice" of the filing. Since removal of Channel 230 from Iowa City was the change on which the Anamosa proposal rested, we noted that Hodges could have his proposal considered in connection with Big Country's. Rather than wait for this to occur, we acted on Hodges petition for reconsideration. The inability to consider the Big Country petition on its merits and hence the need for a notice was dictated by the fact that it had not been filed before the "cut-off" deadline specified in the Anamosa/Iowa City Notice. Communicators strongly disputes the legitimacy of any reliance on the filing of an untimely proposal in resolving the treatment to be given to Anamosa. By taking judicial notice of the filing of the Burlington petition Communicators sees the Commission as having vitiated its entire "cut-off" procedure.

8. We can understand the view expressed by Communicators. If the Big Country filing was allowed to have an impact on the merits of the case that clearly would have been improper and contrary to our "cut-off" procedure. Obviously, if allegedly more meritorious proposals are given consideration notwithstanding their untimeliness, then it will be vastly more difficult to ever conclude a proceeding, to ever make an assignment. Whatever view might be appropriate in special circumstances or where overwhelming need appears to exist is not applicable here since no such circumstance was presented by the Big Country filing. It simply represented a competing claim for the channel, and like virtually all proposals, could be said to have some merit. In no way did it suggest such overwhelming importance as to virtually mandate its success and thus give it a basis for special consideration. Therefore no reliance should have been placed on the filing of the pleading save to note that Hodges might again have a day in court if he wished to raise the Anamosa proposal as a counterproposal in connection with any Notice issued in a Burlington proceeding. Communicators, however, thought that the Third Report and Order did place some reliance on this untimely filing in deciding the merits of the Iowa City/Anamosa contest. Such was not our intent.

9. We now turn to the merits of the proposals before us. There are three communities to consider: Iowa City, Anamosa and Burlington.[3]

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[2] Our reason for requiring a response from the proponent is simple: We want to avoid making assignments where there is no assurance that they will be effectuated. Thus, even if no data are called for, the expression of continuing interest is in itself an important matter.

[3] There is a reason for including the Burlington proposal notwithstanding our earlier discussion. Simply, the reason is this: no matter which community is preferred, Anamosa or Iowa City, the Burlington proposal would still be entitled to consideration on the

Because of the procedural irregularities we have outlined, the whole case requires a reversion to the *status quo ante*, and all of our reference to channel assignments will be based on those existing before adoption of the First Report and Order. Save for our need to discuss the reasons for its reversal, reference should not be made to the Third Report and Order, for it is without force and effect. Anamosa, a community of 4,389 persons has no FM channel or AM station. Anamosa is the county seat and largest community in Jones County (pop. 19,868) and the assignment of Channel 232A would bring the county's first local aural outlet. Iowa City has a population of 46,850 and Johnson County, in which it is located, has a population of 72,127. Iowa City has a noncommercial educational FM station and two commercial FM channel assignments, one of which is occupied and the other of which is the subject of this proceeding. Iowa City also has two AM stations, one a commercial daytime-only station and the other noncommercial educational, unlimited time.[4] Burlington has a population of 32,366 and its county (Des Moines) a population of 46,982. Burlington has one Class C FM station and two AM stations, one daytime-only and the other full-time.

10. In the Third Report and Order we gave relatively little attention to intermixture in Iowa City, found little significance in the decline in Anamosa's population (and that of its county) as contrasted with Iowa City's (and its county's) substantial growth, and appeared to rely upon speculative benefits to be derived from the use of Channel 230 elsewhere than Iowa City, particularly in terms of serving previously unserved or underserved areas. In addition we gave overriding importance to the matter of local service in applying to this case the priorities used to govern the making of FM assignments. Each of these points warrants consideration at some length and will be discussed in the order mentioned.

11. Having examined the subject at length, we have concluded that the matters relied on in the Third Report and Order were insufficient to override our usual practice of avoiding intermixture. While on occasion we have provided for intermixture, the circumstances present in this case do not parallel those normally relied upon by the Commission. This is not a case in which a party finding no other available channel seeks a Class A channel even though the others already in the community are Class B or C. In such situations, the proponent runs the risks and the public stands to receive the gains since the channel is the only one which could be used there. Thus, a net public gain could be said to result. Here, the effect would be to deprive not add, and to justify this there must be a showing of an important public need that would be served. Although it is true that five of the nine other communities in Iowa with populations between 25,000 and 50,000 are intermixed, the fact is that in three of them the Class A channel remains unoccupied. There is an additional question of how relevant

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merits at some future time. Ordinarily, we would simply decide the Burlington matter when it is reached in turn. However, this is not the ordinary case. To avoid further delays in this already extended proceeding, following the making of a choice between Anamosa and Iowa City, we shall act on the Burlington proposal in this proceeding.

[4] In the meantime, Communicators has obtained a construction permit for the Class A channel pending the outcome of its petition for reconsideration.

this intermixture is when considering how much larger Iowa City is and hence arguably in greater need for two Class C channels. In addition, the occupier of Iowa City's second channel would be operating an independent station in competition with a joint AM–FM operation. Communicators had not been willing to proceed on this basis for understandable reasons. The most that could be said is that Anamosa would gain a channel. The importance of that point is one of the issues this proceeding was intended to resolve. While Burlington could also gain a second channel, this proposal was not entitled to comparative consideration with Anamosa and Iowa City in the Third Report and Order.

12. In terms of the Burlington proposal itself, the Third Report and Order referred to that community as slightly smaller than Iowa City, but the difference between 46,850 and 32,366 is not slight.[5] Iowa City is 44.8% larger and its county 53.5% larger. Moreover, if educational services and Communicators' conditional permit are excluded, each has a daytime-only AM station but Burlington has two full-time commercial stations (1 AM and 1 FM) while Iowa City has only an FM station. Particularly when intermixture is at issue, the fact that unlike Iowa City, Anamosa (and Jones County) are losing population assumes considerable importance.

13. One of the key points made by Communicators is that the operation it would establish at Iowa City would not only serve more people but in significant part would provide a first or second FM service. The Third Report and Order spoke in terms of the possibility that another use of Channel 230 would equally serve the purpose of serving populations lacking in adequate service. To the extent that the document generally pointed out that Communicators' argument about first or second service would have to be tempered by the recognition that the channel could be used elsewhere, it was on firm ground. Reliance on such substitute use, however, especially one not yet before the Commission for action and without the presence of any supporting data, would not be on equally sound footing. It would have been error to base an action on such an assumption, and as such would have been in direct conflict with the assertion that the Burlington proposal was not being considered on the merits.

14. Finally, a question has arisen regarding our use of the priorities in judging between conflicting FM proposals. To set the matter straight, the priorities [6] are these:

> (1) Provision for all existing FM stations. [not applicable here]
>
> (2) Provisions of a first FM service to as much of the population of the United States as possible; particularly that portion of the population which receives no primary AM service nighttime.
>
> (3) Insofar as possible, to provide each community with at least one FM broadcast station, especially where the community has only a daytime-only or local (Class IV) AM station, and especially where the community is outside of an urbanized area.

[5] All figures are from the 1970 U.S. Census.

[6] These priorities were listed in the Further Notice of Proposed Rule Making in the FM proceeding in Docket 14185, FCC 62–867 (1962).

(4) To provide a choice of at least two FM services to as much of the population of the United States as possible, especially where there is no primary AM service available.

(5) To provide, in all communities which appear to be of enough size (or to be located in areas with enough population) to support two local stations, two local FM stations, especially where the community is outside of an urbanized area.

(6) To provide a substitute for AM operations which, because they are daytime-only or suffer serious interference at night, are marginal from a technical standpoint.

(7) Channels unassigned under the foregoing priorities will be assigned to the various communities on the basis of their size, location with respect to other communities, and the number of outside services available.

As can be seen, not all of the priorities are pertinent here. Likewise, it should be noted that these priorities were never intended to be applied rigidly or in a mechanical fashion.

15. Priority two (service to unserved areas) is directly involved in the present case, and it is a matter of considerable importance. Priorities three and four of course are of lesser importance and in fact are rather close to each other in terms of the weight accorded them under ordinary circumstances. In fact, in some situations, using the strict order of priorities leads to anomalous results. Thus, applying them literally, the result would be that any community, even one of only 100 persons, seeking a first channel would automatically succeed in preference to a second channel in a city of 1,000,000 that would bring a second service to 4,000,000 people. Needless to say, we have not followed such a rigid pattern and have taken into account the size of the respective communities and their need for an FM station. Whatever might be our ultimate conclusion in this proceeding, it is clear that the evidence now before us does not support the actions taken in the Third Report and Order. The regrettable fact is that not every community has been or will be able to have its own assignment. Especially where the demand is great and the supply is limited, difficult choices are presented. Although accommodation is sometimes possible, this is not always the case. In our view, the second priority—that of providing a first service—stands out, but since the relative weight to be accorded the third and fourth priorities are not so different, we must consider the relative sizes of the communities, their growth patterns and the need for service. In paragraph eight, the Third Report and Order misapplied the priorities by overemphasizing local service and giving first service short shrift. Contrary to that document, the priorities do not preclude reaching a decision to leave the channel in Iowa City. Whether that will be the outcome remains to be seen. All parties are at liberty to provide data on any pertinent aspect of the comparison process, not just the vital area of first service.

16. When we are considering the need for service and evaluating the extent to which service is already provided, recognition must be given to AM and FM services as joint components of a single aural service. This view is a relatively recent development, so it was not reflected in the discussion when we adopted the priorities for FM as-

signments. FM service to unserved areas still has significance, but consideration now must be given to the presence of primary AM signals, especially at night. Here, there is a lack of evidence on the extent of AM coverage nighttime in the area which Communicators would provide with a first and second FM signal. All we have before us are some general assertions by Hodges, and this will not suffice. Because this information is necessary to a resolution of the issues before us, we are issuing this further notice so that we can address these issues knowledgeably. Two specific questions exist: To what extent would Communicators be able to provide a first or second aural service, and, to what extent could it provide a first or second FM service? [7]

17. As to Burlington, the following factors should be taken into consideration in the preparation of its exhibit. As stated above, Big Country proposed Channel 230 for Burlington by moving the channel from Iowa City without proposing a replacement channel. However, if Channel 228A were to be assigned to Iowa City, the utilization of Channel 230 as a Class C channel at Burlington would be restricted to an area at least six miles southwest of the community, due to the distance separation requirements from Iowa City and Channel 232A at Beardstown, Illinois. On the other hand, if Channel 230 were to be used on a site in the state of Illinois (Zone I) as a Class B station, with its attendant restriction on the power and antenna height, there would be a greater latitude in the choice of a site because the required separation there would be 40 miles to both channels 232A and 228A [Section 73.207(b)]. Since Channel 228A could be assigned to Burlington without a site restriction if Channel 230 were utilized at Iowa City as proposed by Communicators, Big Country should indicate its views on this alternative approach. Particularly we need to know whether Big Country would proceed to activate a station if a Class A channel were made available.

18. *Showings required.* Comments are invited upon the proposals discussed above. As indicated, the Commission has questions concerning the proposals, and the proponents of the proposed assignments will be expected to answer them. In addition, each should reaffirm its intention to apply for the channel if assigned, and, if authorized, to promptly build the station. Failure of a proponent to make these showings *will* result in denial of its proposal.

19. *Cut-off procedures.* The following procedures will govern:

(a) Counterproposals vis-a-vis the Burlington proposal will be considered, if advanced in initial comments in this proceeding, so that parties may comment on them in reply comments. They will not be considered, if advanced, in reply comments. Counterproposals advanced as alternatives to the Anamosa and Iowa City proposal will not be accepted because the cut-off period on it has long since expired.

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[7] For the purpose of responding to these questions, the showing as to FM service should follow the procedures set forth in the *Roanoke Rapids-Goldsboro, North Carolina* FM proceeding, 9 F.C.C. 2d 672 (1967). Appropriate showings regarding AM nighttime service are also required so that the extent of nighttime interference-free AM coverage can be determined.

(b) With respect to petitions for rule making which conflict with the Burlington proposal, they will be considered as comments in the proceeding, and Public Notice to this effect will be given, as long as they are filed before the date for filing initial comments herein. If filed later than that, they will not be considered in connection with the decision herein.

20. The authority for the action taken herein is contained in Sections 4(i), 303 (g) and (r), and 307(b) of the Communications Act of 1934, as amended.

21. IT IS ORDERED, That the petition for reconsideration of the Third Report and Order filed June 12, 1972, Communicators, Inc., IS GRANTED to the extent indicated above and IS DENIED in all other respects.

22. Pursuant to applicable procedures set out in Section 1.415 of the Commission's Rules, interested parties may file comments on or before June 14, 1974, and reply comments on or before July 2, 1974. All submissions by parties to this proceeding, or persons acting in behalf of such parties, must be made in written comments, reply comments or other appropriate pleadings.

23. In accordance with the provisions of Section 1.419 of the Rules, an original and 14 copies of all comments, replies, pleadings, briefs and other documents shall be furnished 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. (1919 M Street, N.W.).

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

FCC 74-366

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 (MERCED, CALIF.)	Docket No. 19800 RM-2012

REPORT AND ORDER

PROCEEDING TERMINATED

(Adopted April 9, 1974; Released April 16, 1974)

BY THE COMMISSION:

1. The Commission has before it for consideration its Notice of Proposed Rule Making issued on August 7, 1973 (FCC 73-840), and published in the Federal Register on August 14, 1973 (38 Fed. Reg. 21940), inviting comments on a proposal to assign Channel 248 to Merced, California, as a second Class B assignment to that community. The Notice was issued in response to a petition for rule making filed by Radio One, Inc. ("Radio One"), on July 12, 1972. Interested parties were requested to file comments and reply comments by September 14, 1973, and September 25, 1973, respectively. The only comments received was filed by the petitioner on September 14, 1973, and an informal statement in support filed by the Merced Chamber of Commerce on September 5, 1973. There were no comments or reply comments filed in opposition.

2. Merced, population 22,670,[1] is the seat of Merced County, population 104,629. Since 1960, the population of Merced and its county have increased 13% and 15.7%, respectively. There are presently four aural broadcast services at Merced: FM Station KAMB, Channel 268, AM Stations WYOS and KWIP (daytime-only), and educational FM Station KBDR (licensed to Merced Community College). Other aural broadcast stations in the county are Stations KLBS (daytime-only) and KLBS-FM (Channel 240A) licensed to Los Banos, population 9,188.

3. The Commission, in its Notice of Proposed Rule Making requested Radio One to furnish additional information as to the availability of FM channels to three sizeable communities that would be affected by preclusion if Channel 248 were assigned to Merced. They are Coalinga, population 6,161, which has only a daytime AM station, Avenal, population 3,035, which has no radio broadcast facilities, and Atwater, population 11,640, which also has no radio broadcast facili-

[1] All population statistics cited are from the 1970 U.S. Census unless otherwise indicated.

ties. Petitioner, in its further engineering analysis accompanying its comments, shows that there are six channels available for assignment to Coalinga and Avenal (Channels 223, 224A, 261A, 269A, 272A and 292A) and four channels for Atwater (Channels 232A, 261A, 288A, and 296A). It also submits a revised tabulation of service to unserved and underserved areas, stating that a station operating on Channel 248 at Merced would provide a first FM service to 1,234 persons in an area of 30 square miles and a second FM service to 36,414 persons in an area of 326 square miles. Radio One also reasserts its intention to apply for the channel if assigned and to promptly construct the station if the application is granted.

4. We believe the assignment of Channel 248 to be in the public interest. It would provide Merced with a second local FM broadcast facility, which would be in accordance with the FM allocation criteria as to population, as well as provide for a first and a second FM service to some areas. Although there would be few communities located within the precluded areas, it has been shown that there are a number of other FM channels presently available for assignment to these communities.

5. Authority for the amendment adopted herein is found in Sections 4(i), 303, and 307(b) of the Communications Act of 1934, as amended, and Section 0.281(b)(6) of the Commission's Rules and Regulations.

6. Accordingly, IT IS ORDERED, That effective May 23, 1974, the Table of Assignments contained in Section 73.202(b) of the Commission's Rules and Regulations IS AMENDED, insofar as the community named below is concerned, to read as follows:

City:	*Channel No*
Merced, Calif	248, 268

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

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

46 F.C.C. 2d

104-036—74——9

FCC 74-353

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 91.354 OF THE COMMISSION'S RULES TO ALLOCATE CERTAIN LOW-POWER BUSINESS RADIO SERVICE FREQUENCIES TO THE FOREST PRODUCTS RADIO SERVICE	RM-1482

MEMORANDUM OPINION AND ORDER

(Adopted April 9, 1974; Released April 24, 1974)

BY THE COMMISSION:

1. Forest Industries Radio Communications (FIRC) has petitioned the Commission to allocate to the Forest Products Radio Service on a shared basis, twelve low power frequencies [1] currently available to the Business Radio Service.

2. In support of its petition, FIRC makes two points: (1) that while technological advances in the field of equipment manufacture and design have made remote control log hauling practical, the shortage of low power Forest Products frequencies [2] has resulted in severe crowding and has limited the number of persons who may take advantage of these advances; and (2) that re-allocation of the requested Business Radio Service frequencies to the Forest Products Radio Service on a shared basis is necessary to ensure proper tone selection coordination.

3. The Commission has carefully reviewed the petitioner's request and has concluded that petitioner's needs can be satisfied without frequency re-allocation. First, Forest Products eligibles are also Business Radio Service eligibles, and may apply in the latter service to obtain the low power frequencies needed to meet their remote controlled log hauling requirements. Second, the Commission has discussed the question of tone signal coordination with the National Association of Business and Educational Radio [3] and that organization has indicated that it would perform the necessary tone coordination in conjunction with the frequency selection coordination.

4. Accordingly, the Commission concludes that the re-allocation requested in FIRC's petition is not necessary and its grant would not be in the public interest. IT IS therefore ORDERED, That the petition of Forest Industries Radio Communications IS DENIED.

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

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[1] 457.525 MHz; 457.550 MHz; 457.575 MHz; 457.600 MHz; 467.750 MHz; 467.775 MHz; 467.800 MHz; 467.825 MHz; 467.850 MHz; 467.875 MHz; 467.900 MHz; 467.925 MHz.

[2] 154.57 MHz; 154.60 MHz are the only allocated low power frequencies.

[3] The industry coordinating group for the Business Radio Service.

FCC 74-373

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF FRIENDLY BROADCASTING CO., INC., RADIO STATION WSHB, RAEFORD, N.C.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted April 9, 1974; Released April 18, 1974)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Memorandum Opinion and Order adopted on March 29, 1973 (40 FCC 2d 979) imposing a forfeiture in the amount of one thousand dollars ($1,000) on Friendly Broadcasting Company, Inc., the licensee of Station WSHB, Raeford, North Carolina, and (2) an application of the licensee dated May 10, 1973 for remission or mitigation of the forfeiture.

2. The forfeiture was assessed for repeated violation of Section 73.52(a) of the Commission's Rules which at the time of the violations provided in part that the operating power of each station shall be maintained as near as practicable to the licensed power and shall not exceed the limits of 5 per cent above and 10 per cent below the licensed power. It appeared that the licensee exceeded the 5 per cent limit on numerous days in 1971, as fully set forth in the Memorandum Opinion and Order issued in this proceeding.

3. In the application for mitigation or remission of forfeiture, the licensee submitted a statement by its vice president and managing officer, who did not hold either position when the violations were committed. He states that in his opinion, based upon his subsequent experience with the operations of the meters, his acquaintance with prior managers and a review of the logs, the entries in the operating logs which indicated overpower operation were inaccurate and were caused by incorrect reading of the meters, and that therefore the station did not operate with power in excess of the allowed limit. Licensee requests reconsideration of the imposition of the forfeiture in that the station is under new management, has better personnel, has installed new equipment, and that, although the station is now making a profit, the forfeiture would be a substantial burden.

4. Licensee has failed to provide any significant evidence to support its assertion that the station did not operate with excess power and its financial condition was considered prior to adopting the Memorandum Opinion and Order of May 29, 1973. Upon consideration of these

and other matters raised in the application for remission or mitigation, we are not persuaded to grant the application.

5. Accordingly, IT IS ORDERED, That the application for remission or mitigation of the forfeiture IS DENIED.

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

FCC 74-346

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
GOODSON-TODMAN BROADCASTING, INC., PASADENA, CALIF.	Docket No. 15754 File No. BP-16159
ORANGE RADIO, INC., FULLERTON, CALIF.	Docket No. 15755 File No. BP-16160
PACIFIC FINE MUSIC, INC., WHITTIER, CALIF.	Docket No. 15756 File No. 16161
ROBERT S. MORTON, ARTHUR HANISCH, MACDONALD CAREY, BEN F. SMITH, DONALD C. MCBAIN, ROBERT BRECKNER, LOUIS R. VINCENTI, ROBERT C. MARDIAN, JAMES B. BOYLE, ROBERT M. VAILLANCOURT, AND EDWIN EARL, D.B.A. CROWN CITY BROADCASTING CO., PASADENA, CALIF.	Docket No. 15762 File No. BP-16168
VOICE IN PASADENA, INC., PASADENA, CALIF.	Docket No. 15764 File No. BP-16172
WESTERN BROADCASTING CORPORATION, PASADENA, CALIF.	Docket No. 15765 File No. BP-16173
PASADENA BROADCASTING CO., PASADENA, CALIF.	Docket No. 15766 File No. BP-16174
For Construction Permit	

MEMORANDUM OPINION AND ORDER

(Adopted April 9, 1974; Released April 19, 1974)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE DISSENTING.

1. We have before us a petiton for reconsideration [1] of our Decision, FCC 73-1264, released December 10, 1973, in the above-captioned proceeding, filed on January 9, 1974, by Orange Radio, Inc. (Orange) pursuant to Section 1.106 of the Commission's rules.

2. In our Decision we disposed of the applications for review of the Review Board's Decision, released May 26, 1971; [2] granted the application of Western Broadcasting Corp. (Western) for a construction

[1] Also before us are oppositions to the petition for reconsideration filed by the Broadcast Bureau on February 1, 1974 and by Western Broadcasting Corp. (Western) on February 4, 1974, comments filed on February 4, 1974 by Voice in Pasadena (VIP), a statement in lieu of opposition filed on February 4, 1974 by Crown City Broadcasting Company, and a reply to the oppositions and comments filed by Orange on February 21, 1974.

[2] 29 FCC 2d 533. The Review Board disqualified all of the applicants except Orange on technical engineering grounds. With respect to the Orange application, it held that a grant could not be made without further hearing because a serious question had been raised concerning the character qualifications of some of Orange's principals. It therefore severed the Orange application from the consolidated proceeding and, by a separate Memorandum Opinion and Order, 29 FCC 2d 849, released May 26, 1971, enlarged the issues and remanded the proceeding to the Administrative Law Judge for further hearing and resolution of the added issues.

permit and license to operate a new station in Pasadena, California, replacing Station KRLA on the 1110 kHz frequency; and denied the other pending competing applications.

3. In its petition, Orange asks the Commission to set aside its grant of Western's application and to reinstate the Decision of the Review Board that Orange is the only technically qualified applicant. In the alternative, Orange seeks remand for further hearing to update the record on technical qualifications of all applicants or just Western and Orange, particularly with respect to the issues of compliance under the ten percent rule and adjustability of Western's proposed antenna array; a decision by the Review Board on non technical comparative issues in the event more than one applicant is found technically qualified; or a stay of the Decision pending appeal.

4. The petition and accompanying engineering affidavit are directed primarily at: (1) the Commission's finding that Orange violates the ten percent rule[3] while Western does not and that the ten percent rule is the overriding consideration which requires the denial of Orange's application and the grant of Western's; (2) the Commission's assessment of a demerit against Orange because its 0.5 mv/m daytime contour falls short of the Mexican border; and (3) its finding that the Orange array would be the least stable of the high power applicants. With respect to each of these points, Orange alleges that new matters which are not in the record and concerning which it has not previously presented its position to the Commission are relevant and material to the disposition of this case and justify reconsideration under Section 1.106(c) of the Rules.[4] It further represents that its petition for reconsideration is filed as a prerequisite to judicial review, pursuant to Section 405 of the Communications Act and Section 1.106(m) of the Commission's Rules.[5]

5. At the outset it is particularly noteworthy that Orange has made no effort to balance any of its contentions against the Commission's clear determination in its Decision that the time has come for the administrative process to be brought to a conclusion and that the public interest will best be served by the issuance of a final decision in this proceeding "based on the evidence adduced at the hearings and on the facts as they existed when the record was closed." Rather, its petition evidences, on the whole, an effort to redebate matters on which the Commission has deliberated and spoken and it is fundamental that reconsideration will not be granted merely for this purpose, *Cable TV Company*, 33 FCC 2d 787 (1972). Nevertheless, we have examined

[3] The provisions of Section 73.28(d) of the Rules which are applicable to this proceeding prohibit with certain exceptions, the assignment of a station to a channel if the interference received would affect more than ten percent of the population in the proposed station's normally protected primary service area. One exception is where the proposed nighttime facility is to a community not having such a facility.

[4] Circumstances warranting reconsideration under Section 1.106(c) are as follows: "(1) the facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; (2) the facts relied on were unknown to the petitioner until after his last opportunity to present such matters, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or (3) the Commission or the designated authority determines that consideration of the facts relied on is required in the public interest."

[5] Section 1.106(m) provides that a petition for reconsideration is a prerequisite to judicial review of Commission action where the appeal "relies on questions of fact or law upon which the Commission or designated authority has been afforded no opportunity to pass." A like provision is contained in Section 405 of the Act.

the allegations in the petition and the responsive pleadings to determine whether the asserted facts justify favorable action on the petition or whether such significant public interest factors are present which require reconsideration on the Commission's own motion.

10-PERCENT RULE

6. Central to Orange's challenge of the Commission's findings under the ten percent rule is its proposed incorporation into the record of 1970 Census data relating to the populations of Pasadena (proposed Western site) and Fullerton (proposed Orange site). Orange contends that, whereas Western was found to be in compliance with the ten percent rule under 1960 Census data in the record (in contrast to Orange, 23.2% of whose listeners within the proposed 2.5 mv/m normally protected nighttime contour would encounter interference), current population figures reveal that Western is now in violation of the rule since 11.5% of the population within its 2.5 mv/m normally protected nighttime contour would encounter interference (an increase from 9.6% under earlier data).[6] With both applicants in violation of the rule, Orange states, a different situation as to exemption or waiver is presented than that which was considered in the Decision. An earlier effort to update the record as to this interference issue was not made, it asserts, because neither the Administrative Law Judge (ALJ) in his Initial Decision, released April 2, 1969 (29 FCC 2d 609), nor the Review Board in its Decision, released May 26, 1971 (29 FCC 2d 533), attached any decisional significance to the ten percent rule. The effect of the 1970 Census figures on the status of the parties under the ten percent rule, Orange asserts, did not become a crucial consideration until the Commission's final ruling.

7. While Orange may not have anticipated the significance which ultimately would be attached to the ten percent rule in the Commission's Decision, the fact remains that the applicant has known since at least 1965 when the competing applications were designated for hearing that the ten percent rule was at issue in this proceeding. The 1970 Census figures were available to Orange since prior to the issuance of the Review Board's decision [7] but failed to take timely steps to bring the information, which it now considers so crucial, to the attention of the Commission or the Review Board. In these circumstances, the fact that Orange did not anticipate the weight which would be attached to the evidence concerning the ten percent rule is irrelevant. As the Court stated in *Colorado Radio Corp.* v. *Federal Communications Commission*, 73 U.S. App. D.C. 225, 227, 118 F2d 24, 26: "We cannot allow the appellant to sit back and hope that a decision will be in his favor, and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed." See also:

[6] Pursuant to 1970 population figures, interference within Orange's 2.5mv/m contour would apparently increase slightly to 23.9%.

[7] By a petition filed with the Review Board on July 31, 1970, Orange sought to introduce preliminary figures of the 1970 populations of Pasadena and Fullerton in support of its contentions with respect to a different issue. However, it made no allegation that the 1970 Census data would affect the status of the parties under the ten percent rule and it made no request that the data be considered in connection with that issue.

Springfield Television Broadcasting Corp. v. *Federal Communications Commission*, 117 U.S. App. D.C. 214, 328 F2d 186. Orange's failure to bring to the attention of the Commission evidence which it deemed relevant to a proper resolution of this designated issue until after the release of the Commission's final decision is inexcusable.

8. Western disputes the accuracy of Orange's engineering showing and claims, instead, that any violation of the ten percent rule on its part would be *de minimis*.[8] For the reasons set forth above, however, we do not propose to undertake a resolution of the dispute at this late stage of the proceeding. Nevertheless we note that, even under Orange's showing, the Western proposal will make a substantially more efficient use of the frequency than that of Orange. The further contention of Orange that it is entitled to an exemption from the rule was fully considered in our Decision (par. 43) and no further comment is necessary here.[9] Other allegations advanced by Orange in support of its request for reconsideration of our disposition of the issue going to the ten percent rule have also been given careful consideration but they present no sufficient basis for favorable action on its request. We find and conclude that no justification has been shown for the long delay before Orange submitted its alleged new evidence relating to the ten percent rule to the Commission and, consequently, under Section 1.106(c) it is not entitled to have its petition considered on the merits; that no significant error was committed by the Commission in its disposition of the issue concerning the ten percent rule; and, finally, that no such public interest considerations have been shown to exist which would require reconsideration by the Commission on its own motion.

TREATY RIGHTS PROTECTION

9. Regarding the Commission's assessment of a "slight demerit" against Orange because its 0.5 mv/m daytime contour falls short of the Mexican border and thus does not afford the same protection as other high power applicants to the rights of the United States to use the 1110 kHz frequency under the US–Mexico agreement, Orange offers "new" technical information and analysis interpreting the significance of this contour deficiency and allegedly demonstrating that the Commission's analysis in this matter is "based on factually erroneous assumptions." It is not contested by Orange that, in contrast to the other high-power proposals, its 0.5 mv/m contour falls short of the Mexican border and, as a consequence, excludes a narrow coastal strip fifty miles in length between Oceanside, California, and Tijuana, Mexico. Orange contends, however, that there would be no meaningful difference in coverage of the area and protection from possible encroachment of United States' rights to use of the 1110 kHz frequency by a Mexican operation.

[8] We note that Western, in the engineering statement submitted with its opposition pleading, provides an alternative methodology for calculating the location of proposed contours and the degree of interference to be encountered, relevant to compliance under the ten percent rule; and, based on 1970 Census figures, suggests that only 10.026% of the relevant population would encounter interference.

[9] Orange contends that in denying it the benefit of the exemption, the Commission has confused transmission service with reception service, but we have not done so. Rather we held that, in light of our overall approach to this case and the high power proposed to be used by the applicant, the exemption in Section 73.28(d) is inapplicable.

10. The opposition pleadings dispute the inferences and conclusions drawn by Orange from the technical information submitted with its petition and allege that other facts and circumstancess detract from their significance. For instance, it is urged that the introduction of a future Mexican operation and encroaching signal cannot be ruled out since allocation circumstances may change with respect to the present adjacent channel operations, as a result of which areas not shown and notified to Mexico as encompassed by a United States radio contour, such as the coastal strip excluded by Orange's proposed 0.5 mv/m contour, would be open to foreign encroachment. For the reasons set forth above in connection with our discussion of the ten percent rule, we deem it unnecessary to resolve this dispute. Orange makes no claim that the information was not previously available, but it relies instead on the assertion that the matter of its contour falling short of the Mexican border was never at issue and was never raised until the oral argument and that, accordingly, it has not heretofore been afforded an opportunity to present the material.

11. We find that, in fact, the general question of the provision of treaty rights protection by the applicants' proposed contours has long been at issue in this proceeding and that Orange has had ample notice of the relevance of its 0.5 mv/m contour's particular characteristics. When, in 1964, the Commission granted the interim 1110 kHz operation to Oak Knoll, it noted that its action would "accord utmost protection of the interests of the United States under international agreement by avoiding any possibility of controversy concerning the continued use of the frequency in the Southern California area" (2 RR 2d 1011, 1016). Cognizance of this aspect of the case was taken by the ALJ in his Initial Decision following the hearing and, in his findings concerning the technical descriptions of contours, he included an identification of those proposed 0.5 mv/m contours which would reach the Mexican border (29 FCC 2d at 611, 663–675). The Review Board, in its Decision, discussed as a "fundamental consideration" in the disposition of the Section 307(b) issues in this proceeding "the unique public interest benefits to be derived from a proposal which would continue to accord utmost protection to the United States with respect to this existing high-power AM frequency assignment near a border location of a neighboring country" (29 FCC 2d at 541). Although the Review Board made no specific findings as to the relative merits of each of the high-power proposals in this respect and assessed no demerit against Orange because its contour would fall 50 miles north of the Mexican border, the Board made express mention of the fact that the 0.5 mv/m contour of one of the low-power proposals would fall 98 miles short of the border and would therefore "provide the least protection of any of the proposals against any possible daytime use of the frequency south of the border, which could preclude further utilization of the frequency by the United States in southern California" (29 FCC 2d at 542–543).

12. In light of the foregoing, we must reject Orange's contention that it has not had an opportunity to present material bearing on the adequacy of protection of United States' treaty rights afforded by its proposed 0.5 mv/m contour. Its submission of allegedly relevant

additional engineering data therefore comes too late. In any event, we note that only a slight demerit was assessed against Orange for the failure of its 0.5 mv/m contour to reach the Mexican border; and that, even if this demerit were removed, it would not affect the outcome of this case. Consequently, no purpose would be served by a reopening of the record for the purpose of considering the proffered evidence.

ADJUSTMENT, MEOV MAINTENANCE, AND ELECTRICAL STABILITY OF THE PROPOSED DIRECTIONAL ANTENNAS

13. As regards the general issue of applicants' capacity to avoid interference to KFAB, Omaha, Nebraska, Orange challenges the Commission's preference of Western over Orange for electrical stability of the proposed directional antenna arrays. It provides no specific showing, however, that its analysis and related materials qualify under Section 1.106(c) of the Commission's Rules and appears simply to take exception to certain of the Commission's final determinations in this matter. In any event we find no merit to Orange's contentions for the reasons set forth below.

14. By way of background information relevant to the directional antenna concepts addressed by Orange we note the following: All applicants in this proceeding have sought to demonstrate that their proposed nighttime directional antennas would produce a high degree of suppression over a wide area in the northeastern direction in order to protect station KFAB. Orange, in its original application, proposed a nighttime directional antenna pattern which does not show complete nulls (zero value of radiation) in the KFAB direction, and which is referred to as the "filled" pattern. This pattern and its MEOVs (maximum expected operating values) formed the basis of Orange's nighttime coverage and intereference calculations. Later in the proceeding, Orange also submitted a so-called "zero-null" pattern which showed zero radiations in the KFAB direction. According to Orange's technical consultant, the submission was made to place Orange's proposal on the same basis for consideration as those of the other applicants who proposed "zero null" patterns (Tr. 460–461).

15. Orange claims that the Commission erred in finding at paragraph 35 of the final Decision that Orange "did not specify the initial adjustment values of its array, and made no showing of the extent to which current ratios and phase deviations could be varied without exceeding the MEOVs." With respect to the specification of initial adjustment values, it refers us to Orange Exhibit 23, page 40, where it stated that ". . . the parameters of the 'zero-null' pattern would be the goal toward which the engineer adjusting the array would work in order to obtain as ideal an adjustment as possible." We note, however, that on the same page Orange states that "it is unlikely that a zero-null pattern would be obtained in the actual adjustment of the system"; and there is further testimony by Orange's engineer that he does not propose to adjust to the zero null parameters because he does not think it can be done (Tr. 461). It is clear from the foregoing that specific adjustment values have not been provided

and their attainment is apparently considered by Orange to be unlikely.

16. With respect to the showing of the extent to which current ratio and phase deviations could be varied without exceeding the MEOVs, Orange infers that, had the Commission considered the effect of Orange's suggested 1% current ratio and one degree phase changes on the zero-null rather than filled pattern, it would not have found, as it did at paragraph 35 of the final Decision, that such changes applied to calculated radiation values would result in radiated fields in excess of the MEOVs over the entire KFAB protection arc. We find, on the contrary, that, pursuant to Orange Exhibit 23 (at p. 41, 44), MEOVs would also be exceeded for the zero-null pattern over the entire KFAB protection arc in the horizontal plane and over approximately 87.5% of such arc at the vertical radiation angle of 15 degrees.[10] Accordingly, since Orange made no further showing of the extent to which current ratios and phase deviations could be varied without exceeding the MEOVs, our conclusion that no showing has been made is warranted.

17. Finally, Orange objects to the Commission's use of the ratio of RSS (root-sum-square of individual towers) field to the minimum MEOV for purposes of evaluating the stability of directional antenna arrays. This approach to the assessment of the stability of directional antenna arrays is supported by hearing record testimony to the effect that the ratio of the RSS field to minimum MEOV radiation provides a "figure of merit" as to the difficulty of adjusting and maintaining an array, a lower ratio indicating a more stable array (Western Exhibit R2, p. 1; Tr. 7492). A comparison of the RSS/MEOV ratios for the several proposed arrays involved in this proceeding is also contained in the Initial Decision, where it was found that "since the Western array has an RSS/MEOV ratio lower than that of the other proposals, it should be less difficult to adjust and more stable to maintain within the MEOV insofar as day to day variations of phase and current ratio are concerned than the others" (29 FCC 2d 609 at 706). Orange did not except to this finding, nor did it adduce any engineering data to rebut the RSS/MEOV ratio concept.

18. In its present petition for reconsideration Orange still has not presented any technical data to rebut the RSS/MEOV ratio concept but is claiming that by specifying a lower MEOV than Western it would be providing much greater protection to KFAB than Western. Since Western would be providing complete protection to the KFAB service area, Orange's claim of greater protection is of no decisional significance and does not in any way affect the Commission's finding that Orange's array is less stable than that of Western.

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[10] Orange also claims in its petition to have demonstrated in Exhibit 23 (at pp. 41–44) that, even with the assumed hypothetical one degree phase and 1% current ratio variations under worst conditions starting from the initial adjustment goal "zero-null" parameters, the permissible signal toward the KFAB service area would never be exceeded, and thus interference would never be caused to KFAB. In view of Orange's own testimony which indicates high improbability of such initial adjustment, this claim is of questionable merit. Moreover, Exhibit 23 indicates that, for the same range of current ratio and phase variations applied to the filled pattern (which is Orange's actual proposed pattern), permissible values of radiation toward KFAB would be exceeded at a number of azimuthal directions and pertinent radiation angles.

OTHER MATTERS

19. Additional questions have been raised by Orange, again without meeting the prerequisites for reconsideration specified in Section 1.106(c) of the Rules. These matters have been considered, but we are not persuaded that any change in our Decision is warranted. For the reasons set forth herein and in our Decision, we reaffirm our conclusion that the public interest will be served by a grant of Western's application.

20. Contrary to the express provisions of Section 1.44(e) of the Rules that a "request to stay the effectiveness of any decision or order of the Commission shall be filed as a separate pleading", Orange has included such a request in its petition for reconsideration. The request will not, therefore, be entertained.

21. Accordingly, IT IS ORDERED, That the petition for reconsideration of our Decision, FCC 73–1264, filed January 9, 1974, by Orange Radio, Inc., IS DENIED.

22. IT IS FURTHER ORDERED, That the request for a stay of our said Decision IS DISMISSED.

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

FCC 74-356

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of GRANVILLE CABLEVISION, INC., GRANVILLE, MIDDLE GRANVILLE, N.Y. For Certificates of Compliance.	CAC-1477 (NY279) CAC-1653 (NY280)

MEMORANDUM OPINION AND ORDER

(Adopted April 9, 1974; Released April 23, 1974)

BY THE COMMISSION: CHAIRMAN WILEY CONCURRING IN THE RESULT.

1. On October 24, 1972, Granville Cablevision, Inc. filed applications for certificates of compliance for its existing systems at Granville and Middle Granville, New York, which are located outside all television markets. The systems currently provide their subscribers with the following television broadcast signals:[1]

WKTV (NBC/ABC, Channel 2) Utica, New York.
WCAX-TV (CBS, Channel 3) Burlington, Vermont.
WMHT (Educ., Channel 17) Schenectady, New York.
WPTZ (NBC, Channel 5) Plattsburgh, New York.
WRGB (NBC, Channel 6) Schenectady, New York.
WMTW-TV (ABC, Channel 8) Poland Spring, Maine.
WTEN (CBS, Channel 10) Albany, New York.
WETK (Educ., Channel 33) Burlington, Vermont.
WAST (ABC, Channel 13) Albany, New York.

Granville has requested authorization to carry the following television signal:

WVNY-TV (ABC, Channel 22) Burlington, Vermont.

Carriage of this signal is consistent with the Commission's Rules.

2. Sonderling Broadcasting Corporation, licensee of Television Broadcast Station WAST, Albany, New York, filed an objection to the applications, and Granville has replied. Sonderling asks that Granville's applications be denied because: (a) they were filed pursuant to Section 76.11(c) rather than Section 76.13(b);[2] (b) there is no statement explaining how carriage of WVNY-TV is consistent with Subpart D of the Commission's Rules as required by Section 76.13(b)(5); and (c) the applications do not have a statement pursuant to Section 76.13(b)(7) that a copy of the complete application has been served on the franchising authority, and that if such application is not

[1] Granville has a population of 2,746 with 427 subscribers. Middle Granville has a population of 500 with 82 subscribers. Both systems have 12-channel capacity.

[2] Section 76.13(b) lists the information required to be submitted in a certificate application by an existing cable system proposing to add television signals. Section 76.11(c) establishes filing deadlines for the submission of applications.

made available for public inspection at an accessible place, the applicant will do so. Furthermore, it was stated that no service was made on the franchising authority for the Village of Middle Granville.

3. The Commission notes with interest that Sonderling has raised no objection to the carriage of the requested signal but, rather, calls to our attention "several defects inherent in said applications which dictate that these applications be denied." These "defects" are procedural in nature and do not go to the substance of the applications. Although Granville concedes that its one-page applications were filed pursuant to Section 76.11(c) of the rules rather than the appropriate Section 76.13(b), the applications substantially contain the required information. We agree with Sonderling that Granville's statement that the cable systems are not located "within a top-100 market" is an insufficient explanation of how carriage of WVNY–TV is consistent with our Rules. However, we will take note that these communities are outside of all markets and that systems so located may carry any television signals. Granville's applications make it perfectly clear that the Village and Town Boards of Granville were served with a copy of the applications. Also, since Middle Granville is an unincorporated hamlet within the Town of Granville, all appropriate franchising authorities appear to have been served. It is not clear whether a copy of the application was made available for public inspection. Even if it was not, however, given the size of the communities involved and the nature of the systems' requests, we do not believe that this omission warrants a denial of the applications. Therefore, we will *sua sponte*, waive Section 76.13(b)(7) of the Rules in this instance.

4. In its reply, Granville complains that its copy of our Rules does not contain some of the provisions that Sonderling claims were not complied with. We take this opportunity to remind Granville that Section 76.301 of the Rules requires cable television operators to have a current copy of, and to be familiar with, Part 76 of the Commission's Rules.

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

Accordingly, IT IS ORDERED, That the objections filed by Sonderling Broadcasting Corp. ARE DENIED.

IT IS FURTHER ORDERED, That the applications for certificates of compliance (CAC–1477, 1653) filed by Granville Cablevision ARE GRANTED, and appropriate certificates of compliance will be issued.

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

FCC 74-374

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of GROSS TELECASTING, INC. For Renewal of Licenses of Stations WJIM, WJIM-FM, WJIM-TV, Lansing, Mich.	Docket No. 20014 File No. BR-830, BRH-1052, BRSCA-207, BRCT-68

MEMORANDUM OPINION AND ORDER

(Adopted April 9, 1974; Released April 22, 1974)

BY THE COMMISSION:

1. The Commission has before it for consideration: (a) the above-captioned applications for renewal of licenses for Stations WJIM, WJIM-FM and WJIM-TV, Lansing, Michigan, filed July 2, 1973, by Gross Telecasting, Inc. (hereinafter Gross or licensee);[1] (b) the results of a Commission field investigation and non-public inquiry into the operations of Stations WJIM-AM-FM-TV; (c) an untimely petition to deny the above-captioned application for renewal of license for WJIM-TV, filed October 15, 1973, by the Lansing Branch of the American Civil Liberties Union of Michigan (hereinafter Complainants or ACLU); (d) a response to the untimely petition to deny, filed February 21, 1974, by Gross; and (e) various other related pleadings.

2. The record before the Commission discloses that on September 2, 1973, the Detroit *Free Press* published an article alleging that Gross had, over a number of years, utilized WJIM-TV's facilities and services as a vehicle for furthering its economic, personal and political objectives. Subsequent articles in the *Free Press* contained additional allegations against Gross. As a result of these articles, an informal field investigation was conducted by the Commisssion. Additionally, the Commission, pursuant to the provisions of Section 403 and 409(e) of the Communications Act of 1934, as amended, instituted a non-public inquiry. *Gross Telecasting, Inc.*, Docket No. 19929, FCC 74-92, released February 1, 1974, *reconsideration denied*, FCC 74M-250, released March 8, 1974. Testimony was taken in Washington, D.C., on February 20, 1974, and on March 8, 1974, the Administrative Law

[1] Gross Telecasting, Inc., a public corporation listed on the American Stock Exchange, is also the licensee of WKBT-TV, La Crosse, Wisconsin. Application for renewal of license for WKBT-TV was granted on November 28, 1973, but in view of the matters raised in this proceeding such grant was subsequently rescinded on December 5, 1973. Further, Gross also has pending before the Commission an application to acquire the license of WKJG-TV, Ft. Wayne, Indiana (BALTP-440; BALCT-531). Action on this application has also been deferred. Action on the WKBT-TV renewal application and the WKJG-TV assignment application will continue to be deferred pending completion of this proceeding.

Judge certified the record in the proceeding to the Commission, FCC 74M–251.

3. Subsequent to the initiation of the Commission's investigation, the ACLU filed, on October 15, 1973, a petition to deny the application for renewal of license of WJIM–TV. In this pleading, Complainants raised essentially the same allegations contained in the Detroit *Free Press* articles and, among other things, also raised questions relating to WJIM–TV's ascertainment efforts, public affairs programming, the classification of certain programs, and public service announcements. However, since the petition was late filed, the staff, after consulting orally with the Commission, notified the ACLU that the petition would be treated as an informal objection filed pursuant to Section 1.587 of the Commission's Rules.[2]

4. The record further discloses that by letter dated February 1, 1974, the staff requested the comments of Gross on the ACLU's allegations. In this regard, the staff sent a copy of its letter to ACLU and notified it that it might file its own comments on the licensee's response to its charges within ten days after receipt of the licensee's response. The staff also sent another letter on February 1 to Gross, requesting its comments on questions raised by the Commission's own field investigation which were not among the allegations made by ACLU. Gross' responses were filed on February 21 and 28, 1974. Instead of filing comments on the Gross response to the ACLU complaint, ACLU on March 1 requested a nine-week extension of time in which to file comments. In view of the facts that the ACLU failed to show good cause, that the Commission already had conducted its own field inquiry into the facts and that a Section 403 inquiry had been conducted, the staff on March 15, 1974, denied ACLU's request for the extension.[3]

5. Information before the Commission raises a number of serious questions as to whether the captioned applicant possesses the qualifications to remain a licensee of the Commission. In view of these questions, the Commission is unable to find that grant of the captioned applications would serve the public interests, convenience and necessity, and must, therefore, designate the applications for hearing. However, certain other matters raised by Complainants fail to present substantial and material questions of fact requiring exploration in an evidentiary hearing.

6. In its complaint, the ACLU alleges that Gross has violated the Commission's policies by editorializing on matters in which it had a significant personal interest without revealing that interest. Specifically, Complainants cite: (a) the Whitehills Tax Assessment edi-

[2] An application for review of this action, taken pursuant to delegated authority, was filed with the Commission on February 26, 1974. In view of our action herein, designating the WJIM license renewal applications for hearing and naming the ACLU as a party to the proceeding, the Complainant's application for review will be dismissed.

[3] An application for review of this action, taken pursuant to delegated authority, was filed with the Commission on March 21, 1974. The Commission could hold its action here in abeyance until this matter is resolved; however, we believe that the public interest would be more expeditiously served if we also dismiss the foregoing application for review and promptly designate the WJIM license renewal applications for hearing on the issues specified herein. In the event the ACLU desires to comment further with rspect to the matters initially raised in its petition to deny or to raise additional matters, which it believes should also be explored in the hearing, such presentation should be addressed to the Review Board in accordance with Section 1.229 of the Commission's Rules.

torial broadcast in or about July 1961; (b) the Pear and Partridge Restaurant editorials broadcast on December 15, 1967, January 2, 1968, and January 17, 1968; and (c) the Lansing Cable TV Franchise editorials broadcast on September 13, 1967, October 31, 1967, and October 27, 1971. The Commission's analysis of these editorials reveals that Gross has apparently violated our policies by its broadcasts of the Whitehills Tax Assessment editorial and the Pear and Partridge Restaurant editorials. The Commission believes, however, that since the former was broadcast seven years prior to a definitive enunciation of our policies in this area,[4] that no action should now be taken regarding this editorial. With respect to the restaurant editorials, the Commission notes that it already has disposed of this matter. *Gross Telecasting, Inc.*, 14 FCC 2d 239 (1968). Accordingly, no issues inquiring into these editorials have been included herein.

7. Complainants have also made allegations that Gross:

(a) offered color television sets to members of the Lansing City Council in order to influence their votes on pending cable TV matters;

(b) hosted a whiskey and steak dinner for members of the Lansing City Council in order to influence their votes on pending cable TV matters;

(c) ordered WJIM news employees secretly to tape record and divulge telephone conversations with members of the Lansing City Council and others in order to improperly influence or embarrass these persons; and

(d) conspired with Lansing City Councilman Joel Ferguson to intercept and keep from the City Council an unfavorable cable TV technical advisory committee report.

The Commission's investigation of the factual sources cited in the complaint as providing the basis for these allegations failed to develop probative evidence of violation of any statute or Commission Rule or policy. Therefore, issues inquiring into these matters have not been included in this Order.

8. Complainants further allege three [5] instances of violation by Gross of the fairness doctrine and Section 315 of the Communications Act of 1934, as amended. These involve: (a) a complaint filed on behalf of Gladys Beckwith; (b) allegations of unfair and imbalanced editorials concerning the *Michigan State News;* and (c) certain news coverage of Dr. Clyde E. Henson. The Commission first notes that the staff has recently issued a ruling concerning the Beckwith complaint. With respect to the other alleged violations, the Commission believes that the information submitted by the ACLU is insufficient to warrant any action at this time. Specifically, with respect to the allegation that the licensee broadcast unfair and imbalanced editorials concerning the *Michigan State News*, the Commission has no indication that the ACLU or the *News* brought the particulars of the complaint to the attention of the licensee prior to seeking Commission review or action, as

[4] See *Gross Telecasting, Inc.*, 14 FCC 2d 239 (1968).

[5] Contrary to the ACLU's contention, its allegations relating to the Ingham County Board of Commissioners do not raise fairness doctrine questions.

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recommended in *The Public and Broadcasting—A Procedure Manual*, 37 Fed. Reg. 20510 (1972). In addition, the ACLU provides no reasonable grounds for the claim that the licensee did not afford reasonable opportunity for the presentation of contrasting views on the issues in its overall programming.[6] See *Allen C. Phelps*, 21 FCC 2d 12 (1969); *Healey* v. *FCC*, 460 F. 2d 917 (D.C. Cir. 1972). With respect to the Henson matter, the Commission notes that on May 17, 1973, the licensee wrote to Dr. Henson stating: "If you would like to comment further on any aspect of your resignation or on Grossfield's report, please don't hesitate to contact me." The Commission has no evidence indicating whether Dr. Henson availed himself of the opportunity afforded him by the licensee. Accordingly, no issues relating to the above allegations have been included herein.

9. In its complaint, the ACLU challenges the validity of the licensee's ascertainment of community problems, arguing that it has failed to consult with several of the significant groups shown by its demographic profile to exist within the WJIM–TV service area. According to the Complainants, no representatives of farmers, Michigan State University students and labor, particularly auto workers and state employees, were included in the licensee's community leader survey. On January 2, 1974, however, the licensee amended its license renewal application to include a supplemental community leader survey specifically directed to the students, farmers, women and labor groups within the WJIM–TV service area. In view of the foregoing, it does not appear that any listed interest group has been omitted from the licensee's ascertainment surveys.[7]

10. The Complainants argue that the licensee has not fulfilled several of the public affairs program proposals which it set forth in its 1970 license renewal application, and has otherwise misrepresented the frequency of two programs which were presented by Station WJIM–TV during the past license term. Specifically, the ACLU contends that the following program series, "You and Your Government," "Ask the Educator," "Spelling Bee," and "We Hold These Truths," were not broadcast by the station. According to the Complainants, there is no indication that several other public affairs programs, such as "High School News Review" and "Confrontation," were aired during the recently ended license period. It is further alleged that Gross has exaggerated and misrepresented to the Commission various facts concerning the broadcasting of the public affairs programs entitled "Close-Up Community College" and "People and Issues."

11. In response to these allegations, Gross maintains that in some instances the above-mentioned programs were presented. In other instances, according to the licensee, alternative programming dealing with the specified problem areas was developed. In its comments, the

[6] Contrary to the ACLU's contention, the April 14, 1972, editorial contained no personal attack.

[7] The licensee is also cited for its failure to apprise the Commission that three of the community leaders interviewed have a financial relationship with Station WJIM–TV. A licensee, however, is not required to limit its ascertainment efforts to those persons with whom it has no economic, family or other relationship. Moreover, there is no showing that their association with Station WJIM–TV affected these individuals' ability to comment on the community's problems from the standpoint of the particular group or organization which they represent. Accordingly, we find no reason to fault the licensee in this regard.

licensee submits as Appendix BB an item-by-item analysis of Station WJIM–TV's performance relative to the aforenoted public affairs program series. Also submitted are Appendices CC and DD which detail from the station's program logs the dates and times during which the "Close-Up Community College" and "People and Issues" programs were telecast by WJIM–TV during the past license terms.

12. As we stated in the *1960 Network Programming Inquiry*, 25 Fed. Reg. 7291 (1960):

> . . . the principal ingredient of the licensee's obligation to operate his station in the public interest is the diligent, positive, and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his community or service area, for broadcast service.

The Commission has never imposed upon licensees any requirement that they broadcast certain types of programs in order to fulfill their public interest obligation. Programming is generally a matter left to the discretion of the individual licensee. It is not the Commission's function to sit as a final arbiter to evaluate the propriety of a licensee's programming decisions. Rather, it is our duty to determine whether or not the licensee has made a reasonable effort to deal with the problems of his service area.

13. A careful review of the 1973 renewal application discloses that 4.9 per cent of the hours of operation of Station WJIM–TV were devoted to public affairs programming. This figure is in excess of the amount of public affairs programming which was proposed in the 1970 renewal application. Subjects which were covered during the past license period dealt with health, citizen/government relations, education, housing, environment, racial tensions, and national and international problems.

14. Examples of specific public affairs programs which were telecast are:

"Challenge." A local thirty minute public affairs program telecast on alternate Sundays during the 1972–1973 and 1973–1974 school terms. It was produced in cooperation with the Lansing Schools Education Association, an organization which represents the teachers of the Lansing School District. This program replaced the originally proposed programs, "Ask the Educator" and "Spelling Bee."

"People and Issues." A local thirty minute public affairs program telecast on the average of once a month, in the evening or late afternoon time periods. The purpose of the program is to explore through dialogue the vital issues confronting the citizens of mid-Michigan. The program was formerly entitled "Confrontation."

"Close up: Community College." A local thirty minute public affairs program currently presented on the average of once a month. The program focuses on the three community colleges in the WJIM–TV viewing area and is produced on a rotating basis in association with the colleges located in Lansing, Flint, and Jackson, Michigan.

"Governor's News Conference." A thirty minute public affairs program presented on the average of once a month. The program

focuses on the relations between citizens and government. The state's chief executive, in a spontaneous and unrehearsed basis, faces a panel of news reporters. This program replaced the 1970 proposed program "You and Your Government."

"Black Dialogue." A local thirty minute public affairs series the subject matter and participants for which are determined by a Black advisory group affiliated with the Lansing Human Relations Committee.

"Martha Dixon Show." A daily local program with a magazine format. It consists of interviews with representatives from community organizations and visiting celebrities, and features primarily of interest to women at home.

15. From our examination of the renewal application it is clear that the public affairs programs set forth in the application were undertaken by the licensee to serve a variety of community problems, needs and interests. This representation is not undermined by the licensee's substitution of some public affairs programs similar in nature to those which were proposed. We conclude, therefore, that Complainant's objections do not raise a material question regarding WJIM–TV's public affairs programming. A licensee has wide discretion in the area of programming. The Commission will not substitute its judgment for that of the licensee in determining what programs are of prime interest to its listening audience and the manner in which they should be presented. Again, we will not interfere with the exercise of the licensee's judgment where, as here, there is no showing that the licensee consistently and unreasonably ignored important matters of public concern.

16. Complainants allege that in its pending renewal application, Gross seriously overstated the amount of time devoted to local programming by falsely labeling as "local" all non-network programs, including such programs as the "University of Michigan Hour," "Oral Roberts" and "Rex Humbard." In response to this contention, Gross states that although the exhibit of the renewal application to which Complainants refer (Exhibit 7) may be unclear, there was no intent on Gross' part to mislead the Commission. The above-mentioned three programs are classified as "local-film" or "local-tape." Programs produced by the station are classified as "local-live." In renewal Exhibit 8, which contains a detailed description of the "University of Michigan Hour," the program is classified as "recorded." In its composite week log analysis, Gross properly stated that "Oral Roberts" and "Rex Humbard" are "recorded" programs.

17. It is clear from Note 2 to Section 73.670 of the Commission's Rules that only those programs which Gross classified as "local-live" should have been classified as "local." See also *Television Program Form*, 5 FCC 2d 175, 179–80 (1966). However there is no question of misrepresentation.[8] Not only are the questioned programs properly classified as "recorded" elsewhere in the application, but it is obvious from the titles of the programs that they were not produced by the

[8] In the same vein, Exhibits 9 and 10 of the WJIM–TV license renewal application do not support the ACLU's accusation that Gross fraudulently listed a total of six vehicles available for use in the station's news gathering operation.

station. Accordingly this contention raises no substantial or material question of fact.

18. "Dial Justice" was a 13-week series of one hour public affairs programs aired in the summer of 1972. Complainants contend that Gross does not disclose the fact in its renewal application that the program was funded almost exclusively from sources outside the station. Instead, the program is claimed as "aired on a completely sustaining basis." The only indications of any outside contributions are vague both as to source and amount. In addition, the ACLU states that the pending renewal application also fails to disclose that for six months in 1972, the salaries of three WJIM–TV employees were paid totally or in part by $13,500 of federal grant money.

19. Complainants also state that the role of the WJIM–TV Public Service Advisory Board (hereinafter PSAB) in suggesting the idea for "Dial Justice" is misrepresented. Although Gross claims the program came out of a "spontaneous discussion" at the February 7, 1972, PSAB meeting, other documents show that by that time the grant of federal money had already been approved for use by WJIM and that at least two participants in the "spontaneous" February 7, 1972, discussion, WJIM–TV program manager Tom Jones and Lansing Police Chief Derold Husby had been involved in the Tri-County Regional Planning Commission (hereinafter TCRPC) planning sessions for "Dial Justice" a month earlier.

20. In response to these contentions, Gross asserts that Complainants efforts to discredit the licensee with regard to its presentation of the "Dial Justice" series are factually incorrect and wholly unwarranted. Gross states that funding for the project was sought by TCRPC on its own initiative and that the station's role was, from the first, merely as the outlet for the series and as the production agent. As stated in the renewal application, the program was "funded in part by a grant from the Michigan Office of Criminal Justice Planning." The funding was primarily used to pay the salaries of three people hired on a six-month contract basis to coordinate the project and to pay for the film and video tape used in keeping a record of the project under the terms of the contract. (See Gross Comments, p. 57, footnote 24.) "The station received no reimbursement for air time or for the many hours that WJIM–TV staff personnel spent on the production of the program."

21. According to Gross, since under the terms of the contract there was to be no advertising within the program nor any sponsorship, expressed or implied, "in the traditional broadcast usage of the term, the programs were, as stated in the renewal application, 'completely sustaining.'" Finally, Gross states, the renewal application contains no misrepresentation as to the role of the PSAB relative to the "Dial Justice" series. The extensive renewal exhibit material concerning "Dial Justice" details the manner in which the program was conceived, developed, and produced, as described above (Exhibit 8, pp. 16, *et seq.*).

22. Again, there is no question of misrepresentation in view of Gross' explanation both in the application and in its response to the complaint. Even the Complainant did not charge that Gross was paid to air the programs, and under Section 73.670 of the Commission's

Rules Gross would not have been required to log the programs as commercial.

23. Complainants also allege that the presentation of the program "Hotline: Model Cities" was heavily financed by outside funding. In response, Gross contends that this allegation is incorrect. Gross states that although the Lansing Model Cities Agency cooperated in the formulation of the series, the Agency advanced no funds of any kind to WJIM–TV, or to its employees. In view of Gross' explanation, this contention raises no substantial or material question of fact.

24. In view of the foregoing, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the captioned applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING at a time and place to be specified in a subsequent Order, upon the following issues:

(a) To determine whether the licensee of WJIM–AM, FM and TV, or any of its employees, agents or principals, ordered the coverage and/or noncoverage of certain persons and/or events and thereby attempted to slant, distort or suppress news.

(b) In light of the evidence adduced pursuant to issue (a), above, to determine whether such orders, if any, resulted in the slanting, distortion or suppression of news.

(c) To determine whether the licensee of WJIM–AM, FM and TV, or any of its employees, agents or principals, ordered the coverage and/or non-coverage of certain persons and/or events in a manner designed to serve the licensee's or its principals' private, rather than the public, interest.

(d) In light of the evidence adduced pursuant to issue (c), above, to determine whether such orders, if any, resulted in the selection of programming for the purpose of serving the licensee's or its principals' private, rather than the public, interest.

(e) To determine all the facts and circumstances surrounding the (i) obtaining of, (ii) submission to the Commission of, and (iii) withdrawal of reliance upon, a letter dated February 26, 1974, signed by Richard Ferman of the Lansing Tennis Club.

(f) In light of the evidence adduced pursuant to issue (e), above, to determine whether the applicant has made misrepresentations to, or has been lacking in candor with, the Commission.

(g) To determine the number of public service announcements broadcast by Station WJIM–TV during the 1973 composite week and, in light of the evidence adduced, to determine whether the licensee has attempted deliberately to misrepresent the extent of these announcements.

(h) To determine, in light of the evidence adduced under the preceding issues, whether the applicant possesses the requisite qualifications to be or to remain a licensee of the Commission, and whether a grant of the applications would serve the public interest, convenience and necessity.

25. IT IS FURTHER ORDERED, That the petition to deny, filed October 15, 1973, by the Lansing Branch of the American Civil Liberties Union of Michigan, IS DISMISSED, and that considered as an informal objection filed pursuant to Section 1.587 of the Commission's

Rules, the aforementioned petition, IS GRANTED to the extent indicated above and IS DENIED in all other respects.

26. IT IS FURTHER ORDERED, That the application for review of action taken pursuant to delegated authority, and the application for review of action taken pursuant to delegated authority denying ACLU's request for extension of time, filed February 26, 1974, and March 21, 1974, respectively, by the Lansing Branch of the American Civil Liberties Union of Michigan, ARE DISMISSED.

27. IT IS FURTHER ORDERED, That the Lansing Branch of the American Civil Liberties Union of Michigan IS MADE A PARTY TO THIS PROCEEDING.

28. IT IS FURTHER ORDERED, That the Chief, Broadcast Bureau, is directed to serve upon the applicant within thirty (30) days of the release of this Order a Bill of Particulars with respect to issues (a) through (g).

29. IT IS FURTHER ORDERED, That the Broadcast Bureau and the Lansing Branch of the American Civil Liberties Union of Michigan proceed with the initial presentation of the evidence with respect to issues (a) through (g), and the applicant then proceed with its evidence and have the burden of establishing that it possesses the requisite qualifications to be a licensee of the Commission and that a grant of its applications would serve the public interest, convenience and necessity.

30. IT IS FURTHER ORDERED, That pursuant to Public Notice, *Questions Concerning Basic Qualifications of Broadcast Applicants*, FCC 73–1024, 28 RR 2d 705, released October 5, 1973, action on the applications (BALCT–531, BALTP–440) for assignment of license of Station WKJG–TV, Ft. Wayne, Indiana, shall be deferred pending resolution of the issues in the instant proceeding. Further, the resolution of the issues in this docketed proceeding shall be binding on any other licensee commonly owned or controlled with the captioned licensee and will be *res judicata* as to any such other licensee.

31. IT IS FURTHER ORDERED, That to avail itself of the opportunity to be heard, the applicant pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, shall, within twenty (20) days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

32. IT IS FURTHER ORDERED, That the applicant herein, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 1.594 of the Commission's Rules, shall give notice of the hearing within the time and in the manner prescribed in such Rule and shall advise the Commission thereof as required by Section 1.594(g) of the Rules.

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

FCC 74-376

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re CEASE AND DESIST ORDER DIRECTED AGAINST: HAMBURG TV CABLE, INC., HAMBURG, PA.	Docket No. 20015 SR-11707 (PA304)

ORDER TO SHOW CAUSE

(Adopted April 10, 1974; Released April 24, 1974)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE CONCURRING IN THE RESULT.

1. On November 24, 1970, WBRE-TV, Inc., licensee of Station WBRE-TV (NBC), Wilkes-Barre, Pennsylvania, filed a "Request for Issuance of Cease and Desist Order" (SR-11707) asking that an Order to Show Cause issue against Hamburg TV Cable, Inc., operator of a cable television system at Hamburg, Pennsylvania [1] for violation of former Section 74.1103(e) of the Commission's Rules.[2] On January 29, 1971, WGAL-TV, Inc., licensee of Station WGAL-TV (NBC), Lancaster, Pennsylvania, filed an "Opposition to request for Issuance of Cease and Desist Order", to which WBRE-TV replied on February 9, 1971. And on November 17, 1971, Hamburg TV filed a letter in reply.[3]

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[1] WBRE-TV directed its original petition against Hamburg Community Cable Co.; however, Hamburg's Form 325 reveals that it is now named in Hamburg TV Cable, Inc. Hamburg TV Cable also operates cable television systems at Mohrsville, Shoemakersville, and West Hamburg, Pennsylvania.

[2] Section 74.1103(e) of the Commission's Rules formerly provided for same day exclusivity protection. In paragraph 114(A)(2) of the *Cable Television Report and Order*, 36 FCC 2d 143, 187 (1972), the Commission stated that: "Requests for same-day network program exclusivity will be presumed to have been modified to request only simultaneous network program exclusivity."

Therefore, we treat WBRE-TV's petition as a request that an Order to Show Cause issue against Hamburg for violation of Section 76.91 of the Commission's Rules. Section 76.91 of the Rules provides in relevant part:

"(a) Any cable television system operating in a community, in whole or in part, within the Grade B contour of any television 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 to the extent specified in §§ 76.93 and 76.95.

"(b) For the 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."

[3] Hamburg TV appears *pro se* in this proceeding. On December 23, 1971, and on January 24, 1972, WBRE-TV filed letters which indicated that its dispute with Hamburg TV might be resolved without formal Commission action; however, on September 19, 1973, WBRE-TV filed a letter which stated that Hamburg TV still is not carrying its signal.

2. Hamburg, Pennsylvania, is in Berks County, Pennsylvania. It has approximately 8,000 residents and is located outside all television markets. Hamburg TV's system provides the following television signals to approximately 1,082 subscribers:

WGAL–TV (NBC) Lancaster, Pennsylvania.
WLYH–TV (CBS) Lancaster, Pennsylvania.
KYW–TV (NBC) Philadelphia, Pennsylvania.
WCAU–TV (CBS) Philadelphia, Pennsylvania.
WPVI–TV (ABC) Philadelphia, Pennsylvania.
WKBS–TV (Ind.) Philadelphia, Pennsylvania.
WPHL–TV (Ind.) Philadelphia, Pennsylvania.
WTAF–TV (Ind.) Philadelphia, Pennsylvania.

WBRE–TV places a predicted Grade A contour over Hamburg while WGAL–TV and KYW–TV place predicted Grade B contours over the community. WGAL–TV and KYW–TV are significantly viewed [4] in Berks County, but WBRE–TV is not. WBRE–TV requests signal carriage [5] on the Hamburg cable television system, and also seeks network exclusivity against WGAL–TV and KYW–TV.

3. Hamburg TV does not carry WBRE–TV, nor does it present any documentation to overcome the presumption that WBRE–TV provides a receivable signal within its predicted Grade A contour. We therefore conclude that Hamburg TV must carry WBRE–TV.

4. We believe, however, that unusual circumstances may exist in this case which militate against issuance of an Order to Cease and Desist against Hamburg TV for its failure to accord WBRE–TV network exclusivity against WGAL–TV. As noted above, WGAL–TV's predicted Grade A contour falls one mile short of Hamburg. WGAL–TV's predicted Grade A contour, however, covers Mohrsville, West Hamburg, and Shoemakersville, Pennsylvania, which Hamburg TV also serves from its Hamburg headend.[6] While WGAL–TV therefore is a lower priority signal than WBRE–TV in Hamburg, it is of equal priority in terms of exclusivity in the other three communities. Literal compliance with our rules would force Hamburg TV to black out WGAL–TV in Hamburg while carrying it in the other three communities. Since Hamburg TV serves the four communities from a common headend, such compliance might force it to buy new equipment to honor the rights of both WBRE–TV and WGAL–TV. In a very similar case, we waived a cable television system's duty to carry one television station on a full time basis so that the system could accord proper exclusivity to another station, rather than requiring the system to provide service which it could not reasonably supply. See *Potomac Valley*

[4] See Appendix B *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 378 (1972).

[5] Section 76.57 of the Rules provides in relevant part: "A cable television system operating in a community located wholly outside all major and smaller television markets, as defined in § 76.5, shall carry television broadcast signals in accordance with the following provisions: (a) Any such cable television system may carry or, on request of the relevant station licensee or permittee, shall carry the signals of: (1) Television Broadcast Station within whose Grade B contours the community of the system is located in whole or in part."

[6] Hamburg TV's operations in Mohrsville and West Hamburg currently are not cable television systems within our rules, because they have 47 and 27 subscribers respectively. Section 76.5(a) of the Rules. Hamburg TV's Shoemakersville system, however, serves 410 subscribers. Moreover, none of the towns appear to be more than seven miles from Hamburg.

Television Co., Inc., 29 FCC 2d 210 (1971). In this case, the pleadings fail to indicate what modifications Hamburg TV will have to make in order to honor the acknowledged but conflicting rights of WBRE–TV and WGAL–TV, nor do they indicate the cost of those modifications. Rather than either ordering such compliance or waiving Hamburg TV's obligation to accord exclusivity to WBRE–TV or WGAL–TV, as in *Potomac Valley, supra*, we have decided to include the issue of the feasibility of Hamburg TV's honoring both stations' rights in the hearing on the Order to Show Cause. If the Administrative Law Judge determines that the public interest would not be served by ordering Hamburg TV to make the modifications necessary to honor the conflicting rights of WBRE–TV and WGAL–TV, he or she shall waive either Hamburg TV's duty to grant WBRE–TV network exclusivity against WGAL–TV or the system's obligation to accord WGAL–TV full time carriage in Shoemakersville.

5. As distinguished from WGAL–TV's predicted Grade A contour, KYW–TV's predicted Grade A contour neither comes close to Hamburg, Pennsylvania, nor covers any of the communities which Hamburg TV serves. Hamburg TV therefore must grant WBRE–TV network exclusivity against KYW–TV's programming pursuant to Section 76.91. Hamburg TV thus is in violation of Sections 76.57 and 76.91 by failing to carry WBRE–TV and by failing to accord it exclusivity against KYW–TV.

In view of the foregoing, IT IS ORDERED, That pursuant to Sections 312 (b) and (c) and 409(a) of the Communications Act of 1934, as amended, 47 U.S.C. 312 (b) and (c), and 409(a), Hamburg TV Cable, Inc., IS DIRECTED TO SHOW CAUSE why it should not be ordered to cease and desist from further violation of Sections 76.57 and 76.91 of the Commission's Rules and Regulations on its cable television system at Hamburg, Pennsylvania.

IT IS FURTHER ORDERED, That Hamburg TV Cable, Inc., IS DIRECTED to appear and give evidence with respect to the matters described above at a hearing to be held at Washington, D.C., at a time and place before an Administrative Law Judge to be specified by subsequent Order, unless the hearing is waived, in which event a written statement may be submitted.

IT IS FURTHER ORDERED, That WBRE–TV, Inc., WGAL–TV, Inc., and Acting Chief, Cable Television Bureau ARE MADE parties to this proceeding.

IT IS FURTHER ORDERED, That the Secretary of the Commission shall send copies of this Order by Certified Mail to Hamburg TV Cable, Inc.

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

FCC 74-434

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
HAWKEYE CABLEVISION, INC., CLIVE, IOWA	CAC-1679
HAWKEYE CABLEVISION, INC., WEST DES MOINES, IOWA	IAO39 CAC-1876
HAWKEYE CABLEVISION, INC., DES MOINES, IOWA	IAO41 CAC-2731
For Certificates of Compliance	IAO36

MEMORANDUM OPINION AND ORDER

(Adopted April 17, 1974; Released April 30, 1974)

BY THE COMMISSION:

1. Hawkeye Cablevision, Inc., proposed operator of cable television systems at Clive, West Des Moines, and Des Moines, Iowa, located within the Des Moines-Ames, Iowa, major television market (#66), has filed applications for certificates of compliance, pursuant to Sections 76.11 and 76.13(a) of the Commission's Rules, requesting certification for the following television broadcast signals:[1]

WOI-TV (ABC, Channel 5) Ames, Iowa.
KRNT-TV (CBS, Channel 8) Des Moines, Iowa.
KDIN-TV (Educ., Channel 11) Des Moines, Iowa.
WHO-TV (NBC, Channel 13) Des Moines, Iowa.
WTCN-TV (Ind., Channel 11) Minneapolis, Minnesota.
KBMA-TV (Ind., Channel 41) Kansas City, Missouri.

Carriage of these signals is consistent with Section 76.63 of the Commission's Rules, applicant's access proposals are consistent with Section 76.251 of the Rules, and the applications are unopposed. The three franchises[2] strictly comply with the requirements of Section 76.31(a) of the Rules. However, since each provides for a franchise fee of 5 percent of gross subscriber revenues, Section 76.31(b) of the Rules requires that the reasonableness of the fee be justified.

2. Hawkeye maintains that the 5 percent franchise fees are reasonable and will not interfere with its ability to provide cable services

[1] The populations of the communities are: Clive, 3,500; West Des Moines, 18,150; Des Moines, 211,000. The proposed cable systems will have 26-channel capacity. Of these channels, six are to be used for television broadcast signal carriage. The remaining twenty channels will be available for access cablecasting for these three systems and for the other three systems on the same headend, which have already been granted certificates of compliance Urbandale (CAC-71), Ankeny (CAC-922), and Windsor Heights (CAC-1469).

[2] Hawkeye was granted a franchise by the City of Clive, Iowa, on October 19, 1972, amended December 27, 1973; it was granted a franchise by the City of West Des Moines on December 11, 1972, amended March 4, 1974; the Des Moines franchise was granted April 2, 1973.

consistent with the Commission's access and program origination goals. Each city asserts that it requires the 5 percent fee to help defray the costs of a regulatory program in which it will receive and resolve subscriber complaints, review plans and system design drawings, advertise the role of the city in the complaint procedures, and retain the legal services of an attorney who will review cable regulatory practices and citizens' complaints. Specifically, the City of Des Moines [3] proposes to maintain a staff of nine full-time employees to implement its city-wide regulatory program. Its tentative annual budget for this program is $125,203. Hawkeye projects that the 5 percent franchise fee will generate $10,474 for Des Moines in its first year of operation; by the sixth year, this amount should rise to the maximum of $124,068. The City of West Des Moines [4] proposes to retain additional staff to perform the regulatory duties, or to utilize existing personnel and delegate some of their previous duties to outside consultants. It estimates that a total of 832 additional hours of administrative, clerical, legal, and inspection services will be required to perform the regulatory duties, at a cost of $6,275. Hawkeye projects that a 5% franchise fee will generate $464 in West Des Moines the first year of operation, and will rise to a maximum of $6,275, by the sixth year. The City of Clive has undertaken to hire consultants or to pay its present staff overtime to fulfill its regulatory obligations. It notes that since it is in metropolitan Des Moines, it will have regulatory obligations comparable to those of a much larger city, although it can expect to receive only $244 in franchise fees the first year, and a maximum of $2,500 after six years.

3. The franchise fees are within the zone of reasonableness contemplated in the *Cable Television Report and Order*, FCC 72-108, 36 FCC 2d 143 (1972). Both Des Moines and West Des Moines have presented proposed budgets detailing the number of employees or manhours required to implement the local regulatory program, and although greater specificity would be desirable from Clive, the Mayor's letter does indicate a "planned local regulatory program." All three proposals indicate that the amount derived from the 5 percent franchise fee will be far from enough to meet the costs of the regulatory program for the first few years of the cable systems' operation; not until the sixth year of operation will the franchise fee cover the costs, and even then, the franchise fee will not exceed the costs of the regulatory program. Therefore, in view of the anticipated additional staff needed to carry out the regulatory programs, and Hawkeye's statement that the fees paid will not interfere with its operations,[5] we believe that the franchise fee showings meet the criteria of Section 76.31(b).

[3] The City of Des Moines has also submitted data justifying its $5,000 application fee. It argues that this is not a revenue measure, but rather will be applied to reimburse the City for its expenses in the granting of the franchise, which included the costs of holding a referendum and the retention of consultants.

[4] The West Des Moines franchise (Section 26) provides for a cable television commission.

[5] Hawkeye notes that it is owned in part by two of the nation's major cable operators, Cox Cable Communications Corporation (20 percent) and Athena Communications Corporation (20 percent).

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

Accordingly, IT IS ORDERED, That the "Application[s] for Certificates of Compliance" (CAC–1679, 1876, and 2731), filed by Hawkeye Cablevision, Inc., ARE GRANTED, and appropriate certificates of compliance will be issued.

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

FCC 74-418

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of HOOPESTON CABLE CO., ROSSVILLE, ILL. For Certificate of Compliance	CAC-2550 IL194

MEMORANDUM OPINION AND ORDER

(Adopted April 17, 1974; Released April 30, 1974)

BY THE COMMISSION:

1. On May 14, 1973, and November 30, 1973, Hoopeston Cable Company proposed the operation of a cable television system at Rossville, Illinois, located in the Springfield-Decatur-Champaign-Jacksonville television market (#64).[1] The application asks for authorization to provide the following television signals:

WICD (NBC, Ch. 15) Champaign, Illinois.
WCIA (CBS, Ch. 3) Champaign, Illinois.
WILL-TV (Educ., Ch. 12) Urbana, Illinois.
WLFI-TV (CBS, Ch. 18) Lafayette, Indiana.
WGN-TV (Ind., Ch. 9) Chicago, Illinois.
WLS-TV (ABC, Ch. 7) Chicago, Illinois.
WFLD-TV (Ind., Ch. 32) Chicago, Illinois.
WTTV (Ind., Ch. 4) Bloomington, Indiana.
WSNS-TV (Ind., Ch. 44) Chicago, Illinois.
WLWI (ABC, Ch. 13) Indianapolis, Indiana.
WAND (ABC, Ch. 17) Decatur, Illinois.[2]

Hoopeston Cable Co. (Hoopeston) based its application on the premise that Rossville was wholly outside all markets and that the appropriate provision in the Commission's Rules for its signal carriage was Section 76.57.

2. On June 25, 1973, an objection was filed by Midwest Television, Inc., licensee of Television Broadcast Station WCIA, Champaign, Illinois. Midwest argues that Rossville, Illinois is not wholly outside the 35 mile zone of the Springfield-Decatur-Champaign-Jacksonville market (#64). It supports its argument with an engineering study that shows that the southwest corner of the jurisdictional bounds of Rossville is actually 34.91 miles away from the Champaign reference point. Therefore, since a portion Rossville is in fact within Champaign's 35 mile zone, Midwest argues that Hoopeston should be required to comply with both the signal carriage limitations of Section 76.63, and the minimum channel capacity requirements of Section

[1] Rossville has a population of 1,420.
[2] Added by "Amendment to Application For Certificate" filed November 30, 1973, pursuant to a recent mandatory signal carriage request.

76.251.[3] Furthermore, Midwest states that it would suffer irreparable economic injury if the subject application were granted.

3. In its reply, filed July 19, 1973, Hoopeston does not take issue with Midwest's engineering study, but generally asks that we view Rossville's intrusion into the Champaign 35 mile zone as *de minimis*. It states that the only portion of Rossville that lies within the 35 mile zone is a .01 square mile parcel of land, upon which is situated only Rossville's village cemetery. In support thereof, on July 20, 1973, the Commission received a letter from the President of the Village of Rossville verifying that the only area within Champaign's 35 mile zone is the cemetery.[4] Hoopeston argues that it should receive the same type of waiver that the cable television system received in Littlefield, Texas.[5] *Diversified Communication Investors, Inc.*, 37 FCC 2d 981 (1972).

4. The facts in this case appear to be analogous to the Littlefield situation. Midwest's argument of adverse economic impact is without merit in these circumstances. We do not feel that the existence of Rossville's cemetery within Champaign's 35 mile zone presents any real danger to Station WCIA. We therefore consider the circumstances appropriate for a waiver of Section 76.5, thereby treating Rossville as lying beyond all markets and permitting unrestricted signal carriage pursuant to Section 76.57.

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, filed June 25, 1973, by Midwest Television, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the "Application for Certification" (CAC–2550) filed May 14, 1973, by Hoopeston Cable Co. IS GRANTED, and an appropriate certificate of compliance will be issued.

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

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[3] Hoopeston proposes only a 12 channel operation.
[4] This fact is also confirmed by an examination of a map that Midwest supplied with its engineering study.
[5] In that case, Littlefield's southeastern tip, .47 square mile with 31 inhabitants, was within 35 miles of Lubbock, Texas, a smaller television market.

FCC 74R–145

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of HYMEN LAKE, PINE CASTLE-SKY LAKE, FLA. For Construction Permit	Docket No. 19432 File No. BP–18491

APPEARANCES

Lewis I. Cohen and *Morton L. Berfield*, on behalf of Hymen Lake; and *Walter C. Miller* and *Robert B. Nelson*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted April 17, 1974; Released April 24, 1974)

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

1. This proceeding involves the application of Hymen Lake for authorization to construct a new Class II standard broadcast station at Pine Castle and Sky Lake, Florida, on 1190 kHz with 250 watts, nondirectional, daytime only. It would be the first local broadcast service for both communities. Lake's application was designated for hearing by the Commission, along with the mutually exclusive applications of Blue Ridge Broadcasting Company, Inc., Blue Ridge, Florida, and S & S Broadcasting Company, Titusville, Florida, *Blue Ridge Broadcasting Co., Inc.*, FCC 72–128, 23 RR 2d 887, released February 14, 1972; however, the latter two applications were dismissed by Orders of the Presiding Judge, FCC 72M–901 and FCC 72M–569, released July 14 and May 1, 1972, respectively. Lake, as the sole remaining applicant, was confronted with the following issues at hearing: (1) an areas and populations issue; (2) a Section 73.30(a) issue; (3) a Section 73.30(b) issue; (4) a Suburban Community issue; (5) a Section 73.188(b)(1) issue; (6) a Section 73.37 issue; and (7) a limited financial issue.

2. The late Administrative Law Judge Millard F. French, in his Initial Decision, FCC 73D–8, released March 2, 1973, resolved all issues favorably to Lake, concluding that the public interest, convenience and necessity would be served by a grant of Lake's application. The proceeding is now before the Review Board on exceptions filed by the Broadcast Bureau directed toward the Judge's favorable resolution of three issues: the Section 73.30(a), Section 73.30(b) and Section 73.37 issues. The Bureau does not dispute the findings and conclusions of the Initial Decision with respect to the other issues. Based upon our consideration of the Initial Decision in light of the Bureau's exceptions and supporting brief, Lake's reply, the argu-

ments of the parties [1] and our analysis of the record, we find ourselves in agreement with the Presiding Judge's ultimate conclusion that Lake's application should be granted. The thrust of the Bureau's argument is that the evidence submitted and relied upon by Hymen Lake, both testimonial and documentary, is unreliable and therefore fails to support the conclusions reached in the Initial Decision. The Board believes, however, that despite some deficiencies, the record evidence as a whole is competent and reliable. Lake's testimony remains unrebutted and his exhibits stand uncontroverted.[2] In contrast, the Bureau's arguments are based mainly on a misconception of Commission case law. Therefore, except as modified by this Decision and by our rulings on exceptions contained in the Appendix attached hereto, the findings and conclusions set forth in the Initial Decision are adopted by the Review Board. Nevertheless, in light of the arguments raised in the Bureau's exceptions and at oral argument, we believe that some amplification regarding the disputed issues is warranted.

SECTION 73.30(a) ISSUE

3. The proposed co-communities of license, Pine Castle and Sky Lake, are located approximately two miles south of the city limits of Orlando, Florida (1970 U.S. Census population—99,006) in Orange County (1970 U.S. Census population—344,311). Hymen Lake has urged throughout the entire proceeding that Pine Castle is coterminous with the Pine Castle Fire Control District, a rectangular entity which extends some three or four miles in a north-south direction and approximately five to seven miles from east to west. Sky Lake, where the transmitter and main studio will be located, is wholly within the Fire Control District on the southern boundary.[3] In addition, the 1970 U.S. Census identifies a portion of this general area as the Pine Castle Census County Division (CCD). The Fire Control District and the CCD overlap, but are not coterminous; Sky Lake abuts the southern border of the CCD.

4. Because both Pine Castle and Sky Lake are unincorporated, neither has a local governing body except for the Orange County government which maintains the school system and highways and provides transportation and police protection. It is undisputed that each community has its own separate and distinct business district and each exhibits such classic indicia of viable communities as social clubs, civic organizations, businesses, religious institutions and educational facilities. Neither community has licensed to it any broadcast facility. A small weekly newspaper is published and circulated to residents in the Pine Castle-Sky Lake area.

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[1] Oral argument was held before a panel of the Review Board on March 12, 1974.

[2] However, Lake's novel argument that the Bureau is, in effect, estopped from excepting to the grant of his application is without foundation or merit. The argument is based solely on the facts that the Bureau did not object to Lake's evidence at the hearing and tested it on cross-examination. The logical extension of this argument is that any uncontroverted evidence, regardless of its reliability, could be used to support the grant of an application. Obviously, we cannot accept this argument.

[3] Pine Castle's origin pre-dates the 1920's; the Fire Control District was created in 1958, with elected Commissioners authorized to levy a tax to subsidize a fire control system; Sky Lake came into existence in 1956 when Hymen Lake first acquired real property, subsequently constructing residential dwellings and other developments.

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5. Various population counts were submitted into evidence by Lake in this proceeding. The Bureau argues that the Commission should rely on the official 1970 U.S. Census; Hymen Lake advocates use of a physical enumeration conducted by employees of the Pine Castle Fire Control District. These figures are as follows:

	Pine Castle Fire Control District	Sky Lake	Pine Castle Census County Division
1960 U.S. census	10,225	342	9,533
1970 U.S. census	26,269	4,915	15,233
1970 fire control district count	30,709		
1972fire control district count	44,000		
1972 Hymen Lake count		6,000	

In addition, all 392 residents of the incorporated community of Edgewood are located inside the boundaries of the Fire Control District, as are 271 out of the 2,705 residents of the incorporated community of Belle Isle. Both of these communities are wholly within the Pine Castle Census County Division.

6. There is no dispute with the findings and conclusions of the Initial Decision with respect to the existence of community indicia; indeed, the Bureau concedes that Sky Lake is a community for allocation purposes and that there exists a population grouping known as Pine Castle which is also a community within the meaning of Section 73.30 (a) of the Rules.[4] The controversy essentially involves three questions: first, whether the population grouping known as Pine Castle is coterminous with the Pine Castle Fire Control District; second, whether the Fire Control District should be deemed a community since there are several "communities", two of them incorporated, within its boundaries; and, third, whether official U.S. Census statistics are the "only" reliable source of population figures.

7. With respect to the first two questions, the Commission has clearly enunciated its policy in *Seven Locks Broadcasting Co.*, 37 FCC 82, 3 RR 2d 177 (1964). In that case, the Commission abandoned the holding set forth in an earlier remand order in the same proceeding [5] which had "imposed a too stringent burden of proof upon the applicants, particularly in view of the nature of the suburban areas claimed . . . as . . . communities." Instead, the Commission, in its final decision in *Seven Locks*, called for reliance upon prior case law which required "less definitive proof as to the community status of the station location . . .", namely, a case-by-case consideration of all relevant facts.[6]

[4] Section 73.30(a) provides in relevant part that ". . . each standard broadcast station will be licensed to serve primarily a particular city, town, political subdivision or community. . . ."

[5] 44 FCC 2749, 22 RR 967 (1962). Therein the Commission stated "that each place of station location applied for must be established as a particular city, town, political subdivision, or community, *i.e.*, an identifiable population grouping separate and distinct from all others; and that the geographic boundaries of the location or locations contended for must not enclose or contain areas or populations more logically identified as, or associated with, some other location." *Id* at 2751–52, 22 RR at 970. The above quoted standard can no longer be relied on in view of the Commission's express disavowal of it.

[6] In deciding *Seven Locks*, the Commission relied on two earlier Commission decisions, *Mercer Broadcasting Co.*, 22 FCC 1009, 13 RR 891 (1957) and *Musical Heights, Inc.*, 29 FCC 1, 19 RR 49 (1960). *Mercer*, in which the Commission granted an application for a new standard broadcast station in the unincorporated residential communities of Levittown-Fairless Hills, Pennsylvania, signifies that there is no hard and fast rule by which a

This is a much more flexible approach than the one the Bureau argues for in its pleadings. In the instant proceeding, the record evidence precludes a determination of whether the Fire Control District is coterminous with Pine Castle, since the latter's boundaries, if any, were not submitted into evidence. The evidence and location of the Pine Castle CCD, together with other evidence, seem to indicate that the two might not be coterminous. The Board believes that such a determination is rendered unnecessary, however, by *Seven Locks*, *supra*, and *Mercer*, *supra* note 6, which indicate that no concrete boundaries are required. In this regard, the record shows that Pine Castle and Sky Lake are separate and distinct from neighboring Orlando, as found by the Judge under the Suburban Community issue; that they possess sufficient formal attributes characteristic of viable communities; that there are distinct needs and a community of interests between Pine Castle and Sky Lake; and that the applicant's unrebutted testimony reveals that residents of Pine Castle and Sky Lake function as, and conceive of themselves as, residents of a community.

8. Nor does the existence of several communities—labeled by the Presiding Judge as "sub-divisions"—within the confines of the Pine Castle Fire Control District pose a problem in determining whether there is a community for allocation purposes. The Board's statement in *Salem Broadcasting Co., Inc.*, 37 FCC 2d 115, 117, 25 RR 2d 68, 71 (1972), that "the area specified must not in fact be a part of another community" is cited by the Bureau as a major obstacle to Pine Castle Fire Control District's designation as a community. In *Salem*, however, an applicant for a Class II–D standard broadcast station was apparently attempting to specify the *business district* of a small town as its principal community. In the instant case, one of Lake's principal communities, Pine Castle, contains either wholly or partially within its borders, several population groupings including two incorporated entities and his proposed co-community of license. The fact that incorporated communities or unincorporated population groupings exist within a larger community does not render invalid the latter's status as a community. See *S & W Enterprises, Inc.*, 37 FCC 220, 2 RR 2d 988 (1964). See also *Babylon-Bay Shore Broadcasting Corp.*, 22 FCC 1191, 14 RR 808(a) (1957). Given the principle that incorporation *vel non* of an area is only one—and not necessarily a decisive—factor in the determination of community status (*Musical Heights* and *Mercer*, *supra* note 6), and because the record is almost barren of evidence concerning these entities within Pine Castle other than that they are located, for the most part, on the perimeters of the Fire Control District, the circumstances are such as to justify the Fire Control District's identification as a community. Likewise, Sky Lake's location within the Fire Control District does not compel denial under this issue, especially since both have been specified as co-communities of license.

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particular population grouping may be adjudged a "community", but rather, a weighing of all relevant facts is the suitable approach. In *Musical Heights*, the Commission awarded a grant to Braddock Heights, Maryland, a small, unincorporated community lacking many of the indicia of a viable community, such as civic and fraternal organizations, religious and education institutions, police and a local government.

9. Addressing ourselves to the dispute over sources for population figures,[7] the Board finds that the Commission's holding in *Albert L. Crain*, 28 FCC 2d 381, 384, 21 RR 2d 607, 611–12 (1971), *i.e.*, that it will "accept, in an appropriate case, any reliable population figures which can be found, under the circumstances, to provide a reasonable, accurate representation of the actual situation", clearly suggests that U.S. Census statistics may not always be the sole source of reliable population data. The test is whether the enumeration is reliable, reasonable and accurate and the Board believes that the house count conducted by the Fire Control District meets this test in every respect. The validity of the count is underscored and corroborated by the more liberal population estimates obtained from several officials of local telephone and power companies; by the fact that the area has recently experienced a rapid population increase, partially due to the construction of Walt Disney World nearby; and because the 1970 count was updated in 1972. The reasonableness of Lake's person-per-household multiplier is established by his unrebutted testimony that the composition of resident families differs from Orlando in that they are younger, growing families; by Lake's reliance on mortgage applications for homes in Sky Lake to determine the size of families; and by his business experience in that general area. Nothing propounded by the Bureau requires a contrary result.[8] The Bureau's request for official notice of certain U.S. Census data which allegedly rebuts the reliability of the multiplier used by Lake cannot be granted. The data was available at the time of the hearing and could have been introduced into evidence at that time. To consider them at this late date would prejudice Lake's right to a fair hearing. The Board therefore accepts the population figures offered by Lake, paragraph 5, *supra*, and we conclude that as of 1972, the population of Pine Castle was 44,000, 6,000 of which represents the population of Sky Lake. In sum, we conclude that Lake's proposal is consistent with Section 73.30(a) of the Rules.

SECTION 73.30(b) ISSUE

10. Section 73.30(b) of the Commission's Rules authorizes a dual-city operation if being licensed to serve only one community would result in an unreasonable burden on an applicant, provided that a main studio will be located in each city and that a substantial number of local live programs will originate from each studio. The fact that Lake plans to locate his main studio only at his proposed transmitter site in Sky Lake, and that he failed to submit evidence with respect to the program origination or "unreasonable burden" requirements of the Rule are urged by the Bureau to be grounds for denial of Lake's application.

[7] The Bureau indicated at oral argument that it does not dispute the population figures for Sky Lake submitted by the applicant. See paragraph 5, *supra*.

[8] The Bureau's reliance on *Salem Broadcasting Co., Inc.*, 38 FCC 2d 170, 25 RR 2d 955, modified on other grounds, 42 FCC 2d 986, 28 RR 2d 407 (1973), is misplaced. In *Salem*, the Review Board sanctioned the use of the most recent U.S. Census data to determine whether a community was within an urbanized area for purposes of a Section 73.37 prohibited overlap issue. To ascertain population data, the Board in *Salem* reserved for the Judge's determination at the hearing, whether "reliable population figures more recent than the 1970 Census figures" could be used.

11. We disagree with the Bureau's arguments. The standard for compliance with Rule 73.30(b) is clearly set forth in *Saul M. Miller*,[9] which holds that the proposed co-communities of license must exhibit "an identity of interests for programming and other purposes sufficient to warrant dual city identification." 4 FCC 2d at 151, 8 RR 2d at 150. The record, especially Lake's showing under the Suburban Community issue, reflects the fact that although Sky Lake has an identity and existence separate from Pine Castle, with more modern dwellings and sewage facilities not available to many residents of Pine Castle, both communities have common problems and needs. Their shared proximity to Disney World was given rise to serious traffic congestion on local roads and highways. The substantial number of tourists who visit Disney World severely burden the area service facilities: water and sewage treatment facilities are barely adequate for Pine Castle and Sky Lake inhabitants, and local motels and restaurants are not equipped to handle the influx of visitors in such disproportionate quantities. The residents of Pine Castle and Sky Lake expressed mutual concern for better fire service, flood control service, street maintenance and lighting, increases in crime and drug abuse, difficulties in schools and lack of governmental services such as libraries, parks and playgrounds. Lake has proposed programming which is designed to meet the needs of both Pine Castle and Sky Lake, and proposes to broadcast two hours of news every day, at least half of which will be devoted to local and regional news, and public service announcements tailored to the needs of these communities will receive preference over general announcements. Significant, too, is the fact that Lake's proposal would provide Pine Castle and Sky Lake with their first local transmission service—a fact which the Commission deemed "compelling" in *Saul M. Miller*, *supra* at 152, 8 RR 2d at 150.

12. The Board finds no merit to the Bureau's contention that the applicant's failure to establish economic hardship, two studio locations and origination of live broadcasts from each studio is fatal. See *Saul M. Miller*, *supra*. This is true for several reasons: (a) the Commission has consistently authorized dual-city identification where the single studio is located at the transmitter site, despite the difference between Section 73.30(a), which permits such an operation, and Section 73.30(b), which does not; (b) the Commission has traditionally required only a minimal showing with respect to economic and programming hardship; and (c) simultaneous live broadcasts have been supplanted by the current widespread practice of playing tapes. We also find instructive the fact that the purpose of Section 73.30(b), when first enacted, was to prevent a station located in a suburb or small city from broadcasting all of its programs from a studio in a large metropolitan city. See Report and Order in Docket 8747 (Origination Point of Programs), 15 FR 8992, 1 RR (part 3) 91:465, 466 (1950). Such a situation does not obtain here. Finally, while the Board is aware of no Commission precedent governing applications specifying two com-

[9] 4 FCC 2d 150, 8 RR 2d 148, affirmed *per curiam*, *Miller* v. *FCC*, 9 RR 2d 2031 (D.C. Cir. 1967). The Bureau regards *Saul M. Miller* as inapposite solely because the Commission granted a waiver of the Rule. However, that fact does not diminish the applicability of the principles espoused therein.

munities, one within the boundaries of the other, the Board does not consider such a geographical anomaly an anathema; rather the Board concludes that resolution of the issue in Lake's favor is mandated by our analysis of "the totality of practical and public interest facts of record." *Saul M. Miller, id.* In sum, we conclude that Lake's proposal is consistent with the intent and spirit of Section 73.30(b) of the Rules.

SECTION 73.37(b) ISSUE

13. Because overlap of the proposed 0.5 mv/m contour of Hymen Lake and the .025 mv/m contour of Station WAVS, Fort Lauderdale, Florida has been acknowledged to exist,[10] and because the Commission has foreclosed consideration of a waiver of Section 73.37,[11] the Board must either conclude that Lake's application falls within the exceptions enumerated in subsection (b) of the Rule [12] or dismiss the application. Initially the Board disagrees with the Presiding Judge's conclusion that Sky Lake met the requirements of the Rule in that it was located outside the Orlando Urbanized Area when the application was first filed in 1969, as defined by the 1960 U.S. Census. It is clear that only the latest U.S. Census, *i.e.*, the 1970 U.S. Census, may be used to determine whether a community is within an urbanized area and therefore within an exception to the Rule. *Salem Broadcasting Co., Inc., supra* n. 8. Since both Pine Castle and Sky Lake are within the Orlando Urbanized Area according to the 1970 U.S. Census, and are therefore ineligible for one exception to the Rule, population figures for the two communities are critical to our determination whether Lake's proposal qualifies under another exception to the Rule.

14. It has already been established that the 1972 population of Pine Castle is 44,000, of which 6,000 persons reside in Sky Lake. Therefore it is clear that Pine Castle falls within the "25,000 population" exception and is eligible for a first local transmission service. On the other hand, Sky Lake's population alone is insufficient under Section 73.37(b). But, the Board is of the opinion that in view of the unusual facts and circumstances in this proceeding, Lake's appplication may

[10] Lake's proposed 0.5 mv/m contour extends 13.5 miles toward Station WAVS from his transmitter site. Station WAVS's .025 mv/m contour extends 172.5 miles in the direction of Lake's site. The two sites are separated by 174 miles.

[11] *Blue Ridge Broadcasting Co., Inc., supra*, 23 RR 2d 891 n. 4.

[12] Section 73.37(b) of the Rules provides as follows: "(b) An application for a new daytime station or a change in the daytime facilities of an existing station may be granted notwithstanding overlap of the proposed 0.5 mv/m contour and the 0.025 mv/m contour of another co-channel station, where the applicant station is or would be the first standard broadcast facility in a community of any size wholly outside of an urbanized area (as defined by the latest U.S. Census), or the first standard broadcast facility in a community of 25,000 or more population wholly or partly within an urbanized area, or when the facilities proposed would provide a first primary service to at least 25 percent of the interference-free area within the proposed 0.5 mv/m contour: *Provided*, That: (1) The proposal complies with paragraph (a) of this section in all other respects and is consistent with all other provisions of this part; and (2) No overlap would occur between the 1 mv/m contour of the proposed facilities and the 0.05 mv/m contour of any co-channel station."

nevertheless be granted.[13] We are aware of no other case where an applicant requesting dual-city authorization was confronted with the prospect of only one community qualifying under the overlap rule. However, the Board is of the view that because Sky Lake is situated within the boundaries of Pine Castle, Lake's proposal conforms with the spirit of the Commission's pronouncements concerning Section 73.37 and the exceptions thereto, *viz.*, to provide at least one local broadcast station to as many communities as possible, except for "relatively small communities largely of a suburban character, located relatively close to large communities and served by stations therein." *Assignment Standards—AM and FM*, 45 FCC 1515, 1524–25 n. 10, 2 RR 2d 1658, 1668–69 n. 10 (1964). Had Lake specified only Pine Castle as his community of license, and being in compliance with an exception to Section 73.37(b), received a grant, then there is little question but that a subsequent request for dual-city authorization specifying Pine Castle-Sky Lake showing compliance with the requirements of Section 73.30(b) would not constitute a breach of the overlap rule, because contours are not relevant to dual-city authorization requests. See Section 73.30(b) of the Rules.

SUMMATION

15. In sum, the Board concludes that both Pine Castle and Sky Lake are communities for allocation purposes within the meaning of Section 73.30(a) of the Rules; that their geographical location, mutually shared problems and needs and their interrelationship entitle them to dual-city identification under Section 73.30(b) of the Rules; and that their size and geographical location bring them within the meaning of the exception to the prohibited overlap rule expressd in Section 73.37(b). We therefore conclude that a grant of Hymen Lake's application would serve the public interest, convenience and necessity.

16. Accordingly, IT IS ORDERED, That the application of Hymen Lake (BP–18491), for a construction permit for a new standard broadcast station at Pine Castle-Sky Lake, Florida, IS GRANTED.

DONALD J. BERKEMEYER,
Member, Review Board,
Federal Communications Commission.

[13] The existence of two separate communities, one wholly within the other, exhibiting an "identity of interests", is an unusual fact, in the Board's view.

APPENDIX

RULINGS ON EXCEPTIONS OF THE CHIEF, BROADCAST BUREAU

Exception No.	*Ruling*
1	Granted. See par. 4 of this decision.
2, 4, 5, 8	Granted to the extent indicated in par. 3, note 3 of this decision; denied in all other respects for the reasons stated in par. 7 of this decision.
3, 10	Denied as being without decisional significance.
6, 7, 9	Denied. See pars. 5 and 9 of this decision.
11	Granted in substance. See par. 4 of this decision.
12	Denied. The judge's findings accurately and adequately reflect the record evidence.
13, 19	Granted to the extent indicated in pars. 6 and 10 of this decision; denied in all other respects for the reasons stated in pars. 9, 11, and 12 of this decision.
14	Granted to the extent indicated in par. 13 of this decision; denied in all other respect as having no decisional significance.
15	Denied. See pars. 9 and 14 of this decision.
16	Granted. See par. 6 of this decision.
17, 18	Denied for the reasons stated in pars. 7 and 8 of this decision.
20	Denied for the reasons stated in pars. 9, 13 and 14 of this decision.
21, 22	Denied for the reasons stated in the whole of this decision.

FCC 73D-8

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of HYMEN LAKE, PINE CASTLE-SKY LAKE, FLA. For Construction Permit	Docket No. 19432 File No. BP-18491

APPEARANCES

Lewis I. Cohen, on behalf of Hymen Lake; *Walter C. Miller* and *Robert B. Nelson*, on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE MILLARD F. FRENCH

(Issued February 26, 1973; Released March 2, 1973)

PRELIMINARY STATEMENT

1. On February 14, 1972, the Commission released its designation order in this proceeding. The order designated for hearing the mutual exclusive applications of Hymen Lake, Blue Ridge Broadcasting Company, Inc., and S & S Broadcasting Company. Hymen Lake (Lake) proposed to operate on 1190kc, 250w, Day, at Pine Castle-Sky Lake, Florida; Blue Ridge Broadcasting Company, Inc., proposed to operate on 1190kc, 250w, Day, at Sanford, Florida; and S & S Broadcasting Company proposed to operate on 1190kc, 5 kw, DA, Day, at Titusville, Florida.

2. Only one applicant remains in this proceeding, the other two having been dismissed by the Presiding Judge on July 11 and May 1, 1972, respectively. Mr. Lake seeks dual-city authorization to operate a new Class II standard broadcast station at Pine Castle and Sky Lake, Florida, employing a non-directional antenna. His proposed transmitter site would be located at the southeastern corner of Sky Lake, about 3.5 miles from the city limits of Orlando, Florida. The main studio location would be at the transmitter site.

3. Pursuant to the designation order, the following issues remain pertinent to the resolution of this proceeding:

(1) To determine the areas and populations which would receive primary service from the proposed operations and the availability of other primary aural (1 mv/m or greater in the case of FM) service to such areas and populations.

(2) To determine whether the proposal of Hymen Lake would serve primarily a particular city, town or other political subdivision as contemplated by section 73.30(a) of the Commission rules and, if not, whether circumstances exist which would warrant a wavier of said section.

(3) To determine whether the proposal of Hymen Lake is consistent with the requirements of section 73.30(b) of the Commission rules, to warrant an authorization for dual-city operation.

(4) To determine whether the proposal of Hymen Lake will realistically provide a local transmission facility for its specified station location or for another larger community, in light of all the relevant evidence, including, but not necessarily limited to, the showing with respect to: (a) The extent to which the specified station location has been ascertained by the applicant to have separate and distinct programming needs; (b) The extent to which the needs of the specified station location are being met by existing aural broadcast stations; (c) The extent to which the applicant's program proposal will meet the specific unsatisfied programming needs of its specified station location; and (d) The extent to which the projected sources of the applicant's advertising revenues within its specified station location are adequate to support its proposal, as compared with its projected sources from all other areas.

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

(8) To determine whether the proposal of Hymen Lake would provide coverage of the city sought to be served, as required by section 73.188(b)(1) of the Commission rules, and, if not, whether circumstances exist which would warrant a waiver of said section.

(9) To determine whether overlap would occur between the proposed 0.5 mv/m contour of Hymen Lake and the .025 mv/m contour of station WAVS, Fort Lauderdale, Florida, in contravention of section 73.37 of the Commission rules.

(13) To determine with respect to the application of Hymen Lake: (a) The present availability of funds to meet construction costs and operating expenses; (b) Whether, in light of the evidence adduced pursuant to (a) above, Hymen Lake is financially qualified.

(17) To determine, in light of the evidence adduced pursuant to the foregoing issues, which, if any, of the applications should be granted.

4. On August 3, 1972, the Presiding Judge released an order granting Lake's petitions for leave to amend filed on June 15, 1972 and July 20, 1972. Both petitions requested leave to amend Lake's application to reflect business interest in various enterprises.

5. A prehearing conference was held on March 31, 1972. Hearing sessions were held on July 11, 12, and August 17, 1972. The hearing record was closed on August 17, 1972.

FINDINGS OF FACT

ISSUE 1—AREAS AND POPULATION TO BE SERVED

6. Mr. Lake is requesting the use of 1190 kHz with a power of 250 watts, daytime only, using a non-directional antenna. Based on an effective field of 92 mv/m and ground conductivity values for the area taken from Fig. M–3 of the Rules, the proposed coverage is as follows:

Contour (mv/m)	Population	Area (square miles)
0.5 (normally protected)	147,202	556
Interference from WAVS	1,160	59.9
Interference-free	146,042	496.1

7. In addition to the applicant's community of Pine Castle-Sky Lake, the proposed operation would provide primary service of 2.0 mv/m or greater to the following urban areas:

Urban area:	*Population*
Belle Isle	2,705
Conway	8,642
Holden Heights	6,206
Orlando (part)	[1] 57,720

[1] Part served.

8. Standard broadcast stations WDBO, WORL, WHOO, WKIS and WLOF in Orlando, Florida, provide primary service of 0.5 mv/m or greater to rural areas and 2.0 mv/m or greater to urban areas, to all of the proposed primary service area.

9. Standard broadcast stations WDBO, WKIS, WLOF, WHOO and WORL in Orlando, WGTO, Cypress Gardens, WFIV and WACY, Kissimmee, and WBJW, Winter Park, Florida, provide daytime primary service of 2.0 mv/m or greater to the applicant's communities of Pine Castle-Sky Lake.

ISSUE 2—THE 73.30(a) COMMUNITY ISSUE

10. Mr. Lake's station proposes to be licensed to Pine Castle-Sky Lake, Florida. The boundaries of these communities are those of the Pine Castle Fire Control District. The record shows that the legislature of the State of Florida enacted legislation that permits the establishment and maintenance of fire control districts in Orange County in which Pine Castle-Sky Lake is located. The law provides that the district is to be created by election. A petition is required to be filed with the Board of County Commissioners, signed by more than 5% of the registered freeholders requesting an election be held. A majority of the freeholders in 1957 voted to establish the Pine Castle Fire Control District (herein referred to as simply Pine Castle). Pursuant to the legislation enacted by the State legislature, the freeholders elected Fire Control Commissioners who had the authority to tax the residents of the district to pay expenses involved in employing fire fighting personnel, acquiring and operating equipment, fire stations

and other buildings. The district was created in 1958 and since that time has so functioned. It provides two fire stations and personnel to man these stations. The district also provides rescue and emergency facilities. The district has levied a tax of 2¾ mills, which is allocated solely for the purpose of operating the Pine Castle Fire Control District.

11. Pine Castle and Sky Lake are unincorporated communities. Thus, they had no legally defined boundaries until the Pine Castle Fire Control District came into being in 1958. The district has well-defined geographic limits because if a person lives within the Pine Castle Fire Control District he is subject to the tax levied by the district. As noted in the preceding paragraph, the people residing in the Pine Castle Fire Control District believe they live in Pine Castle and the district is so named. The Fire Control District is roughly rectangular in shape and extends approximately 3 to 4 miles in a north-south direction, and from Lake Conway on its eastern border it extends some 5 to 7 miles to the west.

12. The evidence in this case shows that as of early 1970 the permanent population of Pine Castle Fire Control District was physically counted to be 30,709, by employees of the district. The district keeps very accurate records regarding the population residing therein. The population was based upon an actual physical count which commenced in the latter part of 1969 and was completed in early 1970. The conservative nature of the count is established by the low multiplier the district used for the occupancy of a single family home. It used a 3.25, or 3.4 multiplier, instead of the more popularly used 3.7, 3.8 or 4.25 multiplier. Furthermore, Mr. Lake testified that he personally investigated to determine the accuracy of the population count. He conferred with officials of the Florida Power Company and the local telephone company. In each instance their estimates were considerably higher.

13. The 1970 physical census revealed the following additional statistics concerning Pine Castle District: 8,775 residences with a population of 30,709, 600 motel units and a population of 984, 580 commercial units, 9 elementary, junior and senior high schools, 20 churches, and 23 day nurseries.

14. The record further reveals that the employees of the Pine Castle Fire Control District actually counted on a house-to-house, street-by-street, basis the population of the district as of June 1972. The count was 44,000. This count was judged to be much too conservative by Walter Keele, the General Manager of the Florida Power Company in Pine Castle, who has been in charge of the Pine Castle activities for the power company for at least twenty years.

15. The number of businesses located in Pine Castle is in excess of 600. A large industrial park is located in Pine Castle, across the highway from Sky Lake, named the Orlando Central Park. It is a distribution center for Central Florida, with 2,000 acres of industrial sites. There are approximately 7,000 persons employed in the Park which has an estimated $40 million annual payroll.

16. Pine Castle has several clubs and civic organizations. Illustrative of the clubs is the Pine Castle Women's Club which was founded in 1940 before the present Pine Castle Fire Control District was formed. Its first project was the construction of the club house, and since its completion it has served as the meeting place not only for the Women's Club, but also for the Girl Scouts, lending library, the Lions Club, the Community Council, various churches, community luncheons, dinners and meetings, recreation activities, a polling place and, most recently, the home of the Southern Garden Arts Center Little Theatre.

17. The present South Orange Community Council is an outgrowth of the Pine Castle Community Council, which was organized by the club in 1955. There are so many organizations in Pine Castle that an umbrella organization has been formed, called the Pine Castle Area Community Council, which coordinates the activities of various clubs and organizations in Pine Castle.

18. One of the educational facilities in Pine Castle is GENESYS, the Graduate Engineering Extension System, an extension of the University of Florida. Its students are professional engineers with BS degrees working toward graduate degrees. The school is attended by approximately 110 students who are all full-time employees. Mid-Florida Technical Institute is also located in Pine Castle. It is a post high school vocational school teaching a variety of vocational subjects. It offers day and evening classes and has an enrollment of approximately 4,000 students.

19. As found hereinbefore, Pine Castle-Sky Lake have no city limits because they are unincorporated. But they have well defined geographic limits—namely, that of the Pine Castle Fire Control District. Sky Lake's development as a community came about through the efforts of Mr. Lake. Commencing in 1956 he acquired land in what is now known as Sky Lake. He began developing land and constructing homes a short time later, and his efforts are continuing to the present time. The population of Sky Lake continues to grow. Thus, in early 1970, the population was approximately 5,000. In the years 1970–71, 125 homes were constructed. In 1971–72, 140 homes were constructed. As of June 1972, Sky Lake's population was estimated at 6,000, based upon a conservative multiplier of 3.76. The minimum number of occupied homes in Sky Lake was 1,725 as of July 1972, with 60 additional houses to be occupied by September 1972. In addition, the estimated transient population is 1,000 persons housed in commercial establishments and motels.

20. Physically located within Sky Lake is a variety of public establishments, such as a large supermarket, two convenience markets, a beauty shop, a dentist, a doctor, a vacuum cleaner sales office, a credit agency, a bowling alley, two restaurants, a motel, three service stations, a cocktail lounge, a kindergarten, several day care centers, a photographer, a laundromat and a piano studio. It is estimated that 300 persons are employed in these businesses. The estimated retail sales for Sky Lake is $7,000,000 annually.

21. Presently under construction is a giant regional shopping center at the southern border of Sky Lake which will house five major department stores and approximately 200 tenants. In addition, there

are approximately 500 apartment units now being processed for immediate construction in Sky Lake, and building will commence very soon.

22. Sky Lake has an active civic association with several hundred members. It has been in existence for over ten years. Sky Lake has a little league baseball team, several bowling leagues, a cub scout pack, and a cooking club. The St. Johns Circle is an organization of women of a local church. There are two churches in the Sky Lake area, one is named the Sky Lake Park Church and the other is the Sky Lake Baptist Church.

23. There is a senior and a junior high school and two elementary schools with a combined school enrollment of approximately 4,400 students. Also located in Sky Lake is the Sky Lake Kiddie College, a pre-kindergarten school, with 300 students.

24. There is published in the area a newspaper entitled "The Southside News," which circulates primarily in the Pine Castle-Sky Lake area with a circulation of 8,000.

25. Much data was presented by the applicant with respect to Orange County and Disney World, to show their rapid growth and development. However, other than the fact that all of Sky Lake and most of Pine Castle are located in Orange County and are within about 12 miles of Disney World, such data has limited evidential value, except as found hereinafter, due to the problems such rapid growth creates.

ISSUE 3—THE 73.30(b) DUAL-CITY AUTHORIZATION ISSUE

26. The community of Sky Lake is wholly within Pine Castle and it is surrounded by Pine Castle on three sides. It is geographically a part of Pine Castle and shares in common churches, clubs, schools, YMCA, sewage facilities, library, fire department, utilities and retail stores. The same post office and zip code serves Pine Castle and Sky Lake.

27. Pine Castle encompasses a larger geographic area than Sky Lake and existed prior to the creation of Sky Lake. The recognition of Sky Lake as a community came about through the acceptance in the area that Sky Lake was developing and growing. Thus, there came about an identity and existence of its own which has definite geographic boundaries.

28. Pine Castle and Sky Lake have, to a significant degree, common concerns and problems. In addition to matters enumerated above, they share their proximity to Disney World. This relationship to Disney World has brought about unique and pressing community problems. For example, the main roads traversing Pine Castle and Sky Lake are causing havoc to the residents of both communities. Other unique problems common to Pine Castle-Sky Lake, brought about by their closeness to Disney World, are set forth in paragraphs 34 and 35, *infra.*

29. The two communities share problems such as obtaining better fire service, flood control services, street maintenance and street lighting, rapidly increasing crime and drug use, difficulties with the schools and the lack of governmental services, such as libraries, parks and playgrounds. The only problems that the two communities do not share in

common are those relating to the different physical environment. Sky Lake is a newer community with more up-to-date housing and sewage. Thus, its residents have many services and facilities that all of the residents of Pine Castle do not have.

30. A disagreement has arisen between the Broadcast Bureau and the applicant as to the population figures for Pine Castle and Sky Lake. While both agree that Pine Castle and Sky Lake are communities, the Bureau claims that only U.S. Census data can be relied upon to supply such figures. On the other hand, Mr. Lake places reliance on an actual house count in 1970 and again in 1972 by personnel of the Pine Castle Fire Control District, as set forth in paragraphs 12 and 14, *supra*. In the designation order, the Commission noted the conflicting claims over the population, and, citing *Albert L. Crain*, 28 FCC 2d 381 at 384, stated that it would accept "... any reliable population figures which can be found, under the circumstances, to provide a reasonable, accurate representation of the actual situation." Thus, it is found that the population figures presented by the applicant are to be accepted over those figures presented by the Bureau.

ISSUE 4

To determine whether the proposal of Hymen Lake will realistically provide a local transmission facility for its specified station location or for another larger community, in light of all the relevant evidence, including, but not necessarily limited to, the showing with respect to: (a) The extent to which the specified station location has been ascertained by the applicant to have separate and distinct programming needs.

31. There are significant differences between Orlando and Pine Castle-Sky Lake. The latter communities lie south of Orlando between Orlando and Disney World. Pine Castle-Sky Lake are unincorporated areas of Orange County. Orlando is a city which provides excellent government services such as fire protection, libraries, police protection, roads which are well maintained and comprehensive traffic engineering.

32. The growth of Pine Castle-Sky Lake is largely attributable to the fact that the Martin Company located in this area approximately 12 years ago and, at the time, was the largest employer in the State of Florida. Indeed, Sky Lake had its impetus from the tremendous need for housing caused by the impact of the Martin Company, which at one time employed over 11,000 persons. The Martin Company attracted many Northern and young people with growing families to come to Pine Castle-Sky Lake to work and live. As compared to Orlando, very few retired persons were attracted to Pine Castle-Sky Lake.

33. The residents of Pine Castle-Sky Lake have available from Orange County very few services available to the residents of the City of Orlando. For example, Orlando has fine sewage facilities, while Sky Lake has adequate facilities and portions of Pine Castle have none. Police protection is good in Orlando. It is inadequate in Pine Castle-Sky Lake. Roads are well maintained in Orlando, but are poorly maintained in Pine Castle-Sky Lake. Orlando has excellent water and power supplies while Pine Castle-Sky Lake is dependent upon two com-

panies which provide power as best they can, and parts of Pine Castle have very poor water service provided by marginal companies. Orlando has an excellent library. The county provides Pine Castle-Sky Lake with few library facilities. Orlando has a good park maintenance program, while Pine Castle-Sky Lake has none. Recreational facilities in Orlando are much better than in Pine Castle-Sky Lake. Street lighting is very good throughout Orlando and, with a few exceptions, is nonexistent in Pine Castle-Sky Lake.

34. The different problems of Orlando on the one hand and Sky Lake-Pine Castle on the other hand, are best exemplified by Disney World. While the whole region is affected by the impact of Disney World, Pine Castle-Sky Lake are the nearest contiguous communities to Disney World and are impacted to an extraordinary degree. For example, there have been incredible traffic jams where the traffic has been backed up for 30 miles! Traffic has been jammed from Orlando to Tampa which is 48 miles away. Such events have a particularly adverse effect on residents of Pine Castle-Sky Lake in terms of getting back and forth to work, going to stores, obtaining emergency services and trying to lead their normal day-to-day existence. The proximity to Disney World has brought about enormous strains on service facilities, such as sewage and water, which are barely adequate for residents of these communities. Pine Castle-Sky Lake is not equipped to handle the literally millions of tourists who look to these communities for services during their visit. Thus, gigantic environmental and pollution problems have been created by the closeness of Pine Castle-Sky Lake to Disney World.

35. The impact of the Disney explosion is different on Pine Castle-Sky Lake than Orlando. Most of the tourists visiting Disney World are not interested in visiting Orlando, which is approximately 30 miles away. Their trip is centered around Disney World and they wish to stay close to Disney World. Consequently, Pine Castle-Sky Lake's motels, restaurants, roads and service facilities are the ones that tourists utilize. A good example of this is the McCoy Jetport which is the closest airport to Disney World. It is located to the east of Pine Castle, and, thus, Pine Castle-Sky Lake is directly between the airport and the Disney World area. The main airport road to Disney World traverses the southern boundary of Pine Castle-Sky Lake.

36. In addition to the above information concerning Pine Castle-Sky Lake's separate and distinct needs, Mr. Lake personally supervised and directed the taking of a survey of the area's needs. In the summer of 1971, he participated actively in many phases of the survey. Mr. Lake and his wife, Harriett, who is to be general manager of the Pine Castle-Sky Lake facilities, in conjunction with their counsel, prepared a format for the two types of interviews to be taken, *i.e.*, of the general public and of community leaders in the area. Then a list of community leaders was prepared, listing those persons who held the positions, qualifications and expertise to speak effectively for the various groups in the area. The list contained the names of leaders of groups dealing with negroes, the poor, the young, the elderly, elected and appointed officials from Pine Castle-Sky Lake and nearby areas, spokesmen for

various civic, citizen and service organizations, representatives from the business world, educators, clergymen, doctors and lawyers.

37. Mrs. Lake, under the supervision of Mr. Lake, actually did all the interviewing and gathering of data for this survey. For the portion of the survey dealing with civic leaders, she set out to interview each person whose name had been listed as a community leader contact. Except for a few instances where barred by extraordinary circumstances, she accomplished this task. She interviewed 89 persons in Pine Castle-Sky Lake, principally, and also in many adjacent communities within the Orlando metropolitan area. A few interviews were held as far away as downtown Orlando, when the interviews concerned county services important to Pine Castle-Sky Lake about which no information could be obtained locally. The interviews conducted by Mrs. Lake were in all cases by face-to-face conversation or by telephone, except for the few instances in which particularly busy officials specifically requested an opportunity to write down their thoughts and send them on to the applicant.

38. Mrs. Lake also conducted the interviewing designed to sample public opinion in the area generally. To assure that a representative cross-sampling would be obtained, Mrs. Lake spent several days doing house-to-house interviews in various residential portions of Pine Castle-Sky Lake. During these neighborhood interviews, Mrs. Lake spoke not only with heads of households and wives, but also with young people on the streets. Churches were visited, and recreational areas. One full day was spent at the 7–11 store in Tangelo Park, on a holiday weekend (Independence Day) when the volume of business was extremely heavy. Mrs. Lake visited a teen dance to speak with young people. A diligent effort was made to obtain the opinions of black residents from different walks of life. Mrs. Lake conducted interviews on campus at Valencia College and at several secondary schools. Interviews were conducted at random by telephone. In all, 91 interviews took place in connection with the general public survey.

39. Based upon the surveys conducted by Mr. and Mrs. Lake, they ascertained that Pine Castle-Sky Lake has the following separate and distinct programming needs:

Traffic

The most repeated need mentioned was action to reduce traffic congestion. In southern Orange County the combination of Disney World, Martin-Marietta Company, McCoy Jetport, and Orlando Central Industrial Park constitutes a growth area away from other presently developed areas. Thus, great strain is placed on all streets, highways, and roads in Pine Castle-Sky Lake, as they unsuccessfully attempt to carry vehicles from one populous area to another.

Education

Problems in this area are both qualitative and quantitative. The friction concerning quality of education stems from the fact that the ruling educational authority, the Orange County School Board, is extremely conservative in philosophical makeup. A disproportionately high percentage of Pine Castle-Sky Lake's resi-

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dents are young families recently transplanted from northern urban areas who generally share a more progressive attitude toward educational institutions. While many parents feel that the Board's attitudes are antiquated, some persons feel just as strongly that the Board is too liberal, and that stricter discipline should be enforced. The young people of Pine Castle-Sky Lake feel shackled by Board-enforced dress codes and other measures.

Crime control

Housebreaking, burglary and vandalism is soaring, as compared to Orlando, inasmuch as the tremendous size of the area to be covered by the police makes police protection very difficult. Also the large amount of construction in progress has stimulated vandalism. There has been much arson which is popularly considered related to labor union problems in the area. The solution to these problems is more policemen and better police protection.

Sewage disposal

Modern sewage disposal is a necessity in the Pine Castle-Sky Lake area. While Sky Lake pioneered sanitary sewers in the late 1950's by means of a private system, county-supplied services to Pine Castle and nearby areas are sadly lacking. The county's sewage treatment plant is inadequate. Its expansion is essential and the extension of the sanitary sewers to Pine Castle is badly needed.

Recreational facilities

Pine Castle-Sky Lake residents feel that additional public recreational facilities of various types must be made available in the area, particularly for the use of young people. Young people interviewed spoke of time on their hands with no place to go, and adults expressed a feeling that the lack of such facilities as teen centers were a contributing factor to the crime problem. Concern was also expressed for similar facilities and services for elderly residents.

Local government services

Many persons interviewed complained that the county government is not providing needed services, is not providing effective local government, and is not responding to the growing needs of the residents of Pine Castle-Sky Lake. This is the root of most of the communities expressed needs and problems. Numerous isolated complaints about needs such as improved public transportation, improved and more plentiful public housing, street lighting, job training, and increased public assistance and health programs all tie into the basic dissatisfaction among Pine Castle-Sky Lake residents with their local governing body.

40. Pine Castle-Sky Lake is largely independent of Orlando primarily because the employment and economic activities of the residents are related to facilities located in the southern half of Orange County, outside of Orlando. For example, substantial employment at the Martin Company, located in Pine Castle, the Orlando Central Industrial Park, located in Pine Castle, the McCoy Jetport, located

south of Pine Castle, and the entire Disney World complex still further south. These activities are largely divorced from Orlando and exist independent of Orlando. Growth patterns indicate this trend will accelerate because the only undeveloped land areas are located north and south of Orlando.

41. The basic cause of the differences in attitudes and problems of the residents of Pine Castle-Sky Lake on one hand, and Orlando on the other, is that the population in Pine Castle-Sky Lake is largely younger, better educated, northern in origin, and primarily white Christian.

ISSUE 4(b)

The extent to which the needs of the specified station location are being met by existing aural broadcast stations.

42. In order to determine the extent to which the needs of Pine Castle-Sky Lake were being met by existing aural broadcast stations, Mr. Lake sent interrogatories to each AM and FM station which provides primary service to Pine Castle-Sky Lake. The interrogatories (13 in number) sought to elicit information from the queried stations as to whether they carried programs, news or any other items that related to, or was directed to, meeting the needs of Pine Castle-Sky Lake. None of the ten stations answering the interrogatories indicated they specifically programmed for the Pine Castle-Sky Lake area. Furthermore, Mr. Lake, who has lived in the Orlando area since 1962, and who listens to the radio approximately 2½ hours each weekday and four to five hours during the weekend, stated that the stations serving Pine Castle-Sky Lake with primary service direct their programming to the larger audience throughout the area rather than to Pine Castle-Sky Lake. Except for the handful of newsworthy items originating from Pine Castle-Sky Lake, the nearby stations do not direct their programming to the separate and distinct needs of the residents of Pine Castle-Sky Lake.

ISSUE 4(c)

The extent to which the applicant's program proposal will meet the specific unsatisfied programming needs of its specified station location.

43. Hymen Lake will provide a first *local* service to Pine Castle-Sky Lake and adjacent small communities. By means of two surveys, Mr. Lake has heard the residents express their needs and concerns, and has seen that a fundamental problem underlying almost all the needs expressed in an inability to effectively influence the conduct of government in the Pine Castle-Sky Lake area. It is his opinion that the communities need a voice, a liaison through which to exchange views with the government.

44. The following proposal sets forth programming designed specifically to meet the outstanding needs of Pine Castle-Sky Lake:

The Citizens Speak will be broadcast six days per week (Monday through Saturday), from 2:00 to 2:15 p.m. This program will allow the people of Pine Castle-Sky Lake to present, discuss, and debate their views on issues of community concern. The format

will vary. On some occasions, a particular group or organization may utilize the entire program to make known its views on a particular issue. Civic organizations, black groups, youth groups, ad hoc committees, or the like, will have this time made available for such a purpose. As to the many issues over which there are contrasting views in the community, representative groups or individuals will be asked to participate, either in a debate or panel discussion on one program, or to appear on different programs spaced as closely as arrangements will permit.

Report to the People is proposed six days per week (Monday through Saturday), from 10:00 to 10:15 a.m. The station will offer its facilities each day to a different county or other governmental official or civic leader, who will bring the listeners his views and ideas on a currently important topic. The community needs expressed by Pine Castle-Sky Lake residents will be frequent topics, as will other needs as they exist or develop. It is expected that visiting state officials will take the microphone periodically, and that frequent participation by Orange County public officials will serve to expand the listener's knowledge and understanding of the matters being discussed. Local civic leaders will be able to utilize this program to keep Pine Castle-Sky Lake residents abreast of developments on community problems.

Take Sides, to be presented every Sunday from 1:00 to 1:30 p.m., will be a panel program led by a moderator. The special guest for each program will be a government official, such as a school board member or county commissioner, or a public servant, such as the head of a welfare or job training program, a school principal, the head of a drug treatment center, or a spokesman for the state highway department or environmental control organization. Appearing with the moderator and the special guest will be other civic leaders or organization spokesmen from Pine Castle-Sky Lake. After opening remarks from the special guest about his work and the way in which his particular organization is dealing with the problems assigned to it, the other guests will be able to discuss and debate these matters with the special guest. In this way, residents of Pine Castle-Sky Lake will have a forum for face-to-face dialogue with public officials, and will be able to discuss the problems most troubling to them.

Community Bulletin Board will be broadcast twice each day from 9:25 to 9:30 a.m. and from 4:25 to 4:30 p.m. These two five-minute segments will be devoted to announcements on behalf of organizations, groups and individuals in the Pine Castle-Sky Lake area concerning forthcoming meetings and events.

Teen Center, each Saturday from 11:45 to 11:55 a.m., will provide local news of interest to teenagers, and will consist primarily of school news as reported by the students themselves.

Police Report each Monday and Thursday from 3:30 to 3:40 p.m., will consist of reports from the police department concerning crime prevention in general and concerning criminal activity in the Pine Castle-Sky Lake area.

45. Mr. Lake proposes to broadcast two hours of news each day. Of this time, no less than 50% (seven hours per week) will deal with local and regional news. This practice will give exposure to many of the area's problems and needs.

46. The applicant has proposed to broadcast 150 non-commercial public service announcements weekly. Mr. Lake will maintain a policy of tailoring these announcements to the particular needs of Pine Castle-Sky Lake to the extent possible. That is to say, PSA's directed specifically toward Pine Castle-Sky Lake will be preferred over general announcements. For example, the area Social Security Office Manager pointed out the need for more public service announcements to dispense information about available social security benefits for the area's elderly, and the applicant proposes to meet this and similar requests.

ISSUE 4(d)

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

47. In order to meet this issue, Mr. Lake and his wife queried businesses located in Pine Castle-Sky Lake. He contacted no businesses located in Orlando. Each potential advertiser was shown a questionnaire and rate card, and Mr. Lake received 16 advertising commitments totaling $45,626. Mr. Lake also received many expressions of interest in advertising on his proposed station, however, no specific dollar commitments were set forth.

48. Inasmuch as Mr. Lake's estimated revenue for the first year, as set forth in Section III, paragraph 1, of his application, is $50,000, the remaining $4,373 will be obtainable from other revenue sources outside of Orlando, including those businesses which expressed interest but would not state a specific sum they would commit to advertising over Mr. Lake's new station. In this connection, it is noted that Pine Castle-Sky Lake lies within approximately six miles of Disney World and Mr. Lake will be able to obtain a minimum of between $5,000 and $10,000 a year in national and regional advertising revenue. He expects this sum to far exceed that amount. This judgment is based upon the several million tourists visiting Disney World each year, 80 percent of whom drive to the area.

49. None of the advertising commitments come from businesses located in Orlando. Mr. Lake believes that his proposed station, with a power of 250 watts, and with very limited coverage of Orlando, cannot reasonably compete for advertising revenue in Orlando against the existing stations in that city. Therefore, Mr. Lake projects no revenue from Orlando.

50. The record shows that Mr. Lake proposes the minimum power permitted for a Class II station operating on the Class I–B channel 1190 kHz. With this minimum power of 250 watts, it was extremely difficult to locate a transmitter site that would meet all of the Commission's rules at the time the application was filed in February 1969. At this time Sky Lake was a community wholly outside of the Orlando urbanized area as defined by the latest U.S. Census.

51. The location of the Lake transmitter site is very restrictive since it requires that the transmitter be located at the exact site shown in the Lake application. A transmitter site relocated as little as 1,000 feet north of the proposed site would have caused a penetration of the Orlando city limits as defined by the U.S. 1960 Census. A move of as little as 4,000 feet east would have prevented the required 25 mv/m coverage to the business area of Sky Lake. A move of any distance at all south would have precluded 25 mv/m coverage to Pine Castle as well as increasing the overlap received from WAVS, Ft. Lauderdale, Florida. A move in a westerly direction would have prevented the required 25 mv/m coverage to Pine Castle's business area. Also, any move east, south or west would have prevented 100% coverage of the 5 mv/m to Pine Castle. Further, any move north would increase the penetration to Orlando by the proposed 5 mv/m contour. The proximity to Orlando and the Pine Castle and Sky Lake business districts prohibit a transmitter site at a location other than that proposed by Hymen Lake.

52. The transmitter site proposed by Mr. Lake meets all the requirements of the FCC rules with regard to city and business area coverage, while at the same time providing the least service possible to Orlando and a minimum overlap received from WAVS, Ft. Lauderdale, Florida. The proposed transmitter site of Lake is 1.3 miles from the Pine Castle business area, 0.8 mile from Sky Lake business area and 5.8 miles from the Orlando business area.

53. The studio and transmitter location of Mr. Lake are located within the confines of Sky Lake-Pine Castle and is about 3½ miles from the nearest point of the Orlando city limits.

54. Mr. Lake's proposed 25 mv/m contour serves all of the business areas of Pine Castle and Sky Lake and the 5 mv/m contour serves all of the city limits of Sky Lake and Pine Castle.

55. The Lake proposal barely penetrates the city limits of Orlando with a 5 mv/m contour. It provides service to but 5,297 persons. It does not serve any of the business area of Orlando with a 25 mv/m signal, and only serves slightly over 50% of the city with a 2 mv/m contour.

56. The deepest penetration of Orlando by the proposed 5 mv/m contour is to the recently annexed southwestern portion of Orlando. This area is known as the Major Realty Tract which is virtually uninhabited. The deepest penetration of the 5 mv/m contour in this particular area is some 3,500 feet. For the purpose of this showing, however, the population within all portions of the Orlando city limits are assumed as evenly distributed. The total penetration of the city of Orlando is 1.47 square miles or 5.35% of the total area (27.5 square miles). Assuming uniform distribution of population even in the Major Realty Tract, the total population in the 5 mv/m contour within the city limits of Orlando is 5,297 persons. This figure is based on the U.S. 1970 Census of 99,006 persons for Orlando.

ISSUE 8—COVERAGE OF BUSINESS DISTRICT

57. Under Section 73.188(b)(1) of the Commission's rules, Lake's proposed 25 mv/m contour should cover the business or factory areas

of each of his two specified communities. The Pine Castle main business area lies about 0.5 mile west of Lake Conway, while the Sky Lake main business district lies about two miles southwest of the Pine Castle main business area. The northern extremity and most remote point of the Pine Castle main business area lies 1.75 miles northeast of the proposed transmitter site. The proposed 25 mv/m has a reach of 1.75 miles in all directions, thus providing complete coverage of that area. The southern extremity and most remote point of the Sky Lake main business area lies 1.3 miles west of the proposed transmitter site, thus the proposed 25 mv/m contour covers all of that area. Accordingly, it is found that Lake's proposed operation complies with Section 73.188(b)(1) of the rules.

ISSUE 9—PROHIBITED OVERLAP ISSUE

58. Under Issue 9 it must be determined whether Hymen Lake's proposed 0.5 mv/m contour would overlap with the 0.025 mv/m contour of Station WAVS, Ft. Lauderdale, Florida (1190 kHz, 5 kw DA–D) in contravention of 47 CFR 73.37.

59. The proposed 1.0 mv/m contour falls 9.5 miles from the proposed transmitter site in the direction of Station WAVS. The 0.5 mv/m contour of Station WAVS extends some 155 miles toward the proposed site and does not overlap the proposed 1.0 mv/m contour by a margin of about 10 miles.

60. The proposed 0.5 mv/m extends a distance of 13.5 miles from Hymen Lake's site in the direction of Station WAVS. The 0.025 mv/m contour of Station WAVS extends 172.5 miles in the direction toward Hymen Lake's site. Since the two sites are separated by 174 miles, the 0.025 mv/m contour of Station WAVS will have a penetration of about 12 miles within the proposed 0.5 mv/m contour. Thus, there is prohibited overlap under Section 73.37(a) of the Commission's rules.

61. The remaining question is whether Hymen Lake's proposal can nevertheless be granted under the special provisions contained in 47 CFR 73.37(b). That subsection reads in pertinent part as follows: "73.37 minimum separation between stations; prohibited overlap. (b) An application for a new daytime station or a change in the daytime facilities of an existing station may be granted notwithstanding overlap of the proposed 0.5 mv/m contour and the 0.025 mv/m contour of another co-channel station, where the applicant station is or would be the first standard broadcast facility in a community of any size wholly outside of an urbanized area (as defined by the latest U.S. Census), or the first standard broadcast facility in a community of 25,000 or more population wholly or partly within an urbanized area, or when the facilities proposed would provide a first primary service to at least 35 percent of the interference-free area within the proposed 0.5 mv/m contour; Provided, that:

> "(1) The proposal complies with paragraph (a) of this section in all other respects and is consistent with all other provisions of this part; and
>
> "(2) No overlap would occur between the 1 mv/m contour of the proposed facilities and the 0.05 mv/m contour of any co-channel station."

62. In this connection, it should be noted that in its designation order the Commission specified that if Hymen Lake's proposal violated 47 CFR 73.37(b), that application would be dismissed. Moreover, the Commission further concluded that Lake had not justified the addition of waiver clause in regard to such a violation.

63. Mr. Lake's application, when it was filed in February 1969, was consistent with the provisions of Section 73.37(b). There was an overlap between the proposed 0.5 mv/m contour of his application and the 0.025 mv/m contour of WAVS, Ft. Lauderdale, Florida. However, Sky Lake was outside any urbanized area at the time the application was filed.

64. The 1970 Census redefined the Orlando Urbanized Area to include Sky Lake. The application still complies with Section 73.37(b) inasmuch as in early 1970, the population of the Pine Castle Fire Control District was conservatively and actually physically counted to be 30,709. As of June 1972, the population was counted again and found to be 44,000. As found hereinbefore in paragraphs 11, 12 and 30, *supra*, these figures represent the population count of Pine Castle. As also shown above, the boundaries of the Fire Control District are the boundaries of Pine Castle. Consequently, the population of Pine Castle exceeds the 25,000 population required by Section 73.37(b).

ISSUE 13—FINANCIAL ISSUE

65. Under Issue 13, Mr. Lake must show the present availability of funds to meet construction and operating expenses. In this connection, it should be noted that the Commission had no real question regarding his ability to meet his financial obligations. Rather it was simply a question that Lake's data was not current.

66. Mr. Lake has produced a more current balance sheet (as of June 1, 1972). The balance sheet shows current assets of $185,000 and liabilities of only $50,000. Thus, Lake has $135,000 in excess of liabilities to meet his first year construction and operating costs of $84,400.

Ultimate Findings and Conclusions

1. Hymen Lake seeks authorization to operate a new Class II standard broadcast station at Sky Lake and Pine Castle, both in Florida. Mr. Lake would operate on 1190 kHz with 250 watts, non-directionally, daytime only. This proceeding had its beginning as a three applicant proceeding involving a choice between three communities but has reduced itself to one applicant where the ultimate issue is whether Pine Castle-Sky Lake will be granted a first local transmission facility.

2. After analyzing Mr. Lake's application, the Commission designated the following issues on his proposal:

(1) an areas and populations issue
(2) a 73.30(a) community issue
(3) a 73.30(b) dual city authorization issue
(4) a *Suburban Community* issue
(8) a 73.188(b)(1) coverage of the business district issue
(9) a 73.37 overlap issue
(13) a limited financial issue.

3. In the Proposed Findings of Fact and Conclusions of Law filed by the Broadcast Bureau and by Hymen Lake, the only two parties still remaining in the case, there is basic agreement that the applicant has met his burden of proof on the following designated issues: (1) the areas and population issue; (4) the *Suburban Community* issue; (8) the 73.188(b)(1) business district coverage issue; and (13) the limited financial issue. Therefore, on the basis of the Findings of Fact set forth hereinbefore, it is concluded that Hymen Lake has successfully met his burden of proof on the four issues next hereinabove mentioned.

4. The essential disagreement between the Bureau and Mr. Lake as to the remaining three issues arises out of the proper population figures that may be ascribed to Pine Castle-Sky Lake. In this connection, it is noted that the Commission, in its designation order, anticipated some of the difficulties in this proceeding, since, in paragraph 9 of the designation order, the Commission specifically instructed all parties to this proceeding to use ". . . the most recent and reasonable population figures available . . ." The Commission relied upon its Decision in *Albert L. Cain*, 28 FCC 2d 381, wherein it held it would accept ". . . any reliable population figures which can be found, under the circumstances, to provide a reasonable, accurate representation of the actual situation."

5. The record in this proceeding establishes that Pine Castle-Sky Lake are communities which are unincorporated and have no legal boundaries. However, they do have well defined geographic boundaries which are conterminous with the boundaries of the Pine Castle Fire Control District. The findings show that the District had a population of 30,709 persons in early 1970 and 44,000 persons as of June 1972, based on an actual house count. Sky Lake's population as of June 1972, was conservatively estimated to be 6,000. The findings further show that the Fire Control District is roughly rectangular in shape, with a 3 to 4 mile extension in a north-south direction, and a 5 to 7 mile dimension from east to west. The Bureau's contention that Pine Castle, the boundaries of which, the findings show, is the same as the Pine Castle Fire Control District, is not a community because it has several sub-divisions, such as, Efeldink, Dr. Phillips, Tangelo Park, etc., is without merit, and is analogous to saying that Arlington, Virginia is not a community because it has many sub-divisions, such as, Westover, Clarendon, Cherrydale, Garden City, etc.

ISSUE 2—THE 73.30(a) COMMUNITY ISSUE

6. The testimony shows that Sky Lake had its inception in 1958. In 1960 its 342 people were located outside the Orlando urbanized area, but by 1970 Sky Lake was located wholly within the Orlando urbanized area. In connection with the 73.188(b)(1) coverage of the business district issue, Mr. Lake submitted evidence showing that Sky Lake has its own separate and distinct business district. He also submitted sufficient evidence to show that Sky Lake has its own civic associations and retail establishments. Therefore, it is concluded that a community called Sky Lake, Florida exists for allocation purposes.

7. There is also an identifiable population grouping called Pine Castle. It is a community that not only has its own civic associations and organizations, it has its own separate and distinct business district. It is a much older community than Sky Lake, as its origin can be traced back to the 1920's. However, it was unincorporated, and without any tangible boundaries at that time. In fact, the Pine Castle Fire Control District did not come into existence until 1958, when the people living therein voted to establish the District in accordance with appropriate State of Florida legislation. The present record shows that Pine Castle District has a population in excess of 44,000. There are more than 600 businesses located within the District, including a 2,000 acre industrial park with 141 tenants and 7,000 employees with an estimated $40,000,000 annual payroll. Pine Castle has an abundance of community and civic life including Women's Clubs, Girl Scouts, Lions Clubs, Community Council, Little League, PTA's homemaker clubs, Little Theatre, library and churches. Also located in Pine Castle are two important educational facilities, a division of the University of Florida and a technical institute with 400 students. There are 18 motels constructed or under construction in Pine Castle. Therefore, it is concluded that a community known as Pine Castle, Florida exists for allocation purposes, and that the requirements of 73.30(a) have been satisfied.

ISSUE 3—THE 73.30(b) DUAL-CITY AUTHORIZATION ISSUE

8. The findings reveal that Sky Lake is wholly within Pine Castle and is surrounded by Pine Castle on three sides. Geographically, it is a part of Pine Castle and shares in common churches, clubs, schools, YMCA, sewage problems, library, fire department, utilities and retail stores, as well as the same post office and zip code. As a community, Sky Lake became recognized throughout the District by reason of its growth and development.

9. The record shows that the two communities have many common problems and concerns, not the least of which is the need for a first local transmission facility. The two communities share problems such as obtaining better fire service, flood control services, street maintenance and street lighting, rapidly increasing crime and drug use, difficulties with the schools and the lack of governmental services such as libraries, parks and playgrounds. The only problems that the two communities do not share in common are those relating to the different physical environment. Sky Lake is a newer community with more up-to-date housing and sewage. Thus, its residents have several services and facilities that all of the residents of Pine Castle do not have, but sorely need.

10. On the basis of the findings, it is concluded that Pine Castle-Sky Lake "have an identity of interests for programming and other purposes sufficient to warrant dual city identification." *Saul M. Miller*, 4 FCC 2d 150. Nor does the fact that only one studio is proposed detract from such identification, since the studio will be located at the transmitter site.

ISSUE 9—THE PROHIBITED OVERLAP ISSUE

11. Lake's application was filed in February 1969. At that time, Sky Lake, the co-community of license, was outside the Orlando urbanized area and, therefore, the application met the requirements of Section 73.37(b). However, his application was not designated for hearing until three years later in February 1972, and by that time, the Census had redefined the Orlando urbanized area and included Sky Lake within that area.

12. During this period of time, Pine Castle and Sky Lake had grown enormously. In early 1970, the population of the Pine Castle Fire Control District was actually counted to be 30,709. As of June 1972, the population was counted again and found to be 44,000. These figures represent the accurate population of Pine Castle, for the boundaries of the Pine Castle Fire Control District are the boundaries of Pine Castle. There is no evidence in this record which casts doubt upon the reliability and accuracy of the population count or upon its relevance to the facts in this proceeding. Therefore, it is concluded that the facts establish that Pine Castle has a population considerably in excess of 25,000, and the provisions of Section 73.37(b) have been met. The overlap issue must be resolved in favor of Hymen Lake.

13. One further matter that must be considered is, whether Hymen Lake has rebutted the presumption that he proposes to serve Orlando rather than Pine Castle-Sky Lake. The findings show that Lake proposes the minimum power, 250 watts, that is permitted for a Class II station operating on the channel 1190 kHz. They further reveal that the location of his transmitter site is very restricted. A site located as little as 1,000 feet north would have caused a penetration of the Orlando city limits. In addition, any move north will increase the 5 mv/m penetration of Orlando. A move as little as 4,000 feet east would have prevented the required 25 mv/m coverage to the business area of Sky Lake. A move any distance south would have precluded 25 mv/m coverage of the Pine Castle business district, as well as increasing the overlap received from WAVS, Fort Lauderdale, Florida. A move west would have prevented the required 25 mv/m coverage to the Pine Castle business area. Finally, any move east, south or west would have prevented 100% coverage of the 5 mv/m to Pine Castle. Thus, the requirements of the Commission's engineering rules prohibit a transmitter site at a location other than that proposed by Lake.

14. It is further noted that the Lake proposal barely penetrates the city limits of Orlando with a 5 mv/m contour providing service to but 5,297 persons. It does not serve any of the business areas of Orlando with a 25 mv/m signal and only serves part of the city with a 2 mv/m signal. The deepest penetration by the proposed 5 mv/m contour is in a virtually uninhabited portion of Orlando. Assuming, however, even distribution of the population, the penetration of Orlando is but 1.47 square miles or 5.35 percent of the total area. The total population in the 5 mv/m contour within the city limits of Orlando is less than 6,000 people. Under the facts developed in this record it is concluded that Mr. Lake's purpose in filing his application was to serve Pine Castle-

Sky Lake, and not to serve as an Orlando station. Furthermore, Mr. Lake does not propose to solicit any advertising revenue from Orlando.

15. Upon the basis of the entire record in this case and the foregoing findings and conclusions, it is concluded that the public interest, convenience and necessity would be served by a grant of the Hymen Lake application.

Accordingly, IT IS ORDERED that unless an appeal to the Commission is taken by any party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of Hymen Lake for a construction permit for a new standard broadcast station at Pine Castle-Sky Lake, Florida, to operate on 1190 kHz with a power of 250 watts, daytime only, IS GRANTED.

MILLARD F. FRENCH,
Administrative Law Judge,
Federal Communications Commission.

FCC 74-324

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of KAISER BROADCASTING CORP. (ASSIGNOR) AND GENERAL ELECTRIC BROADCASTING CO. (ASSIGNEE) For Assignment of License for Station KFOG(FM), San Francisco, Calif.	File No. BAPLH-147

MEMORANDUM OPINION AND ORDER

(Adopted April 2, 1974; Released April 24, 1974)

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

1. The Commission has before it for consideration (1) the above-captioned application; (2) a Petition to Deny and to Intervene; and (3) responsive pleadings. The Petitioners are the Community Coalition for Media Change and the Committee for Open Media.

2. Petitioners request that the Commission designate the above-captioned application for evidentiary hearing or reject the application as defective and improperly filed and dismiss it pursuant to Section 1.566 of our Rules. This relief is requested based upon Petitioners' contentions regarding the adequacy of assignee's ascertainment of community needs, proposed programming, and equal employment opportunity program for KFOG and those EEO programs in effect at assignee's other broadcasting stations and the past and present anti-trust proceedings involving assignee's parent, General Electric Company. These matters will be treated separately below.

3. Co-petitioner, Community Coalition for Media Change (CCMC), claims standing as a "party in interest" under Section 309(d) of the Communications Act, based upon its contention that it "is representative of all minorities in the San Francisco area and is especially concerned with their economic, social and psychological development" and that persons it represents reside within KFOG(FM)'s service area and are regular listeners of the station. The Committee for Open Media (COM) is described as a standing committee of the Santa Clara Valley Chapter of the American Civil Liberties Union composed of students and faculty at local colleges, churchmen and others "concerned with First Amendment rights and free speech in broadcasting." The Petition is signed by Marcus Garvey Wilcher, Chairman of CCMC and contains the supporting affidavit of Phillip Jacklin, a direc-

tor of COM. Petitioners claims to standing as parties in interest are not contested by the applicants and such status will be presumed by the Commission.

4. A description of KFOG(FM)'s programming format, and assignee's survey of community needs, proposed programming and Equal Employment Opportunity Program will be helpful to an understanding of the matters raised in the Petition.

5. Station KFOG(FM) has been operated by assignor, Kaiser Broadcasting Corporation, with a programming format described as: "a specialized service of popular album music designed for an adult audience, with extremely limited commercial interruption, a news service designed to keep listeners abreast of major local, national and international events and a public affairs and public service announcement format which stresses quality and meaningful communication above quantity."

The station generally carries only six minutes of commercial announcements per hour which are scheduled to produce minimum interruption. This format has been developed over a period of years and assignee, General Electric Broadcasting Company, Inc. (GEBCO), states that it intends to continue this basic format with expansion of news and public affairs programming.

ASCERTAINMENT OF COMMUNITY NEEDS

6. The metropolitan area of San Francisco has a total population of 3,109,519. The following shows the racial makeup of the community:

White	2,574,802	Chinese	88,108
Black	330,107	Philippino	44,056
American Indian	17,011	Other	27,972
Japanese	32,463		

The assignee's principals conducted personal interviews with 208 leaders of the community and 243 members of the general public to ascertain the needs and interests of San Francisco. The leaders represented local governmental agencies, social groups, minority groups, hospitals, churches, businesses, police and fire departments and youth organizations. Some of the problems discovered in the survey are: (1) crime; (2) drugs; (3) poor housing; (4) poor educational facilities; (5) discrimination; (6) inadequate youth recreational facilities; (7) high taxes; (8) race relations; (9) pollution and (10) high cost of living. Each of the above racial groups reported these issues as problems facing San Francisco.

PROGRAMMING

7. Programs proposed by the assignee to meet the above needs and interests include:

Special One-hour documentaries

A minimum of six major documentaries in the first year. These in-depth programs will cover the above-mentioned problems discovered in

the survey. Recognized authorities and experts in the community will be invited to participate. This is a minimum commitment and the assignee expects to exceed this.

Black renaissance

A 30 minute program to be broadcast Sunday evenings. The program delineates the accomplishments and aspirations of the Black-American minority. Local leaders will discuss local problems of interest to the minority community.

Community dialogue

A 30 minute program scheduled for Sunday evening during which time local leaders will discuss those problems discovered in the community survey.

Report from Washington

Background profiles of people and events in the nation's capitol with particular emphasis on timely subjects affecting California and the Bay area.

Focus on farming

A two minute Monday through Saturday program featuring information obtained from local, state and federal services for the local farming community.

A comparison of the assignor's and the assignee's programming shows:

Proposed by assignor in BR-999, granted Nov. 29, 1971:

	Assignee's proposal
Hours of operation 160	165
News 4.2 percent	4.6
Public affairs 0.6 percent	.8
Other 0.2 percent	.2

Assignee proposes to broadcast a minimum of 140 PSA's per week.

COMMERCIAL PRACTICES

8. Assignee proposes to broadcast a maximum of eight minutes of commercial matter per hour. Assignee states: "Applicant does not anticipate this limit will be exceeded during the license period, however, if unforeseen events occur, such as requirements of Section 315 of the Communications Act, as amended, requiring additional commercial time, the limitations of the NAB Code would then apply."

EQUAL EMPLOYMENT OPPORTUNITY PROGRAM

9. Assignor filed a satisfactory Section VI and there are no outstanding complaints against the station's employment practices. The assignee states that it will not discriminate against minority groups or women. To implement this policy, assignee proposes to post a notice in the station's lobby informing current and prospective employees of their rights regarding discrimination. Additionally, employment advertisements will be placed with such publications as the San Francisco Sun-Reporter, the California Voice, the East-West Chinese News

Weekly, the Basta-Ya and the America Hispania. These publications have significant circulation among minority group persons in the KFOG(FM) recruiting area. Local schools will also be contacted regarding employment vacancies. Minority leaders of the community will be informed of the station's equal employment policy and will be encouraged to send qualified applicants.

10. The employment program also contains protection for the station's employees in job placement, promotion and compensation. Overtime work will be divided as equally as proficient operations permit. Positions with equivalent duties will receive substantially equal salary and fringe benefits. Each employment category where there is little or no minority representation will be reviewed periodically by the station's general manager to determine whether this results from discrimination. On-the-job training is proposed, counseling and educational opportunities will also be made available for employees seeking to improve their employment position.

11. Turning now to the specific allegations in the Petition, we will treat first the matter of the adequacy of assignee's ascertainment efforts. Here, petitioners contend that assignee has not: "Proposed to earnestly and honestly ascertain the Chinese community. Ascertainment is a sham and suggestions by aware community people are not incorporated into any news programming."

In support of these contentions, the Petition includes the notarized statement of the Chinese for Affirmative Action, signed by Germain Q. Wong and Katheryn M. Fong, which describes a two-hour meeting of various Chinese community leaders with Mr. Jim Rieman, a GEBCO official involved in the community needs survey, during which Mr. Rieman promised that he would present certain specific recommendations of the Chinese community to his superiors. The statement criticizes GEBCO for not sending an acknowledgement to the Chinese community and contends that "General Electric has been unrealistic and insincere in sending a White representative from Denver to perform community ascertainment in the San Francisco Chinese community." GEBCO responds that its ascertainment of the San Francisco Chinese community included "a total of 62 community leaders and face-to-face public interviews"; that Mr. Rieman did report the suggestions enumerated at the group interview as promised and that the information has been placed in a follow-up file for use when GEBCO assumes operation of KFOG; that until FCC approval of its application no meaningful "follow-up" is possible, that Mr. Rieman fulfilled the promise he made to the Chinese for Affirmative Action by presenting that committee's recommendations to his superiors.

12. With respect to petitioners' allegation that a White man from Denver cannot adequately survey the needs and interests of the San Francisco Chinese community, we note the fact that 62 face-to-face interviews were made with members of that community in an attempt to learn its problems. In interviewing community leaders to determine the needs of a particular racial or ethnic group, we do not deem it necessary that the interviewer be of the same race or nationality as the minority persons being interviewed. In light of these facts, we find that the assignee has made a reasonable and good faith effort

to ascertain the needs and interests of the San Francisco community in accordance with the Commission's *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C. 2d 650, 21 RR 2d 1507 (1971). For the above reasons, petitioners' request for a hearing on the applicant's failure to adequately survey the Chinese community is denied.

13. Petitioners attack the current broadcast service of KFOG(FM) and assignee's proposals for continuation of that service. Petitioners contend that the KFOG(FM) news programming is inadequate in that it "offers practically no local news for Black, Brown and Asian citizens and taxpayers"—that press releases sent to KFOG(FM) by minorities are ignored.[1] Petitioners contend that assignee proposes no programming to serve the Spanish-Americans and Asian-Americans of the area; that the current and proposed KFOG(FM) public affairs programming is poorly scheduled and inadequate; that assignee does not propose to increase the number of Public Service Announcements carried by KFOG(FM) and it proposes to devote very little time for "timely issue-oriented and/or citizen initiated public service spots."

14. Assignor, Kaiser, in response contends that its specialized format in the San Francisco market is fully justified and that its news is designed to keep listeners abreast of major events. Assignor states, however, it is not surprising that the Petitioners' monitoring of newscasts during the period of November 3 through November 7, 1972 revealed no news items of special minority group interest since the "selective monitoring" occurred during the Friday–Monday period before the national elections. Kaiser adds, however, that this absence of local minority news for this brief period does not mean the station has a policy of ignoring the interests of minority groups in its newscasts. As to the allegation raised above, that press releases sent to the station by minority groups are ignored, the assignor states that these releases are "considered, not in relation to news, but rather in relation to public affairs programming and public service announcements." Assignor adds that this provides both meaningful exposition of minority group views and effective promotion of minority group causes and activities. Assignor also states that its "Black Renaissance" program has covered the widest possible range of topics that are of concern to the Black community and that its "Community Dialogue" program has addressed itself to the problems of other minorities.[2] Assignor defends its scheduling time for these programs (Sunday evenings) on the grounds that they are times when listeners can devote "sustained attention which in-depth treatment of public affairs requires."

15. Assignee, in its opposition, prefaces its response to the specific allegations concerning the adequacy of its proposed programming,

[1] Petitioners give no examples of such "press releases." However, petitioners' Exhibit 3 contains copies of news items that appeared in San Francisco and Oakland newspapers, Jet Magazine and the Washington Post concerning the "Black Panthers" and the Black Caucus in the U.S. Congress.

[2] KFOG(FM)'s 1971 license renewal application lists the following topics as having been discussed on these programs: *Black Renaissance*—Black art, Black separatism, drug abuse, Black involvement in forestry, education, Blacks in the military, G.I.'s against the war, inter-racial discussion, Black neighborhoods, Black employment and Black advertising. *Community Dialogue*—Discrimination of Chinese in San Francisco, Indians occupying Alcatraz, drug abuse, youth summer jobs, penology, low income housing, pollution, racial tensions, urban business, education, changing lifestyles, help for the elderly, alcoholism, rapid transit, handicapped children, etc.

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with a justification of the specialized KFOG(FM) format which it plans to continue. Assignee contends that the musical format of "popular album music is for a mature adult audience" with "a minimum of interruptions—commercial or otherwise" has extreme popularity and that a proposed departure from this format would be met with a substantial public outcry. Assignee lists the formats of 29 AM and FM stations operating in San Francisco and Oakland and concludes that the market is well served with the widest possible variety of programming available to the public. Assignee states that the area is served by eight commercial television stations; that two 24 hour, 50 kw AM stations operate with continuous news or news-talk formats; that news programming is emphasized on two other stations; that Black programming is offered by KDIA, Oakland and foreign language programming, including Chinese is offered by other stations, particularly KBRG and KFOY(FM), San Mateo. In such a market, assignee contends that a distinct program service is necessary in order to be competitive.

16. With regard to its proposed news programming, Assignee points out that KFOG(FM) presently carries 2 or 3 minute newscasts before the hour and news at the half hour from 6 to 9 A.M. and that it proposes to increase this amount by almost 10% and to add a further dimension to the KFOG(FM) news with reports from its Washington News Bureau which will explore government matters having a direct bearing upon residents of the Bay Area. Assignee states its news will include 60% local coverage and coverage of minority events.

17. Assignee has responded to petitioners' allegations that its public affairs programming and public service announcements are inadequate, especially to meet the needs of the area's minorities, with a reiteration of the basic information regarding these aspects of its proposed programming which is contained in the application and which is summarized above. It contends that its proposed programming demonstrates that it has proposed a reasonable amount of news and information programs to keep its listeners apprised of the events and issues in todays world; that access for minorities will be provided and that local needs including those of minorities will be covered and met by its public affairs programs and public service messages and announcements.

18. As we have repeatedly emphasized, matters of program content, including news content, content of public affairs programming and program scheduling are areas in which the licensee is necessarily given wide discretion. Accordingly, the Commission, in programming matters, does not try to "second-guess" or to substitute its judgments for the good-faith judgments of the licensee (or applicant). See *Stone* v. *F.C.C.* 466 F. 2 316; *Commission En Banc Programming Inquiry*, 20 RR 1901 (1960).

Since this application was filed within 18 months from the filing of KFOG(FM)'s prior renewal application, assignor is not required to submit past programming data in this application. However, assignor has shown that it is carrying the public affairs programming proposed in its past renewal, viz., *Black Renaissance* and *Community Dialogue*. We find that the KFOG(FM) programming has been reasonably re-

sponsive to the needs and interests of its community. Thus, petitioners have raised no substantial questions regarding KFOG(FM)'s past and current operation which would warrant a hearing on this application.

19. With regard to assignee's proposed programming, we have carefully considered all of petitioner's allegations and the responses thereto including the exchange of correspondence between petitioner and assignee concerning the carriage of the "Free Speech Messages",[3] and we conclude that these allegations raise no substantial questions of fact or policy which require a hearing on this application. As we have stated above, the matter of news content and program scheduling are areas for the good faith judgment of the licensee in operating his station to meet the needs of his community and provide service in the public interest. We have determined that assignee's proposed programming, as described above, is reasonably attuned to the needs and interests of the San Francisco community which were ascertained by its community needs survey.

20. Petitioners also raise the allegation that G.E. has failed "to correct its pattern of racial discrimination throughout its broadcast properties." It is their contention that G.E. employs a quota system for the exclusion of or limitation of Blacks and Spanish-speaking management and official positions within its broadcasting properties. The Coalition, in support of this allegation, contends that out of 59 official and managerial positions at GEBCO, only one position is occupied by a Black and Spanish-Americans occupy none. The petitioners further state: "With 315 employees in 1971, only 14 were Black and four were Spanish. In 1972, with an increase of six employees, only one Black person was added . . . Thus, in one year, only one minority person was added to its employment rolls."

21. GEBCO responds that the petitioners do not have the correct facts. G.E. replies that its stations in Schenectady, Nashville, and Denver currently employ 31 minority personnel, 28 fulltime and three part-time; 22 are Black, six are Spanish and three are American Indians. GEBCO also notes that when it acquired its Nashville Station, WSIX AM & FM, on April 7, 1966 there was one minority employee and that there are currently ten fulltime and one part-time minority employees at that facility. The KOA stations in Denver were acquired in 1968 having six minority employees and GEBCO states that minorities now occupy 11 fulltime and one part-time positions at those stations. The Forms 395, "Annual Employment Report", for the assignee stations confirm the above stated numbers of minority employees.

22. GEBCO also adds that strong efforts are being made to recruit, train and promote additional minority members and that the success of the program is evidenced by the fact that during the past two years, while overall employment decreased by 22, fulltime minority employ-

[3] The Petition contains copies of an exchange of correspondence between the Committee for Open Media and GEBCO regarding the airing on KFOG(FM) of certain numbers of "Free Speech Messages" (FSM) which are described by COM as covering "all matters subject to ballot, including propositions to which the equal time provision of Section 315 does not apply. COM requested GEBCO to commit itself to carrying one such FSM every six hours. GEBCO has agreed to carry on a 90 day experimental basis one such FSM per week which will be scheduled a total of seven times.

ment rose by seven. GEBCO adds that its training and promotion program has enabled one-third of its current minority staff to upgrade their employment positions. This is shown by the following:

Hired as—	*Current position*
Traffic clerk	TV traffic manager.
Newswriter	TV newscast anchor and news reporter.
News reporter trainee	News reporter, TV newscaster, producer of black program series.
Janitor	Film editor; now TV cameraman.
Film lab technician	Specialist, photographic operations.
Printshop clerk	TV cameraman.
Secretary	Public relations coordinator.
Newsfilm camera trainee	Newsfilm cameraman.
Announcer trainee	Announcer.
TV production trainee	Production coordinator.

G.E. states that six other minority employees are currently in training programs and that another is to be added during 1973. G.E. notes that former employees have advanced themselves in moves to other employment: "A reporter accepted an offer from NBC in Chicago; another reporter became a Chicago newscaster; a third reporter, who had been given leave of absence for advanced study at Columbia University has become a freelance writer; and, a staff artist accepted a responsible position with a major graphic art company."

G.E. concludes its response to the petitioner's discriminatory employment allegation by stating that the same policies, training and promotional opportunities will be applied to the operation of KFOG (FM).

23. The petitioners reply that G.E. has merely indulged in "self-saluting rhetoric." The Coalition further states that while the minority population in Denver is approximately 20%, GEBCO's Denver stations employ only 11 minorities out of 107 employment positions.

24. Petitioners have alleged that G.E. and its subsidiary GEBCO are guilty of maintaining a "pattern of racial discrimination throughout its broadcasting properties." It states this pattern is evidenced by the fact that at each of GEBCO's stations minority employee percentage is lower than the minority population percentage of its city of license. In *Stone* v. *F.C.C.* the United States Court of Appeals for the District of Columbia upheld the Commission's actions of granting the renewal of license of Station WMAL–TV and denying a petition against that application which in part was based upon a statistical showing of employment discrimination. The Court there held that such a showing did not establish a *prima facie* case for denying license renewal when the licensee had a policy of recruiting minority group members and placing them in responsible jobs.[4] On petition for rehearing in *Stone* that same court noted that "statistical evidence of an extremely low rate of minority employment" could constitute a *prima facie* showing of discrimination, but that the statistics in that case—7% Black employment in an area of 24% Black—were "within the zone of reasonableness."[5]

[4] 151 U.S. App. D.C. at 158, 159, 466 F. 2d at 329–330 (1972).
[5] 151 U.S. App. D.C. at 161, 466 F. 2d at 332.

25. We have reviewed all of the information before us, including the F.C.C. Forms 395, Annual Employment Reports, for all of the GEBCO stations (copies of which were appended to GEBCO's opposition pleading) and we have determined that The Petition to Deny raises no substantial questions of employment discrimination.[6] GEBCO has shown that it has substantial numbers of minority employees in responsible employment positions and that it has a program for recruiting and hiring minorities which has resulted in a substantial increase in its minority employees. Moreover, it has shown that its training program for upgrading minority employees has been effective and specific examples of such upgrading have been shown. We recognize GEBCO's fruitful efforts in upgrading minority employees. We also expect that, in time, GEBCO's efforts will result in the placement of additional minority employees in positions of responsibility which, after all, is one of the concepts of affirmative action.

26. Therefore, in view of all of the above, we conclude that no substantial questions have been raised regarding GEBCO's past or proposed Equal Employment Opportunity Programs.

27. Petitioners conclude their argument against G.E. and GEBCO by alleging that G.E., due to its being a party in several pending antitrust actions, does not have the requisite character fitness to be a licensee. As a basis for this charge, petitioners state that G.E. was found guilty of price fixing in 1962 and that a "pattern of practices" has developed since that time. It claims the following cases evidence that pattern: June 7, 1967, Civil Action #47213—*Viking Industries, Inc.* vs. *General Electric Corporations;* June 8, 1970, *Van Curler Broadcasting Co.* vs. *Westinghouse Broadcasting Company, Inc., Group W Program Sales, Inc.* and *Group W Productions, Inc.;* December 29, 1971, Civil Action #71-5677—*American Electric Power* vs. *General Electric;* May 24, 1972, Civil Action #72-CV 255—*United States of America* vs. *General Electric.*

28. G.E. responded to the above character fitness allegation by conceding that in 1961, G.E. and a number of its employees were convicted in antitrust cases for criminal conduct in fixing prices and rigging bids on the sales of electrical equipment. G.E. states, however, that a full and thorough inquiry by the Commission into the above matter resulted in G.E.'s being allowed to continue as a licensee. *General Electric Co.*, 22 RR 307 (1961).

29. The 1962 case referred to by the petitioners in which G.E. and several of its employees were convicted of price fixing and rigging bids on electrical equipment sales, has been considered previously by the Commission in the applications for assignment and renewal of licenses for Stations WGY, WGFM(FM) and WRGB-TV, Schenectady, New York, from General Electric Co. to General Electric Broadcasting Company, Inc. *General Electric Co.*, 2 RR 2d 1038 (1964). The Commission granted the assignment and renewal of licenses after

[6] The only complaint alleging employment discrimination by GEBCO is that filed with the Tennessee Commission For Human Development by Mr. Johnnie Gooch, Jr., against GEBCO's Nashville, Tennessee station, WNGE-TV. The complainant alleged racial discrimination in promotional consideration and monetary compensation. On February 15, 1974, the Tennessee Commission for human Development, after investigating the above allegations, found "no probable cause."

weighing the antitrust conviction against G.E.'s 40 years of public interest broadcasting. Also determinative was the fact that G.E., by the assignment, had assured the Commission that the highest echelon of the parent company's management would be more closely and regularly involved in the direction of the broadcast stations. There is, thus, no need to reconsider or reevaluate the Commission's decision regarding G.E.'s 1961 antitrust conviction.

30. On November 14, 1972, Judge Charles Renfrew, for the United States District Court, Northern District of California, accepted the parties' stipulation and dismissed with prejudice the case of *Viking Industries* v. *General Electric Corporation.* Also dismissed with prejudice on July 17, 1973 was the case, in which G.E. was named a "co-conspirator," *Van Curler Broadcasting Company* v. *Westinghouse Broadcasting Company, Inc., et al.*

31. As to the case of *American Electric Power* v. *General Electric*, four of the plaintiff's operating subsidiaries filed the antitrust action naming G.E. and Westinghouse Electric Corporation as co-defendants. The plaintiffs allege the companies conspired "to establish uniform book prices and to maintain actual selling prices as close as possible to book." This, the plaintiffs allege, "affected the level of prices for turbine generators and prevented larger discounts which might have resulted from intentional price reductions or inadvertent price errors." G.E. answered that complaint and counter-claimed the American Electric Power claiming that it and its companies had conspired ". . . to boycott G.E. turbine generators in order to induce discriminatory treatment." At the present time no jury verdicts have been issued in the above matters and the cases remain pending.

32. In the case *United States of America* v. *General Electric*, the government charges: "The defendant has violated Section I of the Sherman Act by entering into combinations involving reciprocal purchasing arrangements whereby the defendant purchased materials and services sold by various suppliers upon the understanding that said suppliers, or their suppliers, would purchase the products of the defendant, or the products of customers of the defendant, in unreasonable restraint of the aforesaid trade and commerce."

In its answer, G.E. requested judgment dismissing the complaints. At the present time, this case is also pending.

33. The petitioners, after citing four antitrust cases involving G.E., propose that the Commission should reject this application" . . . as it would reject the application of any single person who was convicted of or admitted guilt to a crime of moral turpitude." As stated earlier, the only above-mentioned antitrust conviction involving G.E. was considered by the Commission in its 1964 determination that G.E. was qualified to remain a broadcast licensee. The Commission will not now reevaluate that decision or G.E.'s character because of that conviction. The other cases cited by the petitioners are either pending, with no jury verdicts having yet been issued against G.E., or have been dismissed with prejudice.

34. The two pending suits do not involve G.E. in its broadcast operations. To delay the instant application until such time as the decisions in the outstanding antitrust cases become final would work a hardship

both on the listening public of KFOG(FM), and the applicants here, for it is not possible to predict the date of a final decree or its outcome. However, a grant of this assignment, conditioned upon the final outcome of the above antitrust cases is appropriate and in accord with our past decisions in this area and with the principles we have recently set forth in our Public Notice F.C.C. 73–1024, dated October 5, 1973.

35. In light of the above, IT IS ORDERED that the Petition to Deny filed by the Community Coalition for Media Change and the Committee for Open Media IS DENIED, and, based upon our determination that the public interest, convenience and necessity would be served thereby, the application for the assignment of license for Station KFOG(FM) from Kaiser Broadcasting Company to General Electric Broadcasting Company IS GRANTED SUBJECT TO THE CONDITION that the Commission reserves the right to take such action as might be appropriate upon conclusion of the proceedings in *United States of America* v. *General Electric*, Civil Action #72–CV 255, United States District Court for the Northern District of New York and *American Electric Power* v. *General Electric*, Civil Action #71–5677, United States District Court for the Southern District of New York.

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

STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS CONCURRING IN PART; DISSENTING IN PART

In this matter, Kaiser wishes to sell KFOG–FM, San Francisco to General Electric Broadcasting Company, a wholly-owned subsidiary of General Electric Company. Two community groups, the Community Coalition for Media Change and The Committee for Open Media have filed Petitions to Deny the transactions because of allegedly insufficient community interest programming proposed by GE, particularly with respect to the local minorities.

Because the assignee's proposals are in general accord with express Commission requirements (whatever my personal views on the adequacy of such requirements), and in view of lack of solid factual disagreements, a concurrence based on Commission precedent appears in order.

However, I do dissent to the majority's decision insofar as it fails to come to grips with its policy standard shortcomings as they apply to the expected performance of broadcast stations, especially radio stations. I would have used this opportunity to objectively clarify our policy with respect to public interest programming expectations so as to avoid confusion on the part of our licensees and the public.

FCC 74-375

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of KAYE BROADCASTERS, INC. For Renewal of License of Station KAYE,[1] Puyallup, Wash.	Docket No. 18929 File No. BR-2682

MEMORANDUM OPINION AND ORDER

(Adopted April 10, 1974; Released April 19, 1974)

BY THE COMMISSION:

1. This proceeding involves the application of KAYE Broadcasters, Inc. for renewal of the license for standard broadcast station KAYE, Puyallup, Washington, which we designated for hearing on issues concerning, *Inter alia*, KAYE's policies and procedures for Fairness Doctrine and personal attack matters, its efforts to ascertain the needs and interests of its service area, and the candor and truthfulness of its communications with the Commission. 25 FCC 2d 96 (1970). After numerous hearing sessions, Administrative Law Judge Ernest Nash issued a Memorandum Opinion and Order, FCC 72M-1478, released December 4, 1972, terminating the hearing and dismissing KAYE's application with prejudice, pursuant to Section 1.568(b) of the Rules which provides that failure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal.

2. In support of his ruling, Judge Nash asserts that the record in this proceeding shows that KAYE has no intention to prosecute its application consistent with the rules, procedures, and standards governing administrative hearings. Urging that KAYE sought to prevail in the hearing by wearing down the Presiding Judge with a strategy of disruption and disorder, Judge Nash states that he had to order KAYE's counsel, Mr. Benedict P. Cottone, to leave the hearing room because of his continuous disorderly, disrespectful, and disruptive conduct.[2] In this connection, Judge Nash also alleges that KAYE presented its exhibits in a voluminous, disorganized, and disorderly fashion in order to make a shambles of the record; that KAYE tried to prevent meaningful cross-examination by avoiding any systematic presentation of its witnesses and by resorting to tactics of ridicule, distraction, and invective; and that KAYE engaged in a deliberate scheme to force a discontinuance of the hearing which finally succeeded.

[1] Effective November 11, 1973, the station's call letters were changed to KUPY.

[2] Judge Nash acted pursuant to Section 1.243 of the Rules, which states that the Presiding Judge has authority, *inter alia*, to: "Regulate the course of the hearing, maintain decorum, and exclude from the hearing any person engaging in contemptuous conduct or otherwise disrupting the proceedings."

3. On January 17, 1973, KAYE filed an appeal of Judge Nash's order,[3] claiming that none of Judge Nash's assertions show any lack of willingness by KAYE to prosecute its application, that its efforts to present evidence were impeded by Judge Nash's determination to build a record warranting denial of KAYE's renewal application, and that it has thus been denied its right to a full and fair hearing. KAYE also contends that Section 1.24(b) of the Rules requires a hearing before an attorney may be suspended or censured,[4] that Judge Nash's exclusion of Mr. Cottone from the hearing room was an act of censure without such a basis, and that Judge Nash accordingly had no authority to deprive KAYE of its counsel. KAYE finally urges that its application has been pending for more than four years, that it has been subjected to crushing expenses as a result of Judge Nash's unlawful actions in this proceeding, and that its application should be granted without further hearings to avoid a forfeiture of the license for economic reasons.

4. Both PSC and the ADL support Judge Nash's order, claiming that KAYE's appeal is without merit and that the present record provides an ample basis, without additional hearings, for denial of KAYE's application. In its comments, the Bureau urges that there is no reason to grant KAYE's renewal application in the light of the present record, that Judge Nash properly exercised his authority under Section 1.243 in excluding Mr. Cottone from the hearing, but that Mr. Cottone's actions should not be attributed to KAYE and thus the proceeding should be remanded for further hearings at which KAYE could be represented by new counsel. In its replies, KAYE argues that it should not be deprived of its license without a full hearing affording KAYE all of its rights; that the only possible purpose of Judge Nash's order, since his dismissal of KAYE's application was unlawful, was to censure Mr. Cottone; and that Mr. Cottone should be allowed to represent KAYE, if further hearings are required, to avoid the insuperable financial burden which new counsel would entail.

5. Oral argument was presented on these matters before the Commission, *en banc*, on September 7, 1973.[5] Thereafter, Mr. Cottone filed a notice of withdrawal as counsel for KAYE.[6] On November 9, 1973 a petition to hold in abeyance and/or grant license for regular term was filed on behalf of KAYE by Henry Perozzo. The petition alleged that James H. Nicholls and Hayden Blair, each of whom has held a 50% interest in the licensee, have signed option agreements to sell

[3] In addition, KAYE filed Appendices A through Q in support of its appeal. Comments were filed February 13, 1973, by the Chief, Broadcast Bureau, and oppositions were filed February 14, and February 16, 1973, by the Pacific Northwest Regional Advisory Board of the Anti-Defamation League of B'nai B'rith (ADL) and by the Puget Sound Committee for Good Broadcasting (PSC), respectively. On February 26, 1973, KAYE, contrary to the provisions of Section 1 1.45(b) of the Rules, filed two separate replies to the pleadings of PSC and the Bureau.

[4] Section 1.24(b) provides that: "Before any member of the bar of the Commission shall be censured, suspended, or disbarred, charges shall be preferred by the Commission against such practitioner and he shall be afforded an opportunity to be heard thereon."

[5] A motion to correct transcript was filed by KAYE on September 28, 1973. Since no objection to this request has been received and since it appears that, with minor exceptions, the corrections are proper, KAYE's motion will be granted as indicated *infra*.

[6] In view of the fact that Mr. Cottone has voluntarily withdrawn as counsel for KAYE in this proceeding, we now see no useful purpose in any further consideration of the arguments concerning the propriety of Judge Nash's exclusion of Mr. Cottone from the hearing. However, if Mr. Cottone should seek to file a new appearance in this proceeding at some future time, we believe that the circumstances summarized above require that he first request permission to do so from the Commission.

their holdings to Perozzo. Asserting that Nicholls and Blair had elected new directors and that plans were being instituted to resolve all of the questions in this proceeding with a totally new staff and management, the petition concluded that KAYE's license should be renewed. Since KAYE's renewal application can not be granted until all of the questions bearing on its operation have been favorably resolved and since no transfer of control can be approved in the face of unresolved questions concerning the licensee's character qualifications, that petition was denied. 44 FCC 2d 308 (1973).

6. At the same time, because the pleadings suggested that Nicholls, who had previously exercised control over the licensee, had abdicated his authority and responsibility over the station, we directed the licensee to provide assurance: (a) that the present operation of the station is consistent with the Communications Act and our Rules and Regulations, (b) that the licensee's views are being presented by a properly authorized representative, and (c) that the licensee intends to continue the prosecution of its renewal application in any further hearings which may be required in this proceeding. 44 FCC 2d at 309. On January 21, 1974, a reply to our order was filed on behalf of KAYE by Carl H. Lambert, who had succeeded Perozzo as president of the licensee. That pleading asserts that the question in subparagraph (a) involved an engineering problem which was being corrected, that as to subparagraph (b) Lambert was doing all that he could to carry on for the licensee as president and director, and that with respect to subparagraph (c) the directors intend to continue to fight for renewal of the station's license.

7. In addition to the foregoing pleading, a Petition for Reconsideration and Grant was filed by Lambert on behalf of KAYE on January 14, 1974.[7] Urging that the character of a corporation, unlike that of a natural person, may change with the election of new officers, that the station's format has been corrected so that the community is now being well served, that further hearings would not serve the public interest when the cause of this proceeding, namely, a vendetta between Nicholls and local residents, is gone, and that any attempt to punish the present officers would be like holding a traffic violation against a different driver of the same vehicle, the petition requests either renewal of this license or, if the present operation of the station is morally or legally wrong, its cancellation.[8]

8. As we have stated previously, the station's current operation, no matter how meritorious, has no bearing on the determinations to be made concerning the licensee's past conduct. 44 FCC 2d at 309. Under Section 309(e) of the Communications Act, this renewal application cannot be granted until all of the questions raised in this proceeding

[7] Oppositions were filed by PSC on January 22, 1974, and by the Broadcast Bureau on January 29, 1974.

[8] On January 14, 1974, Lambert also filed a Contingent Petition to Enlarge Issues on behalf of KAYE, alleging that many members of PSC are satisfied that its objectives have been achieved by the recent changes in the operation of KAYE. If further hearings are required, the petition requests that issues be added to consider the legality, authority, propriety, and character qualifications of PSC. Oppositions were filed by PSC on January 22, 1974, and by the Broadcast Bureau on January 29, 1974. However, since this proceeding is concerned with the qualifications of KAYE, not those of PSC, and since no showing has been made which would suggest that PSC's participation in the further aspects of this case should be restricted in any way, this petition will be denied without further consideration.

have been resolved favorably to the licensee. In this connection, it is clear that the renewal applicant's actual performance during the license period provides the fundamental basis for any projection of his likely future efforts. See *RKO General, Inc.* (WNAC–TV), 35 FCC 2d 100 (1972). Thus, the arguments now being presented on behalf of KAYE provide no basis for a grant of KAYE's renewal application without prior resolution of all of the questions bearing on KAYE's qualifications in this proceeding, and the petition for reconsideration of our action at 44 FCC 2d 308 should be denied.

9. We now turn to Judge Nash's dismissal of KAYE's renewal application. While there is some indication that the trial tactics and conduct which Judge Nash found objectionable were supported and approved by the applicant's principal, we are not persuaded that there is a sufficient showing on the present record to warrant a conclusive finding that the licensee was responsible for the alleged misconduct. Under these circumstances, there is no longer any adequate basis for the dismissal of KAYE's application, and we believe that this proceeding should be remanded to provide KAYE an opportunity to complete its rebuttal showing.[9]

10. In this connection, we continue to be concerned about the suggestions that Nicholls may have abdicated his authority and responsibility over the station. Although we afforded the licensee an opportunity to make a showing that the station is being properly operated in this respect, the only response was prepared by Lambert and it was confined to general assertions of his authority over the station. On the other hand, information contained in the pleadings filed in this matter indicates that, after Nicholls agreed to sell his stock in the licensee to Perozzo, new directors, including Perozzo and Lambert, were elected; that Perozzo and Lambert were elected president, and vice president and manager of the station, respectively; and that, when Perozzo withdrew from the operation of the station, Lambert was selected to replace him without a stockholders meeting. Under these circumstances, we are convinced that the issues in this proceeding should be enlarged [10] to determine whether there has been an unauthorized relinquishment of control and whether Lambert is exercising *de facto* control of the licensee without proper authorization. *Cf.*, *Phoenix Broadcasting Co.*, 44 FCC 2d 838 (1974).

11. With respect to the further hearing directed by this order, we believe that the public interest requires the scheduling of a prehearing conference, on a date not to exceed 30 days after the release of this order, at which KAYE shall be prepared to enter into the usual types of agreements establishing dates for exchanges of proposed exhibits, lists of proposed witnesses, summaries of expected testimony, etc., in keeping with the customary practice. While we recognize that if KAYE wishes to obtain new counsel, he will need a period of time to

[9] Although KAYE urges that its renewal application should be granted on the basis of the existing record, the Bureau has not had an opportunity to complete its cross-examination of Nicholls or to submit whatever rebuttal showing may be appropriate, and KAYE, itself, has not completed its showing. Despite the amount of time and energy already devoted to this proceeding, we see no alternative to a further hearing in the light of our due process obligations.

[10] Other questions raised in contingent petitions to enlarge the issues against KAYE filed by the Broadcast Bureau on April 13, and September 6, 1973, will be considered in a separate order.

become familiar with this case, we are convinced that every effort should be exerted to expedite the further aspects of this proceeding and that the evidentiary hearing sessions should in no event commence at a date later than 180 days after the release of this order. In view of the prior history of this proceeding, KAYE should also be aware that, absent demonstrated *bona fide* good cause, failure to comply with this order or KAYE's prehearing agreements will result in, and we are directing, the dismissal of its application under Section 1.568(b) of the Rules.

12. Finally KAYE has made various allegations of bias and prejudice on the part of Judge Nash in conducting the hearing and in preparing his order dismissing KAYE's renewal application. Without at this time considering the substance of KAYE's charges, we are convinced that all of the circumstances concerning this matter, including the fact that we have now remanded this case for further hearings on two separate occasions make appropriate the selection of a new Administrative Law Judge to preside over this proceeding and to issue a Cumulative Initial Decision considering all of the relevant and proper evidence in this record under the designated issues.[11]

13. Accordingly, it is ordered:

(a) That the petition for reconsideration and grant filed on behalf of KAYE by Carl H. Lambert on January 14, 1974, IS DENIED;

(b) That the contingent petition to enlarge issues filed on behalf of KAYE by Carl H. Lambert on January 14, 1974, IS DENIED;

(c) That the Memorandum Opinion and Order, FCC 72M-1478, released by Judge Nash on December 4, 1972, dismissing the application of KAYE Broadcasters, Inc., IS SET ASIDE;

(d) That the issues in this proceeding ARE ENLARGED on the Commission's own motion: "To determine whether there has been an unauthorized relinquishment of control of KAYE Broadcasters, Inc. and whether Carl H. Lambert is exercising *de facto* control of the licensee without proper authorization of this Commission;"

(e) That the appeal filed by KAYE Broadcasters, Inc. on January 17, 1973, IS GRANTED to the extent that this proceeding IS REMANDED to a new Administrative Law Judge to be selected by the Chief Administrative Law Judge, for further hearings consistent with this Memorandum Opinion and Order and IS DENIED in all other respects; and

(f) That the motion to correct transcript filed by KAYE Broadcasters, Inc. on September 28, 1973, IS GRANTED in all respects except for the proposed correction on page 4425, line 16; the first correction on page 4473, line 20; and the correction on page 4486, line 1, where, in lieu of the word specified by KAYE, "this" IS CHANGED to "them."

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

[11] Since the new Administrative Law Judge can review the record and base his Cumulative Initial Decision upon the reasonably and properly admitted evidence, all of KAYE's rights will be protected. See *NLRB* v. *Weirton Steel Co.*, 135 F. 2d 494 (1943).

FCC 74-377

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of KTRB BROADCASTING CO., INC. (ASSIGNOR) AND BIG VALLEY BROADCASTING, INC. (ASSIGNEE) For Assignment of Licenses of Stations KTRB-AM-FM, Modesto, Calif.	File Nos. BAL-7952; BALH-1874

MEMORANDUM OPINION AND ORDER

(Adopted April 10, 1974; Released April 19, 1974)

BY THE COMMISSION: COMMISSIONERS WILEY, CHAIRMAN; REID AND HOOKS CONCURRING IN THE RESULT.

1. We have before us: (1) the above-captioned application to assign the licenses of KTRB (AM and FM), Modesto, California; (2) a Petition to Deny; and (3) responsive pleadings. The Petitioner is Kilibro Broadcasting Corporation, the licensee of Standard Broadcast Station KFIV, Modesto, California.

2. Some background information will be helpful to an understanding of the substantive matters in the petition. The present licensee of KTRB (AM and FM), KTRB Broadcasting Company, Inc., is controlled 100% by the Crocker National Bank, Sacramento, California, as Executor of the estate of William H. Bates, Jr. On April 9, 1973 the Crocker National Bank as Executor petitioned the Superior Court of the State of California in and for the County of Stanislaus requesting Court approval to sell the assets of KTRB Broadcasting Company, Inc. On April 18, 1973 the Court issued such an Order stating:

> It is now therefore ordered, adjudged and decreed that the assets of said KTRB Broadcasting Company, Inc. be sold to Pete Pappas, Mike J. Pappas, Harry J. Pappas, Arnold Wiebe, Roger L. Roberts, A. Judson Sturdevant, Nicholas J. Tocco, Norman W. Johnson, Robert M. Piccinini, and Robert H. Olson, upon their executing a Contract in the form and substance, substantially the same as Exhibit "B" attached to the petition, providing further however, that each and every party hereinabove named as buyers, be jointly and severally obligated for said purchase price; that said Contract be amended to provide that in the event any of the aforesaid buyers do not meet the requirements of the Federal Communications Commission the remaining parties shall have the right to substitute other parties in their place and stead, provided however, that all of said parties remain obligated for said purchase price; that the purchasers shall have the right to have incorporated in said Contract a provision that the same may be assigned to such legal entity as they may designate provided they remain obligated for said purchase price until their application has been approved by the Federal Communications Commission and the purchase price actually paid to the sellers; that the petitioner, as sole shareholder of said corporation, be authorized and empowered to approve said sale and by appropriate resolution direct the Board of Directors and the officers of said corporation to execute said Contract of Sale and proceed with liquidation of said corporation pursuant to the laws of the State of California and the regulation of the Internal Revenue Service.

Eight of the ten persons named as purchasers in the Court Order quoted above are principals in the assignee corporation, Big Valley Broadcasting, Inc. The remaining two persons, A. Judson Sturdevant and Nicholas J. Tocco, have been replaced by their sons, Michael Tuck Sturdevant and James Michael Tocco.[1]

3. The Petition to Deny is based upon the general allegation that substantial questions of fact exist as to whether or not the two sons, Michael Sturdevant and James Tocco, are real parties in interest in assignee corporation. Petitioner submits that the fathers, Judson Sturdevant and Nicholas Tocco (hereinafter fathers), are the real parties in interest. Petitioner further argues that if the fathers are the real parties in interest, then in light of the fathers' other overlapping broadcast interests a grant of the application would violate the Commission's "cross interest policy" derived from Section 73.35(a) of the Multiple Ownership Rules.[2] These other overlapping broadcast interests of the fathers referred to by petitioner are reported in the assignment application and in the Commission's ownership records as follows: The elder Sturdevant is President, a director, and a 15% stockholder in, Argonaut Broadcasting Company, licensee of Station KFAX, San Francisco; Vice-President, director, and 10% stockholder in KULA Broadcasting Corporation, licensee of Station KGMS, Sacramento, California; the elder Tocco is the Treasurer/Assistant Secretary, director, and 15% stockholder in Argonaut Broadcasting Company. Petitioner has submitted an engineering report which shows that the 1 mv/m contour of KTRB–AM overlaps the 1 mv/m contours of KFAX and KGMS and encompasses Sacramento, California, the KGMS city of license.

4. The petitioner's claim to standing to oppose the assignment application is based on the contention that a grant of the application will result in a violation of the Commission's cross-interest policy and thus in an unfair competitive situation involving petitioner's station. Although assignee denies the validity of the petitioner's contention, we will not dispose of the matter on the question of standing, but will address ourselves to the substantive matters of the petition, c.f., *Clay Broadcasters, Inc.*, 21 RR 2d 442 (1971); *Broadcast Enterprises, Inc.* v. *FCC*, 390 F2d 483 [12 RR 2d 2001] (1968).

5. Petitioner's contention that the fathers are real parties in interest in the assignee corporation is based upon the following contentions: (1) that the language of the Court Order, giving judicial approval for the sale of the KTRB Broadcasting, Inc. assets to assignee corporation, establishes the fathers' continuing liability for the station purchase price; (2) that the sons have not shown independent finan-

[1] The assignee corporation is owned by the following 10-percent stockholders: Norman W. Johnson, Robert H. Olson, Treas., Dir., Harry J. Pappas, Dir., Emmanuel J. Pappas, Pres., Dir., Pete Pappas, Robert M. Piccinini, Sec., Dir., Roger S. Roberts, V.P., Dir., Michael T. Sturdevant, James M. Tocco, and Arnold H. Wiebe.

[2] "73.35 Multiple Ownership: No license for a standard broadcast station will be granted to any party . . . if: (a) Such party directly or indirectly owns, operates, or controls: one or more standard broadcast stations and the grant of such license will result in any overlap of the predicted or measured 1 mv/m groundwave contours of the existing and proposed stations. . . ."

The "cross interest policy," designed to ensure arms length competition between competing stations, prohibits any degree of cross interests in two or more stations in the same service which serve substantially the same area. Shenandoah Life Insurance Company 19RR1 (1959).

cial resources or any official business interests or relationships, and that they obtained the funds for the purchase of their share of assignee's stock from their fathers; (3) and that three distinct groups of assignee stockholders exist with no common business link between them except for the nexus provided by the fathers who do have extensive business interests in common with assignee corporation's other eight principals. Additionally, petitioner, in its "Reply pleading" states for the first time that a substantial question exists concerning whether or not the motive for substituting the sons for the fathers was to evade the Commission's cross-interest policy.

6. Based upon our review of all of the material before us, we find that no substantial questions have been raised concerning the real parties in interest in assignee corporation. Family relationship standing alone is insufficient to create the presumption that common control by all family members exists over a broadcast facility in which one family member has an interest. Under these circumstances, without more, the broadcast interests of one family member have not been attributed to another for purposes of applying the Multiple Ownership Rule. See, e.g., *Community Broadcasting Company of Hartsville*, 16FCC2d 891, 15RR2d 1093 (1969); and petitioner's allegations do not raise a substantial question concerning any control exercised by the fathers over the assignee corporation. Moreover, the Court Order granting approval to the sale of the KTRB Broadcasting, Inc. assets does not establish the fathers' continuing liability for the purchase price. Although the Court Order language quoted above does seem to establish such continuing liability by the fathers for the station's purchase price, that Court Order was followed by a second Court Order issued by the same Court on November 1, 1973. The second Court Order states:

> IT IS HEREBY ORDERED that if any of the buyers named in the Order dated May 18, 1973 in the above entitled proceeding is substituted out of the transaction, such buyer or buyers, as the case may be, shall have no further obligation for the purchase price or have any further liability of any kind whatsoever relating to the said transaction.

This second Court Order clearly states that the fathers have no continuing liability for the purchase price.[3] In addition, assignee has submitted affidavits from Citizens National Bank which is the Executor-assignor, and from the Bank's communications counsel, Harry C. Warner, both of which state that assignor will not look to the fathers for any part of the KTRB purchase price. Secondly, the petitioner's allegation concerning the sons' lack of independent financial resources has not been supported by the degree of specificity or by an affidavit of a person with personal knowledge which is required by 309(d)(1) of the Communications Act.[4] In support of the petitioner's contention that the fathers have either directly or indirectly assumed an obliga-

[3] Petitioner argues that the additional pleading submitting the Amended Court Order is unauthorized under the terms of Section 1.45(c) of the Commission's Rules because it was filed only to enable assignee to submit new material. Since that filing was an official order of the Court which has jurisdiction over the disposition of these broadcast properties, which dispelled a possible ambiguity in the Court's earlier order, we would accept it and consider it whether filed as an amendment or as part of a supplementary pleading.

[4] Section 309(d)(1) of the Act states: "The petition shall contain specific allegations of fact. . . . Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof."

tion for repayment of a loan which Security Pacific National Bank has agreed to make to assignee Corporation, petitioner only submits an affidavit from petitioner's President, F. Robert Fenton, stating that "[i]t is my understanding" that such obligation has been assumed. In response to this assignee has submitted an affidavit from the lending bank, Security Pacific National Bank, stating: "[t]hat, specifically and emphatically, the Bank will not, under any circumstances look to Judson Sturdevant or Nicholas Tocco [the fathers] as a guarantor in any guise should Big Valley default upon the Loan in question." Neither has petitioner adequately supported its contention that the fathers contributed the funds with which the sons have each acquired $10,000 worth of assignee's stock. In response to this contention by petitioner, assignee has submitted affidavits from both fathers and both sons stating that during the last six years gifts of cash and of property in excess of $10,000 have been irrevocably given by each of the fathers to his son and that these gifts can be used without any restrictions. We conclude that the Petitioner has not succeeded in showing that the fathers either have presently, or are committed to have in the future, any financial interest in the assignee corporation.[5] Petitioner's third allegation in support of its contention that the fathers are real parties in interest is that, since it is only the fathers who provide a nexus between the three distinct groups of assignee stockholders,[6] they must, therefore, be real parties in interest. This is a conclusion which does not necessarily follow from the factual allegations made. We conclude that the mere observation that the fathers provide a business link between the three distinct groups of assignee's stockholders is not sufficient grounds to raise substantial questions concerning whether or not the fathers are real parties in interest.

7. With respect to the independence of the sons from the influence and control of their fathers, we note that Michael Tuck Sturdevant is 28 years old, married, living apart from his parents, independently employed and resides in Modesto, California. We note that James Michael Tocco is 21 years old, unmarried, is a full-time student who, according to Petitioner's uncontested allegation, presently lives with his parents when not attending school. The younger Tocco has submitted an affidavit in which he states that he was presented with an opportunity to become an investor in KTRB and that it was his judgment to accept that opportunity; that the history of his relations with his father shows that he has been accorded "independence that is complete"; and that as an investor in KTRB he will be "his own man." Mr. Nicholas J. Tocco, the father, has submitted an affidavit in which

[5] In further support of this conclusion, it should be noted that assignee corporation has been found financially qualified to meet all its first year needs by relying only upon corporate assets, not upon additional contributions from any source. These funds are: a $675,000 bank loan to assignee corporation, $97,105 in available liquid assets shown on assignee corporation's balance sheet, and upon the projected cash flow profits to be generated by the KTRB (AM & FM) operations during the year following closing.

[6] Petitioner alleges that assignee corporation has three distinct groups of stockholders, (a) the younger Tocco and Sturdevant with no business relationship with any other stockholder, (b) the "Pappas Group" made up of four stockholders with business interests in common, (c) the "Johnson-Piccinini-Olson Group" all with common business interests. Petitioner contends that the fathers have common business interests with the "Pappas Group" and with the "Johnson-Piccinini-Olson Group," and that one must conclude that the fathers are real parties in interest to explain why the "Pappas Group" and the "Johnson-Piccinini-Olson Group" were willing to join together with the younger Tocco and Sturdevant who have no other business interests.

he states that in 1965 he suffered a serious stroke due to a ruptured aneurism which left him partially paralyzed and with a limited speech capacity; that, as a result, he does not seek any additional business responsibilities, but, in fact, is pleased to allow his son to make his own business decisions as well as all others.

8. In response to petitioner's final allegation stating that a substantial question exists concerning whether or not the fathers' motives for substituting their sons for themselves were to evade Commission policy, we conclude that although the motives for substitution are relevant in determining who the real parties in interest are, it is still essential for petitioner to show that the fathers exercise some control or have a significant stake in the proposed licensee. This has not been shown.

9. In view of the above, we conclude that the petition raises no substantial and material questions of fact as to whether Judson Sturdevant or Nicholas Tocco are real parties-in-interest in this application and that therefore these fathers' other broadcast interests raise no questions under our Multiple Ownership Rules and policies. We have determined that assignee is fully qualified and that the public interest, convenience and necessity would be served by a grant of this application.

10. Accordingly, it is ORDERED, that the Petition to Deny, filed by Kilibro Broadcasting Corporation, IS DENIED and the application for assignment of the licenses of Radio Stations KTRB–AM and KTRB–FM, Modesto, California, from KTRB Broadcasting Company, Inc., to Big Valley Broadcasting, Inc., IS GRANTED.

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

104-036—74——14

FCC 74-394

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 89.511 OF SUBPART P OF PART 89 OF THE COMMISSION'S RULES RELATING TO LICENSING OF SCHOOLBUS OPERATORS	Docket No. 19730

REPORT AND ORDER

PROCEEDING TERMINATED

(Adopted April 16, 1974; Released April 25, 1974)

BY THE COMMISSION:

1. On May 8, 1973, the Commission issued a Notice of Proposed Rule Making in the above-entitled matter. The Notice was published in the Federal Register on May 14, 1973, (38 F.R. 12619). These regulations govern eligibility of school bus operators and permissible communications in radio systems authorized in the Special Emergency Radio Service. Comments were requested by July 10, 1973, and reply comments on or before July 25, 1973. Five comments were similarly filed with the Commission: Boulder County Sheriffs Departments, California Association of Public School Business Officials, Northern California Chapter of the Association of Public Safety Communications Officers, Inc.

2. In the Notice, we proposed to amend Sections 89.511 (a) and (d) of subpart P to make persons or organizations operating school buses on a regular basis, over regular routes, eligible within this service, and to permit communication equipment authorized for use by school bus operators to be used for the transmission of messages pertaining to either the efficient operation of the school bus or the safety and general welfare of the students they are engaged in transporting. Section 89.511(a) presently permits only school bus operations in rural areas to obtain authorization to operate a communication system in the Special Emergency Radio Service. Under the provisions of Section 89.511(d), the communications system may be used for the "transmission of messages pertaining to the safety of life or property or urgent messages relating to buses which have become inoperative on regular runs."

3. The proposed amendment was supported by the California Association of Public School Business Officials and it was opposed by the Washington Ambulance Service, Northern California Chapter of the Association of Public Safety Communications Officers, Inc., (NCAPCO), and the Boulder County Sheriff's Department.

4. Essentially, those parties who opposed the proposed rules did so because they felt that the use of Special Emergency frequencies should

be limited to communications of an emergency nature and that non-emergency communications should not be permitted. The basic reason for this position was their contention that existing Special Emergency frequencies are already crowded and additional communications will further crowd these frequencies.

5. The Commission acknowledges that some additional crowding of these frequencies will occur. We feel, however, that the greater public interest will be served by the amendment of the rules as proposed. As stated in the Notice, the limitations (those which limit licensing to persons or organizations operating school buses in "rural" areas and which allow "only messages pertaining to the safety of life or property or urgent messages relating to buses which have become inoperative on regular runs") undoubtedly served useful purposes at the time they were adopted. However, the nature of school bus operations has now changed and it has become desirable to permit expanded use of the available frequencies. For example, the comments submitted by the California Association of Public School Business Officials contained the following statement: "In school bus transportation, including physically handicapped, there are literally hundreds of daily adjustments in schedules to cover broken down buses, sick drivers, children left at school, blocked roads, etc., when these occur, there is no time for written requests, etc., they must be taken care of immediately."

Thus the use of radio is an important tool in maintaining bus service schedules. The Commission believes that bus drivers should have the capability to notify the proper school officials in the event of delays so that other arrangements can be made immediately to pick up children who will be reached on time.

6. Therefore, after weighing the arguments and balancing the various interests of the parties, the Commission has decided to amend Section 89.511 (a) and (d) of our Rules. In so doing, the Commission is extending eligibility in this service to persons or organizations operating school buses on a regular basis over regular routines. Additionally, as to permissible communications, stations licensed to school bus operators may be used to transmit messages pertaining to either the efficient operation of the school bus service or the safety and general welfare of the students they are engaged in transporting.

7. In view of the foregoing, the Commission concludes that the public interest will be served by amending the rules to extend eligibility under Section 89.511(a) and extend permissible communications under Section 89.511(d).

8. Accordingly, IT IS ORDERED pursuant to the authority contained in Section 4(i) and 303 of the Communications Act of 1934, as amended, that Section 89.511 (a) and (d) of the Commission Rules are amended effective May 31, 1974, as set forth in the attached Appendix.

9. IT IS FURTHER ORDERED, That the proceedings in Docket 19730 are hereby TERMINATED.

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

APPENDIX

In § 89.511, paragraphs (a) and (d) are amended to read as follows:

"§ 89.511 SCHOOL BUSES.

"(a) *Eligibility.* Persons or organizations operating school buses on a regular basis over regular routes are eligible in this service.

* * * * * * *

"(d) *Permissible communications.* Stations licensed to school bus operators may be used to transmit messages pertaining to either the efficient operation of the school bus service or the safety and general welfare of the students they are engaged in transporting."

FCC 74-428

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of MICRO-CABLE COMMUNICATIONS CORP., D.B.A. VALLEY TELECASTING CO., SOMERTON, ARIZ. For Certificate of Compliance	CAC-970 AZO39

MEMORANDUM OPINION AND ORDER

(Adopted April 17, 1974; Released April 30, 1974)

BY THE COMMISSION:

1. On August 7, 1972, Micro-Cable Communications Corp., d/b/a Valley Telecasting Company, filed an application for certificate of compliance to begin cable television service at Somerton, Arizona, located within the Yuma, Arizona, smaller television market.[1] Valley Telecasting proposes to carry the following broadcast signals:

KPHO-TV (Ind., Channel 5) Phoenix, Arizona.
KTVK (ABC, Channel 3) Phoenix, Arizona.
KAET (Educ., Channel 8) Phoenix, Arizona.
KBLU-TV (NBC, Channel 13) Yuma, Arizona.
KECC-TV (CBS, Channel 9) El Centro, California.
XHBC-TV (Spanish, Channel 3) Mexicali, Mexico.
KOOL-TV (CBS, Channel 10) Phoenix, Arizona.
KCOP (Ind., Channel 13) Los Angeles, California.
KHJ-TV (Ind., Channel 9) Los Angeles, California.
KTLA (Ind., Channel 5) Los Angeles, California.
KTTV (Ind., Channel 11) Los Angeles, California.

Valley Telecasting asserts that all of these signals except XHBC-TV are grandfathered pursuant to Section 76.65 of the Rules. On March 1, 1973, Valley Telecasting filed a "Request for Waiver" of Section 76.59 in which it requests that if it has no grandfather rights, a waiver be granted to allow it to carry the same signals it carries in Yuma and Yuma County, Arizona. This waiver request is opposed by KECC Television Corporation, licensee of Station KECC-TV, El Centro, California, and Valley Telecasting has replied.

2. Valley Telecasting bases its claim to grandfathered status on letters of notification sent pursuant to former Section 74.1105. These letters were dated March 10, 1972, and were filed with the Commission March 15, 1972. If they were filed too late to give Valley Telecasting grandfather rights, Section 76.59 would limit it to carriage of the first six signals listed in Paragraph 1. In its waiver request Valley Telecasting contends that the system would not be viable

[1] Somerton has a population of 2,225. The system, served from the headend at Yuma, will have 12-channel capacity, of which eleven channels are proposed for carriage of television broadcast signals.

without the Los Angeles signals;[2] therefore, denial of these signals would deprive Somerton residents of cable service. Moreover, it asserts that carriage of the additional signals would have a negligible impact on the two local television stations. The disputed signals are already carried in all of Yuma County except Somerton and another small community. 96.26 percent of the population of the two counties comprising the "area of dominant influence" of the two local television stations live in communities served by cable systems already carrying the Los Angeles distant signals. Therefore, Valley Telecasting maintains, the Commission's purpose in adopting the smaller market carriage rules, to protect smaller market television stations by lessening the competitive impact of distance signals, would not be served by denying this application. Finally, Valley Telecasting argues that it is consistent with Commission guidelines to allow carriage of signals grandfathered in surrounding areas when the "cumulative impact of waivers for all communities of comparable size" is *de minimis*. *Service Electric Cable TV*, FCC 72–785, 37 FCC 2d 241. Somerton, it alleges is such a *de minimis* situation since the maximum increase in population subjected to the additional distant signals would be 3.74 percent.

3. In its opposition to the waiver, KECC–TV, the CBS affiliate in the El Centro, California-Yuma, Arizona, smaller television market, asserts that since two local television stations must share the already small market of only 27,000 homes, KECC–TV would be damaged by any increased competition and fractionalization in the market. It objects to importation of any distant signal beyond what is allowed by Section 76.59 of the Rules, but it notes particularly that Valley Telecasting is proposing to import an additional CBS affiliate from Phoenix, Arizona, which would compete directly with KECC–TV and, since it is from a different time zone, would present network programs in advance of those presented by KECC–TV. Moreover, KECC–TV argues that the Commission should apply its carriage rules to help protect the "small portion of the audience still available to local market signals."

4. Valley Telecasting replies that KECC–TV presents no facts to support its claim of financial hardship, and did not respond to its request for such information. It argues that the adverse inference rule allows it to conclude that importation of the distant Los Angeles and Phoenix signals would have no significant impact on KECC–TV.

5. We reject Valley Telecasting's arguments. First, the Section 74.1105 letters of notification of proposed cable service filed March 15, 1972, did not confer grandfather rights on the system. In Paragraph 66, *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, we stated that "any notification filed after the end of February, 1972, conferred no rights on cable systems because the effective date of the rules preceded the time for filing objections to the notifications." Turning to the waiver request, Valley Telecast-

[2] Valley Telecasting surveyed 721 homes in Somerton. Of 415 responding, 305 would subscribe to cable with or without the Los Angeles signals; 110 would not subscribe unless the Los Angeles signals were carried. The other 306 homes are occupied primarily by itinerants who would not subscribe anyway, according to Valley Telecasting.

ing's arguments of financial hardship without the Los Angeles signals are not persuasive. Valley Telecasting has submitted no evidence to justify treatment more favorable than that of other new cable systems in smaller markets faced with the same carriage restrictions. Section 76.59 of the Rules attempts to balance a cable system's need for distant signals to help stimulate growth against the adverse impact such signals would have on local television stations in smaller markets. Valley Telecasting has not met the substantial burden necessary to justify a departure from these carriage rules.[3] Accordingly, we will grant a certificate of compliance for carriage of the first six television signals and will deny the rest of Valley Telecasting's carriage request.

In view of the foregoing, the Commission finds that a grant of the above-captioned application, to the extent indicated in Paragraph 5 above, would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Application for Certification" and "Request for Waiver" (CAC–970) filed by Micro-Cable Communications, Corp., d/b/a Valley Telecasting Company IS GRANTED to the extent indicated in Paragraph 5 above and otherwise IS DENIED.

IT IS FURTHER ORDERED, That the "Opposition to Request for Waiver" filed by KECC Television Corporation IS GRANTED.

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

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[3] *See* Paras. 112–113, *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 187. *See See-Mor Cable TV of Sikeston, Inc.*, FCC 73–796, 42 FCC 2d 261 (1973); *Fort Smith TV Cable Co.*, FCC 73–151, 39 FCC 2d 573 (1973).

FCC 74-415

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
MOBILE TV CABLE CO., INC., D.B.A. TELEPROMPTER OF MOBILE, MOBILE, ALA.	CAC-1094 AL088
MOBILE TV CABLE CO., INC., D.B.A. TELEPROMPTER OF MOBILE, PRICHARD, ALA.	CAC-1095 AL099
MOBILE TV CABLE CO., INC., D.B.A. TELEPROMPTER OF MOBILE, CHICKASAW, ALA.	CAC-1096 AL100
MOBILE TV CABLE CO., INC., D.B.A. TELEPROMPTER OF MOBILE, MOBILE COUNTY, ALA.	CAC-1097 AL101
MOBILE TV CABLE CO., INC., D.B.A. TELEPROMPTER OF MOBILE, SARALAND, ALA.	CAC-1098 AL102
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted April 17, 1974; Released April 30, 1974)

BY THE COMMISSION:

1. On August 31, 1972, Mobile TV Cable Company, Inc., d/b/a TelePrompTer of Mobile, filed applications for certificates of compliance (CAC-1094, 1095, 1096, and 1097) for the addition of Television Broadcast Stations WTCG (Ind.), Atlanta, Georgia, WGNO-TV (Ind.) and WYES-TV (Educ.), all New Orleans, Louisiana, and WMAH (Educ.), Biloxi, Mississippi to its existing cable television systems at Mobile, Prichard, Chickasaw, and Mobile County, Alabama. All four systems presently provide their subscribers with the following television signals:

WALA-TV (NBC, Channel 10) Mobile, Alabama.
WKRG-TV (CBS, Channel 5) Mobile, Alabama.
WEIQ (Educ., Channel 42) Mobile, Alabama.
WEAR-TV (ABC, Channel 3) Pensacola, Florida.
WLOX-TV (ABC, Channel 13) Biloxi, Mississippi.
WSRE (Educ., Channel 23) Pensacola, Florida.

On August 31, 1972, TelePrompTer of Mobile also filed an application for a certificate of compliance (CAC-1098) for a new system to be operated at Saraland, Alabama. The new system will be served by the same headend, located in Mobile, that presently serves the four existing systems. TelePrompTer proposes to provide the subscribers of the Saraland system the same six channels which it presently provides the subscribers of the four existing systems, plus the four new signals for which the existing systems are seeking certification. All five systems are located within the Mobile, Alabama-Pensacola, Flor-

ida major television market (#59).[1] Carriage is therefore governed by, and consistent with, Section 76.63 of the Rules. All the applications are unopposed.[2] TelePrompTer, pursuant to Section 76.251 of the Rules, proposes to provide on its Mobile, Prichard and Mobile County systems public and educational access channels as the *quid pro quo* for adding two distant independent signals.

3. TelePrompTer of Mobile's applications as amended [3] request a waiver of Section 76.251 of the Rules to allow it to provide one public access channel and one educational access channel to be shared by the system in Chickasaw and the proposed system in Saraland.[4] Additionally, TelePrompTer seeks an additional waiver of Section 76.251 of our Rules to allow it to share the public access studio and production facilities at Mobile, with the Chickasaw and Saraland system. In support of these requests, TelePrompTer argues that due to the relatively small population of Chickasaw (8,447), and Saraland (7,842), it is unlikely that the communities would be able to make full use of separate access channels. TelePrompTer urges that the communities to be served are neighboring, and share common political, social, ethnic and economic ties.[5] TelePrompTer also indicates that it has sufficient additional channel capacity to provide additional access channels should the need arise. With respect to TelePrompTer's plan to share the studio facility at Mobile, TelePrompTer states that the studio can normally be reached from Chickasaw or Saraland by car in 15 minutes or less.[6] TelePrompTer's applications otherwise appear to be consistent with the Commission's Rules.

3. We acknowledged in paragraph 147 and 148 of the *Cable Television Report and Order*, 36 FCC 2d 143 (1972), that there would be situations in which our access requirements would impose an "undue burden" and a waiver would be appropriate. We are satisfied that considering the size of, and the distance between, the communities, a partial waiver of the provisions of Section 76.251 of the Rules, to allow

[1] The population of the communities and number of subscribers are as follows:

Community of the system	Population	Number of subscribers
Mobile	190,026	5,175
Mobile County (unincorporated)	10,000	8
Chickasaw	8,447	517
Prichard	41,578	513
Saraland	7,840	

[2] By letter dated January 17, 1973, the Mayor of Prichard, Alabama registered his informal objection to a November 21, 1972, amendment to the application for Prichard, which requested a waiver of Section 76.251 of the Rules to provide that one public access channel and one educational access channel be shared by the five systems. By a subsequent amendment, filed April 24, 1973, TelePrompTer of Mobile deleted its request for a partial waiver of the provisions of Section 76.251 of the Rules with respect to Mobile, Prichard, and Mobile County, thereby mooting the Mayor's informal opposition.

[3] In addition to the amendments referred to in footnote 2 *supra*, TelePrompTer amended all of the above-captioned applications on September 1, 1972 and May 7, 1973. Additionally, TelePrompTer further amended its applications for Chickasaw (CAC–1096) and Saraland (CAC–1098) on May 14, 1973.

[4] TelePrompTer also proposes to share with the Chickasaw system the local government access channel and the leased channel capability required by Section 76.251(a) (6) and (7) for the proposed cable television system at Saraland, Alabama.

[5] It appears that the distance between Chickasaw and Saraland is less than 10 miles.

[6] It appears that the distances between Mobile and Saraland, and Mobile and Chickasaw are less than ten miles each.

[7] The applicant has assured us that the franchise was issued after a full public proceeding.

TelePrompTer to share access channels and studio facilities, is justified and within the scope of prior Commission precedents. (See *Century Cable Communications, Inc.*, FCC 74–63, 44 FCC 2d 1023; *Theta Cable of California*, 42 FCC 2d 387 (1973)).

4. TelePrompTer's franchise for Saraland, granted March 23, 1972, does not contain recitations that it was awarded after a full public proceeding or that any modifications of Section 76.31 are to be incorporated into the franchise within one year of adoption.[7] However, the franchise does require that TelePrompTer maintain a local office for complaints. Additionally, the franchise contains a rate schedule and provides that any change in rates is subject to city council authority. Since the franchise was granted prior to March 31, 1972, only substantial consistency with the franchise provisions of Section 76.31 of the Rules need be demonstrated at this time, according to the note to Section 76.13(a)(4). We find the deviations described above to be relatively minor, and therefore find substantial consistency sufficient to grant the application until March 31, 1977. E.g., *Theta Cable of California, supra.*

In view of the foregoing, the Commission finds that a partial waiver of Section 76.251 of the Rules and a grant of the above-captioned applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the above-captioned applications for certificates of compliance (CAC–1094, 1095, 1096, 1097 and 1098), filed by TelePrompTer of Mobile ARE GRANTED, and the appropriate certificates of compliance will be issued.

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

FCC 74-357

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
MOSHANNON VALLEY TV CABLE CO., INC., PHILIPSBURG BORO, PA.	CAC-401 PA396
MOSHANNON VALLEY TV CABLE CO., INC., RUSH TOWNSHIP, PA.	CAC-402 PA397
MOSHANNON VALLEY TV CABLE CO., INC., SOUTH PHILIPSBURG BORO, PA.	CAC-403 PA398
MOSHANNON VALLEY TV CABLE CO., INC., OSCEOLA MILLS BORO, PA.	CAC-404 PA395
MOSHANNON VALLEY TV CABLE CO., INC., CHESTER HILL BORO, PA.	CAC-405 PA392
MOSHANNON VALLEY TV CABLE CO., INC., DECATUR TOWNSHIP, PA.	CAC-406 PA393
MOSHANNON VALLEY TV CABLE CO., INC., BOGGS TOWNSHIP, PA.	CAC-407 PA391
MOSHANNON VALLEY TV CABLE CO., INC., MORRIS TOWNSHIP, PA.	CAC-408 PA394
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted April 9, 1974; Released April 22, 1974)

BY THE COMMISSION:

1. On January 2, 1974, Moshannon Valley TV Cable Co., Inc., filed for reconsideration of the Commission's action in *Moshannon Valley TV Cable Co., Inc.*, FCC 73-1206, 43 FCC 2d 1190, which denied its request for certification of Station WOR-TV, New York, New York. This petition is unopposed.

2. In its petition Moshannon now expressly seeks waiver of the anti-leapfrogging provision of Section 76.61(b)(2)(i) of the Rules on the ground that special circumstances exist which justify carriage of WOR-TV on its cable systems. Moshannon argues: (a) that there presently are no microwave facilities available for carriage of independent signals from the two closest top 25 markets and these signals are not available off-the-air; (b) that it is unreasonable to suggest that Moshannon construct its own CARS facilities at an estimated cost of $125,000 to import such signals; and (c) that WOR-TV is needed for diversity and that nearby cable systems are carrying it. In light of the above, Moshannon concludes that this absence of operational microwave facilities and the Commission's refusal to permit carriage of WOR-TV effectively denies it the ability to provide the minimum service contemplated by the Rules. Because of these circumstances, Mo-

shannon argues that it qualifies for a waiver of the anti-leapfrog rule under *Sun Cable T–V*, FCC 71–67, 27 FCC 2d 261, which the Commission cited at paragraph 25 of the *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 335.

3. Moshannon's petition essentially reiterates the arguments that it raised in the earlier proceeding. *Sun Cable T–V*, *supra*, is clearly distinguishable from the present case. *Sun Cable* involved a 400-subscriber cable system located outside of all markets and Grade B contours. In addition, the system was described as "failing" and, as such, received special consideration. We note that Moshannon emphasizes the use of existing facilities for importing signals to its cable systems, and fails to explore fully the alternate means which could be utilized. For example, there are other cable communities in this part of Pennsylvania which are faced with a similar situation. These systems could possibly form a CARS cooperative for the purpose of importing signals consistent with the Rules.[1] A grant of the requested waiver would eliminate any incentive for the construction of adequate facilities to relay signals in accordance with the Commission's Rules.

In view of the foregoing, the Commission finds that reconsideration of its decision in *Moshannon Valley TV Cable Co., Inc.*, FCC 73–1206, 43 FCC 2d 1190, would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Reconsideration" filed January 2, 1974, by Moshannon Valley TV Cable Co., Inc., IS DENIED.

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

[1] Section 78.13 of the Commission's Rules provides: "A license for a cable television relay station will be issued only to the owner of a cable television system or to a cooperative enterprise wholly owned by cable television owners or operators upon a showing that applicant is qualified under the Communications Act of 1934, that frequencies are available for the proposed operation, and that the public interest, convenience, and necessity will be served by a grant thereof."

FCC 74-404

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of OGALLALA CABLE TV, OGALLALA, NEBR. For Certificate of Compliance	CAC-736 NE005

MEMORANDUM OPINION AND ORDER

(Adopted April 16, 1974; Released April 30, 1974)

BY THE COMMISSION:

1. On June 28, 1972, Ogallala Cable TV filed the above-captioned application for a certificate of compliance to add the following distant television signals to its existing cable system at Ogallala, Nebraska:[1]

KCOP (Ind., Channel 13) Los Angeles, California.
KHJ-TV (Ind., Channel 9) Los Angeles, California.
KTLA (Ind., Channel 5) Los Angeles, California.
KTTV (Ind., Channel 11) Los Angeles, California.

At present Ogallala carries eight television broadcast signals:

KNOP-TV (NBC, Channel 2) North Platte, Nebraska.
KPNE-TV (Educ., Channel 9) North Platte, Nebraska.
KHPL-TV (ABC, Channel 6) Hayes Center, Nebraska.
KWGN-TV (Ind., Channel 2) Denver, Colorado.
KOA-TV (NBC, Channel 4) Denver, Colorado.
KMGH-TV (CBS, Channel 7) Denver, Colorado.
KBTV (ABC, Channel 9) Denver, Colorado.
KTVS (CBS, Channel 3) Sterling, Colorado.

2. On December 8, 1970, Ogallala filed notifications pursuant to former Section 74.1105 with respect to the same four distant signals it now seeks to add. There was no timely objection to this notification.[2] Thus, the four proposed signals are authorized for carriage pursuant to Section 76.65 of our Rules.[3] Further, because Ogallala is located outside all television markets, the requested signals may be carried pursuant to Section 76.57 of the Rules.

3. On August 9, 1972, "Objection to Ogallala Cable TV Certificate of Compliance Application and Petition for Special Relief" was filed by Bi-States Co., licensee of Station KHPL-TV, Hayes Center Nebraska. KHPL-TV is currently carried by Ogallala. In opposing Ogallala's importation of the Los Angeles stations, Bi-States claims that KHPL-TV and its other broadcast interests will be adversely affected

[1] Population, 5200; subscribers, 1319.
[2] On February 10, 1971, Bi-States Co., licensee of Station KHPL-TV, Hayes Center, Nebraska, its parent station KHOL-TV, Kearney, Nebraska, and two related satellite stations, KHQL-TV, Albion, and KHTL-TV, Superior, Nebraska, filed "Comments on Importation Proposal and Petition to Deny Microwave Application" (SR-27113). This pleading was dismissed as moot on April 6, 1973.
[3] See *Butte Television Company*, FCC 73-378, 40 FCC 2d 670.

in audience share, advertising sales, and financial viability. It says KHPL–TV is affected in its revenues, and Bi-States, as a whole, is incurring operating losses because of penetration by cable television (Ogallala in particular) into the rural, sparsely populated areas of Nebraska. It contends that it cannot compete for syndicated, nonnetwork, or off-network programming with the four Los Angeles independents, and cannot get syndicated exclusivity against them because of its market position. Bi-States further argues that the Commission should consider extending the 35 mile zone of smaller markets to place limitations on signal importation by systems outside those markets.

4. On August 28, 1972, Ogallala replied to Bi-States' objection and petition for special relief. It argues that Bi-States does not not question the consistency of the carriage proposal, does not support its claims of economic impact with specific facts, and certainly does not make a showing sufficient to warrant special relief extending Section 76.59's distant signal carriage limitations and Section 76.151's syndicated exclusivity protection beyond their present scope.

5. We agree with the applicant. As we have often stated, objections to signal carriage based on allegations of economic impact must be supported by specific evidence.[4] Bi-States' request for special relief appears to be based on little more than speculation. There are no facts presented which show that Ogallala is now, or in the future will be, responsible for any operating losses, loss of advertising revenues, or viewership. Nor has Bi-States made a sufficient case for extending the size of its 35-mile zone. See paragraph 47, *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 344.

In view of the foregoing, we find that a grant of the above-captioned application is consistent with the public interest.

Accordingly, IT IS ORDERED, That "Objection to Ogallala Cable TV Certificate of Compliance Application and Petition for Special Relief" filed by Bi-States Co., licensee of KHPL–TV, Hayes Center, Nebraska, et al., on August 7, 1972, IS DENIED.

IT IS FURTHER ORDERED, That the application of Ogallala Cable TV filed on June 28, 1972 (CAC–736) IS GRANTED, and an appropriate certificate of compliance will be issued.

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

[4] *See Community TCI of Missouri, Inc.*, FCC 74–95, 45 FCC 2d 133; *Greater New England Cablevision Co.*, FCC 74–42, 45 FCC 2d ——.

FCC 74-435

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of	
OHIO TELECABLE CO., SEVEN HILLS, OHIO	CAC-2871 OH317
OHIO TELECABLE CO., INDEPENDENCE, OHIO	CAC-2872 OH318
OHIO TELECABLE CO., BRECKSVILLE, OHIO	CAC-2873 OH319
OHIO TELECABLE CO., BROADVIEW HEIGHTS, OHIO	CAC-2874 OH320
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted April 17, 1974; Released April 30, 1974)

BY THE COMMISSION:

1. On August 1, 1973, Ohio Telecable Company filed the above-captioned applications to commence cable television service at Seven Hills, Independence, Brecksville, and Broadview Heights, Ohio,[1] communities located within the Cleveland-Lorain-Akron major television market (#8). Ohio Telecable proposes to carry the following television broadcast signals on its systems:

WCOT-TV (CP, Channel 55) Akron, Ohio.
WAKR-TV (ABC, Channel 23) Akron, Ohio.
WKYC-TV (NBC, Channel 3) Cleveland, Ohio.
WEWS (ABC, Channel 5) Cleveland, Ohio.
WJW-TV (CBS, Channel 8) Cleveland, Ohio.
WVIZ-TV (Educ. Channel 25) Cleveland, Ohio.
WKBF-TV (Ind., Channel 61) Cleveland, Ohio.
WUAB (Ind., Channel 43) Lorain, Ohio.
WKBD-TV (Ind., Channel 50) Detroit, Michigan.
CKLW-TV (Ind., Channel 9) Windsor, Ontario, Canada.
WCTF (CP, Channel 19) Cleveland, Ohio.

[1] The population of the communities and the date of the franchise grants are as follows:

Name of community	Population	Date of franchise grant
Seven Hills	12,800	October 1970.
Independence	6,970	June 1970.
Brecksville	9,260	August 1970.
Broadview Heights	11,800	September 1970.

Carriage of these signals is consistent with Section 76.61 of the Commission's Rules, and the applications are unopposed.[2]

2. Ohio Telecable requests a waiver of the provisions of Section 76.251(a)(4)–(a)(7) of the Rules to allow it to provide one public, one educational, one local government and one leased access channel to serve the four communities. In addition, the Parma School District will be provided a separate access channel for use by the three schools within its jurisdiction which are located in the City of Seven Hills. In support of its waiver request Ohio Telecable argues that the population of each community is small (See footnote 1), the communities are contiguous (all four communities are within 12 miles of each other), and the communities share common interests (three of the communities share a common newspaper and two share part of the same school district).

3. We acknowledged in Paragraphs 147 and 148 of the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143, 197 that there would be situations in which our access requirements would impose an "undue burden" and a waiver would be appropriate. We are satisfied that the small size of the four communities involved here justifies the requested partial waiver of Section 76.251 to allow Ohio Telecable to provide at this time one set of access channels to be shared, plus one separate educational access channel for use of the Parma City School District. However, should sufficient demand develop, we expect Ohio Telecable to make additional channels available. This waiver will extend only to March 31, 1977. When Ohio Telecable applies for recertification, we will expect it to show the degree to which its proposal has been successful and has operated in the public interest.

4. The franchises granted to Ohio Telecable by Seven Hills on October 26, 1970, by Broadview Heights on September 14, 1970, by Brecksville on August 4, 1970, and amended on October 19, 1971, and by Independence on June 23, 1970 and amended on July 14, 1970 contain no provisions establishing that they were granted after a public proceeding, requiring a local business office and procedures for the resolution of service complaints, or requiring that modifications of Section 76.31 must be incorporated into the franchise within one year of their adoption by the Commission. The franchises do contain provisions specifying construction time limits, rates to be charged, and statements that rates cannot be increased without approval by the relevant city council. Moreover, the applicant states that substantial publicity was given to each application, public hearings were held, and the franchising authorities did in fact consider the applicants qualifications. Only substantial compliance with Section 76.31 of the Rules must be demonstrated for franchises granted before March 31, 1972, according to the note following Section 76.13(a)(4) of the Rules. We find that these franchises are in substantial compliance with Section 76.31 of the Rules in a manner sufficient to justify a grant of certificates of compliance until March 31, 1977.

[2] On August 21, 1973, Wilbur D. Lewis, Associate Superintendent of the Parma City School District, the jurisdiction of which includes 3 schools in the community of Seven Hills, filed a letter which opposed Ohio Telecable's application for Seven Hills. His objection centered upon Ohio Telecable's plan to provide one educational access channel to be shared among the four systems. By amendment filed September 11, 1973, Ohio Telecable stated that it would provide a separate access channel for the school district and by letter dated September 14, 1973, Dr. Lewis withdrew his opposition.

In view of the foregoing, the Commission finds that a partial waiver of the provisions of Section 76.251 of the Rules and a grant of the above-captioned applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the above-captioned applications for certificates of compliance (CAC–2871–2874), filed by Ohio Telecable Company, ARE GRANTED, and the appropriate certificates of compliance will be issued.

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

46 F.C.C. 2d

104–036—74——15

FCC 74-389

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 2 AND 91 OF THE COMMISSION'S RULES AND REGULATIONS TO PROVIDE A FREQUENCY ALLOCATION FOR OIL SPILL CLEANUP OPERATIONS	Docket No. 20027 RM-2050

NOTICE OF PROPOSED RULEMAKING

(Adopted April 16, 1974; Released April 26, 1974)

BY THE COMMISSION:

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

2. On September 1, 1972, the Central Committee on Communication Facilities of the American Petroleum Institute (API) filed a petition (RM-2050) requesting that the Commission change its rules to accommodate radio communications needed to expedite and coordinate oil spill cleanup operations. API specifically desires a nationwide "family" of frequencies to effect a more satisfactory oil spills cleanup process.

3. The United States Coast Guard has reported that there were 8,763 oil spills in 1971 and 9,931 oil spills in 1972 involving the spillage of 8,839,573 and 18,805,732 gallons, respectively, for those years. While the Coast Guard is given responsibility under the Federal Water Pollution Control Act (as amended) for coordinating the cleanup of oil spills, the petroleum industry has the responsibility of performing the actual cleanup function for any spills caused by its facilities.

4. The individual petroleum companies are legally responsible (Title 33 USCA, Section 1161(f)) for any oil spill, regardless of size, which "causes a visible sheen on water". In order to carry out their responsibilities, the companies have formed oil spill cleanup co-operatives, which numbered 84 as of February, 1973. Such co-operatives are primarily composed of oil companies but may also include local government agencies. The oil companies have donated necessary equipment to the co-operatives, and all spills, large and small, are handled by the co-operatives rather than by the individual companies. In a small spill, only a portion of the available personnel and equipment is used and the radio communications requirement is minimal. Large spills, however, require extensive cleanup operations involving much manpower and machinery. To minimize the destructive effect of such spills, cleanup operations must proceed rapidly and efficiently and are highly dependent on radio for essential communications.

5. Oil spill co-operatives now fulfill their emergency communications needs by diverting frequencies from other functions (i.e. operational

control of various refinery processes). However, this procedure can result in serious disruption of regular services for days or even weeks. To alleviate this situation, API has requested the following frequencies be allocated nationwide to the Petroleum Radio Service for use exclusively in oil spill cleanup communications:

2 low band frequencies (25–30 MHz).
2 medium band VHF frequencies (49–50 MHz).
2 pair, high band VHF frequencies (150–170 MHz).
2 pair, UHF frequencies (450–470 MHz).

The specific frequency channels suggested for use by the API were evaluated to determine their availability for reallocation in the FCC Rules. Not all were obtainable due to conflicts with either planned or existing uses. Those which were found to be available have been incorporated into the frequency plan proposed herein.

6. The number of channels cited in paragraph 5 is needed, according to API, because large oil spills require several independent communications networks for such purposes as directing work crews, communicating between maritime, land, and air vehicles and for managing and coordinating the overall cleanup operation. The provision of channel pairs will enable the use of repeaters to extend mobile and portable coverage over the relatively large areas which may be affected by oil spills, occasionally up to 30 or 40 miles. The availability of channels in several land mobile bands will also enable the maximum use of land mobile type equipment which the oil companies presently have available.

7. In letters to the Commission, both the U.S. Coast Guard and the Environmental Protection Agency (EPA) voiced support for the API petition. Their letters indicate that both of these agencies have been assigned special Government frequencies for use in carrying out their responsibilities in emergencies. Likewise, the EPA believes that the oil industry should have relatively clear channels for handling those aspects of the cleanup operations for which industry has responsibility.

8. Recognizing the Federal Government interest in this area, the Commission requested the Interdepartment Radio Advisory Committee (IRAC) to review the API petition in the context of Government requirements and to assist the Commission in developing a coordinated frequency plan to meet both Government and industry needs. The total number of channels in the joint FCC/IRAC plan is the same as that proposed by API with some differences in specific frequencies to lessen the impact on existing or planned services.

9. We are therefore proposing the following frequencies for the purpose of accommodating air, land, and sea communications to be used for oil spill cleanup operations:

(a) Two channels in the 25 MHz range, centered on 25.04 and 25.08 MHz, each 20 kHz wide. Although these two frequencies are currently allocated to the Petroleum Radio Service, they are lightly loaded and no great future demand is seen for the purpose for which they were allocated. We are proposing to make these two frequencies available for oil spill cleanup operations on a primary basis. Other Petroleum Radio Service use will be permitted on a secondary basis.

(b) Two frequencies in the 30–40 MHz range, 36.25 MHz and 41.71 MHz, both from Government spectrum. These are Coast Guard assigned channels, both 20 kHz wide. These frequencies will be made available to both Government and non-Government stations engaged in oil spill cleanup operations along inland waterways and in coastal areas, subject to prior co-ordination with pertinent local Coast Guard officials.

(c) Two pairs of frequencies in the 150 MHz band, 150.980/156.255 MHz and 159.480/161.580 MHz, to be derived from unused guardband spectrum between presently assignable channels. These guardbands are presently divided between two adjoining services. By combining the two segments, a channel of useable width is obtained. These 150 MHz channels are all 15 kHz wide. Both 150.980 MHz and 159.480 MHz are center frequencies of guardbands between Land Transportation and Public Safety channels. The other two frequencies, 156.255 MHz and 161.580 MHz, are center frequencies between Maritime Mobile channels, and Public Safety and Land Transportation, respectively.

(d) Two UHF frequencies, 454 and 459 MHz, which are the centers of 25 kHz guardbands located between Public Safety and Domestic Public channels. These two frequencies will be made available exclusively to non-Government entities engaged in oil spill cleanups. Two additional UHF frequencies may be derived for oil spill use at such time as the Commission proceeds with channel splitting in the remote pickup broadcast auxiliary bands.

10. Based on past experiences, according to Coast Guard information, oil spills can occur almost anywhere, but the bulk of significant oil spills has occurred on inland waterways and in coastal areas. It was therefore concluded that the 25 MHz pair, the two 150 MHz pairs and the 450 MHz pair be made available on a nationwide basis. The frequencies 36.25 and 41.71 MHz and the remaining, yet undetermined UHF pair would be made available for use only in costal and inland waterway areas, where the anticipated additional demand warrants their employment.

11. The IRAC also recommended that the frequency 157.075 MHz be used as an interface between the U.S. Coast Guard and other Government and non-Government entities involved in a cleanup. Use of this frequency would be under the control of the designated on-scene Coast Guard commander/coordinator, or his deputy, associated with the cleanup operation. Its use by industry would be limited to personnel having primary responsibility for the cleanup activity, and only Coast Guard-owned equipment would be used. Such equipment would be operated as Coast Guard stations not licensed by the FCC.

12. It appears to the Commission that the proposed allocation of frequencies would offer significant public benefits, both from an economic as well as an environmental point of view. The oil spill cleanup could be accomplished more efficiently and effectively as a result of the allocations. The major benefit to be derived from employment of an adequate communication resource would be a savings in time, a crucial factor in an oil spill cleanup in which a day or even an hour can make a major difference in how extensively the oil

spill spreads, and consequently, the amount of wildlife and land or water affected. The new allocation would also ensure availability of existing Petroleum Radio Service frequencies for essential day-to-day operation which must continue even during oil spill emergencies.

13. While we are proposing an allocation of the above frequencies for use in oil-spill emergencies, we will entertain comments concerning possible secondary use of the non-Government channels for *non-critical* operations in the Petroleum and perhaps other radio services which could cease operations immediately if the channels were required during an oil spill.

14. We also propose to amend Part 91 as indicated in the Appendix to provide eligibility in the Petroleum Radio Service for non-profit corporations or associations engaged in the containment or cleanup of oil spills.

15. The proposed amendments to the Rules, as set forth in the appendix, are issued pursuant to the authority contained in Sections 4(i) and 303 or the Communications Act of 1934, as amended.

16. Pursuant to applicable procedures set forth in Sections 1.415 of the Commission's Rules, interested persons may file comments on or before May 31, 1974 and reply comments on or before June 11, 1974. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. The Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice.

17. In accordance with Section 1.415 of the Commission's Rules, one original and 14 copies of all statements shall be furnished the Commission. Responses will be available for public inspection during regular business hours in the Commission's Docket Reference Room at its Headquarters in Washington, D.C.

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

APPENDIX

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

"1. In § 2.106 two new footnotes are added to the Table of Frequency Allocations to read as follows:

"a. In the bands 25.01–25.33, 150.8–150.98, 150.98–151.49, 156.250–157.0375, 158.715–159.48, 159.48–161.575, 161.575–161.625, 451–454, 454–455, 456–459, 459–460 MHz, the following footnote is added: NG—The frequencies 25.04, 25.08, 150.980, 156.255, 159.480, 161.580, 454.000, and 459.000 MHz may be authorized to non-Government entities engaged in oil spill cleanup operations.

"b. In the bands 36–37 and 40–42 MHz, the following footnote is added: US—The frequencies 36.25 MHz and 41.71 MHz may be authorized to Government and non-Government stations engaged in oil spill cleanup operations. Authorization of these frequencies is subject to prior co-ordination with local Coast Guard officials. In addition, the use of these frequencies for oil spill cleanup operations is limited to the inland and coastal waterway regions.

"II. PART 91—INDUSTRIAL RADIO SERVICES

"2. Section 91.301 is amended to add paragraph (d) to read as follows:

* * * * * * *

"(d) A non-profit corporation or association engaged in the containment or cleanup of oil spills. Provided that only those mobile service frequencies desig-

nated by footnotes (38), (39) and (40) in § 91.304(b) and frequencies otherwise available for operational fixed purposes will be assigned to such applicants for these purposes.

"3. In § 91.304(a) the table is amended and, in paragraph (b), limitations (38), (39), and (40) are added to read as follows:

"Petroleum radio service frequency table

"Frequency or band	Class of stations	Limitations
* * *	* * *	*
25.04	do	38
25.06	do	
25.08	do	38
* * *	* * *	*
36.25	Base or mobile	40
40.68	Operational fixed	2, 3
41.71	Base or mobile	40
* * *	* * *	*
150.980	Base or mobile	38
153.035	do	36
* * *	* * *	*
156.255	Base or mobile	38
158.145	do	35
* * *	* * *	*
159.480	do	38
161.580	do	38
169.425	Operational fixed	2
* * *	* * *	*
454.000	Base or mobile	39
456.175	Mobile only	5, 30, 31, 33
* * *	* * *	*
459.000	Base or mobile	39
460.025	Fixed	29
* * *	* * *	*
(b) * * *		
* * *	* * *	*

"(38) This frequency is primarily available for oil spill cleanup operations and for training and drills essential in the preparation for the containment and cleanup of oil spills. It is secondarily available for general base-mobile operations in the Petroleum Radio Service on a non-interference basis. Secondary users of this frequency are required to forego its use should oil spill cleanup activities be present in their area of operation.

"(39) This frequency is available for oil spill cleanup operations and for training and drills essential in the preparation for the containment and cleanup of oil spills.

"(40) This Government frequency is available for shared Government/non-Government use by stations engaged in oil spill cleanup operations and for training and drills essential in the preparation thereof. Used by non-Government stations will be confined to inland and coastal waterways and subject to coordination with local U.S. Coast Guard authorities."

FCC 74-444

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of OLD CAPITAL CABLES, INC., CORYDON, IND. For Certificate of Compliance	CAC-2361 IN101

MEMORANDUM OPINION AND ORDER

(Adopted April 18, 1974; Released April 30, 1974)

BY THE COMMISSION:

1. Old Capital Cables, Inc., has filed the above-captioned application for certificate of compliance to commence cable television service at Corydon, Indiana (Pop. 2,719), a community located within the Louisville, Kentucky, major television market (#38). Old Capital proposes to carry the following television broadcast signals:

WHAS-TV (CBS, Channel 11) Louisville, Kentucky.
WAVE-TV (NBC, Channel 3) Louisville, Kentucky.
WLKY-TV (ABC, Channel 32) Louisville, Kentucky.
WDRB-TV (Ind., Channel 41) Louisville, Kentucky.
WKPC-TV (Educ., Channel 15) Louisville, Kentucky.
WKMJ (Educ., Channel 68) Louisville, Kentucky.
WTTV (Ind., Channel 4) Bloomington, Indiana.

Carriage of these signals is consistent with Section 76.61 of the Rules. Old Capital's application is opposed by Orion Broadcasting, Inc., licensee of Station WAVE-TV, Louisville, Kentucky.

2. In its opposition, Orion argues that Old Capital's application should be denied or dismissed because: (a) the application fails to meet the franchise standards of Section 76.31; (b) the application fails to make adequate provision for access channels; and (c) the application fails to make the required representations pertaining to equal employment opportunity.

3. Old Capital's franchise was granted on January 24, 1966, and, hence, only substantial compliance with Section 76.31 is required. *CATV of Rockford, Inc.*, FCC 72-1005, 38 FCC 2d 10 (1972), *recons. denied*, FCC 73-293, 40 FCC 2d 493 (1973). We rule on Orion's objections as follows: (a) in various submissions to the Commission, Old Capital states that its franchise was granted after a full public proceeding as prescribed by the laws of the State of Indiana, that the initial rates have been approved by the franchising authority, that it will maintain a local office to investigate and resolve all complaints regarding service and equipment, and that it will comply with future modifications of the Commission's Rules. In addition, we note that the franchise requires significant construction within the first year, that the initial term of the franchise is 25 years, and that the franchise specifies a 3 percent franchise fee. In sum, we find that Old Capital's

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; (b) in accordance with Section 76.251, Old Capital's access program consists of the following:

(1) Old Capital Cables, Inc., will provide a 20-channel system with the ability to maintain a comprehensive access program;

(2) For each Class I cable channel utilized, the system will have an additional channel available, 6 MHz in width, for the transmission of Class II and Class III signals;

(3) The system will maintain a "technical plant" with 2-way capacity for nonvoice return communications;

(4) One specially designated public access channel will be maintained, with equipment and facilities available for its use;

(5) One specially designated educational access channel will be utilized;

(6) One specially designated channel for local government use will be available;

(7) Channels will be available on a leased basis, subject to the Commission's rules concerning use and displacement;

(8) When the access channels are used to the degree contemplated by the rules, capacity for non-broadcast access will be expanded;

(9) No program content control will be exercised over these channels, but operating rules for their use will be established;

(10) The educational and local government channels will be made available, without cost, for five years following completion of the basic trunk line of the system and commencement of service.

We find this statement adequate. *Viking Media Corp.*, FCC 72–875, 37 FCC 2d 605 (1972); (c) in its reply to the opposition, Old Capital states that it will have only two full-time employees and, hence, is not required by Section 76.311(c)(1)(i)(b)[1] to file an equal employment opportunity program. Nonetheless, Old Capital assures us that it will not discriminate in hiring, promoting, dismissing, or pay scale because of race, creed, or color. We find this to be an acceptable showing demonstrating compliance with the Rules.

In view of the foregoing, we find that grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Objection of Orion Broadcasting, Inc., Pursuant to Section 76.27," filed May 17, 1973, IS DENIED.

IT IS FURTHER ORDERED, That the application for certificate of compliance (CAC–2361), filed by Old Capital Cables, Inc., IS GRANTED, and the appropriate certificate of compliance will be issued.

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

[1] Section 76.311(c)(1)(i)(b) reads: "(b) If the system (1) has fewer than five full-time employees, and (2) does not within the meaning of paragraph (b)(3) of this section together with other cable television systems constitute a single employment unit with an aggregate total of five or more full-time employees, an equal employment opportunity program statement need not be filed for the employment unit which consists of or includes the system."

FCC 74-417

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of OXFORD CABLE TV CORP., LIVERMORE FALLS, LIVERMORE, AND JAY, MAINE For Certificates of Compliance	CAC-1642 (ME020) CAC-1643 (ME018) CAC-1652 (ME019)

MEMORANDUM OPINION AND ORDER

(Adopted April 17, 1974; Released April 26, 1974)

BY THE COMMISSION:

1. On November 29, 1972, Oxford Cable TV Corporation filed the above-captioned applications for certificates of compliance in which it proposed to add the signal of independent Station WSBK-TV, Boston, Massachusetts, to its existing 7-channel cable television systems at the above-captioned communities. These three systems, located in the Portland-Poland Spring, Maine, television market (#75), now carry the following television broadcast signals:[1]

WLBZ-TV (NBC, Channel 2) Bangor, Maine.
WABI-TV (CBS, Channel 5) Bangor, Maine.
WEMT (ABC, Channel 7) Bangor, Maine.
WCSH-TV (NBC, Channel 6) Portland, Maine.
WGAN-TV(CBS, Channel 13) Portland, Maine.
WMTW-TV (ABC, Channel 8) Poland Spring, Maine.
WCBB (Educ., Channel 10) Augusta, Maine.

These applications are unopposed, and carriage of Station WSBK-TV is consistent with the provisions of Section 76.63 of the Commission's Rules. However, Section 76.251(c) requires that whenever, prior to March 31, 1977, an existing cable television system adds one independent distant signal, it is required to provide a public access channel. It is this requirement of Section 76.251(c) that applicant requests the Commission to waive, since its proposed carriage of WSBK-TV would require the activation of a public access channel for each system.

2. Applicant argues that providing a public access channel for each of these Maine communities would cause it great economic hardship. In support of this claim, Oxford makes the following allegations: that with populations of 3400, 3900, and 1500 in these three communities, applicant currently serves only 500, 36, and 325 subscribers, respectively, and estimates a maximum subscription potential in each community of only 750, 80 and 500; that it now operates at a marginal profit and would lose money if compelled to furnish three public access channels; that no appreciable population growth or industrial growth seems likely in the area, which might alleviate this problem in the future;

[1] Livermore Falls has a population of 3400; Livermore, 3900; and Jay, 1500.

and, that no other cable television system nearby has the facilities to provide a public access channel on a shared basis.

3. We must reject Oxford's arguments. As we indicated in paragraph 148 of the *Cable Television Report and Order*, 36 FCC 2d 141 (1972): "If these requirements should impose an undue burden on some isolated system, that is a matter to be dealt with in a waiver request, with an appropriate detailed showing."

We further emphasized in the *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326 (1972), that waiver requests would be considered but cautioned that we must be given as much information as possible. Oxford has not presented any facts to support its economic hardship claim; no financial data is supplied as to applicant's operating costs, subscriber revenues or likely cost of providing the access channels. Oxford has not even considered such cost saving solutions as a single shared access channel, as was suggested in paragraph 90 of the *Reconsideration*. Furthermore, the Commission's policy, of providing communities with local-oriented programming will not be satisfied, as Oxford suggests, by the information dissemination capabilities of local newspapers and "community interaction on a person to person basis." We have determined that the public interest requires major market systems to provide certain access services as a *quid pro quo* for taking advantage of the new rules to add distant independent signals. And while we have generally adopted a liberal approach to this requirement, recognizing the difficulties faced by some established systems, we are not inclined in this case to grant a blanket waiver.

In view of the foregoing, we find that a grant of the requested waiver of Section 76.251(c) of the Commission's Rules would not be in the public interest.

Accordingly, IT IS ORDERED, That the above-captioned applications for Certificates of Compliance (CAC–1642, 1643, 1652) filed November 29, 1972, ARE DENIED.

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

FCC 74-437

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Cancellation of the Outstanding License of Perfection Music, Inc., Licensee of RADIO STATION WKNA(FM), CHARLESTON, W. VA. In Re Application for Transfer of Control of Perfection Music, Inc. (BTC-6761) In Re Application for Renewal of the License of Radio Station WKNA(FM) (BRH-1084)	Files Nos. BTC-6761, BRH-1084

MEMORANDUM OPINION AND ORDER

(Adopted April 17, 1974; Released April 30, 1974)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. We have before us for consideration the above-captioned license to operate an FM broadcast station at Charleston, West Virginia, an application for transfer of control of the WKNA(FM) licensee and an application to renew this license.

2. The pertinent facts and circumstances are as follows: On August 16, 1967 the Commission granted an application (BALH-992) for voluntary assignment of the license of Station WKNA(FM), Charleston, West Virginia from Joe L. Smith, Jr. Incorporated to Perfection Music, Inc. (PMI). This corporation was wholly owned by Ray C. Tincher of Charleston. On June 15, 1969 an FCC Form 323 (ownership report) was filed showing Tincher as the sole owner of PMI. The license was regularly renewed on September 30, 1969 for a period ending October 1, 1972.

3. On August 9, 1971 the Commission received a letter from Nick Ciccarello, Jr., of Charleston, concerning the ownership of PMI. Ciccarello stated that he purchased the PMI stock from a Chelsea Investment Company. Ciccarello also described two other unreported transfers of control of PMI, the first being a sale by Tincher in January 1971. On advice of counsel, Ciccarello took the station off the air July 31, 1971. Silence authority was authorized by the Commission on August 23, 1971.

4. By letter dated August 20, 1971 Ray C. Tincher informed the Commission that:

> Radio Station WKNA is off the air and I have sold all of the stock I owned in Perfection Music, Inc., a West Virginia corporation. I do not have the license but if I get possession of it I will send it in for cancellation.

5. On December 21, 1971, an application (BTC–6761) was filed for consent to transfer control of PMI to Hawey A. Wells, Jr. (80%), Hawey A. Wells, Sr. (10%) and Margaret S. Wells (10%). In that application it is represented that Hawey A. Wells, Jr. (Wells) had lent Nick Ciccarello the money to purchase the PMI stock from Chelsea Investment Company. The contract sets the consideration for the sale as one dollar plus release of the indebtedness.[1] Apparently, applicants hoped that the Commission would find it to be more in the public interest to allow the transfer of control rather than opening up the frequency to new applicants. Currently the transferees are in the process of negotiating a resolution of certain "financial difficulties" in order to show their financial qualifications and have asked for more time, until May 1, 1974, to resolve these difficulties.

6. On July 1, 1972 the renewal applications for West Virginia were due to be filed. On September 20, 1972 Nick Ciccarello filed a renewal application on behalf of PMI (BRH–1084). This application was accepted for filing on September 22, 1972 contingent on favorable action being taken on the application for transfer of control (BTC–6761).

7. It appears from the above that there were a series of unauthorized transfers of control of PMI in 1971. While the corporation and its assets may have been sold, the license to operate Station WKNA(FM) which is not the property of PMI, could not have been sold. Sections 301, 304, 309(h) and 310(b) of the Communications Act of 1934, as amended, make it clear that the license is not an owned asset or vested property right. Indeed Section 301, in pertinent part, states:

> It is the purpose of this Act . . . to maintain the control of the United States over all channels of interstate and foreign radio transmission; and to provide for the use of such channels, *but not the ownership thereof*, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. [Emphasis added].

8. Moreover, under Section 310(b) of the Communications Act, assignment of a broadcast license or transfer of control of a corporation holding station license requires the prior consent of this Commission. That Section states:

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

9. In light of the above-stated law, the successor purchasers of the PMI stock after Ray C. Tincher acquired no rights in the WKNA (FM) license. In these circumstances it appears that Ray C. Tincher abandoned the Station WKNA(FM) license and all the rights pertaining thereto. Therefore, Nick Ciccarello's ownership of the PMI stock and its assets, gives him no rights to the WKNA(FM) license to transfer. Under these circumstances, it follows that the license must be declared abandoned and forfeited and the frequency made available

[1] On November 31, 1972 Ciccarello was declared bankrupt. The bankruptcy trustee has declared that the bankruptcy does not impair the legal efficacy of the contract for sale of the PMI stock to Wells and that such contract is "unassailable".

for use by others. See *In re KCCE (AM)*, 24 FCC 2d 830 (1970); *In re KMMM-FM*, 23 FCC 2d 830 (1970); *In re KPGE*, 20 FCC 2d 633 (1969); and *In re KHIP*, 10 FCC 2d 271 (1967).

10. In view of the foregoing, and pursuant to Section 4(i) of the Communications Act of 1934, as amended, the above captioned license is DECLARED FORFEIT, and the call letters WKNA(FM) are deleted and the above captioned renewal and transfer applications ARE DISMISSED.

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

FCC 74-393

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTIONS 91.302 AND 91.304 OF THE COMMISSION'S RULES AND REGULATIONS TO CODIFY PRACTICES AND PROCEDURES FOR USE OF CERTAIN FREQUENCIES FOR PETROLEUM GEOPHYSICAL OPERATIONS	Docket No. 20032 RM-1917

NOTICE OF PROPOSED RULEMAKING

(Adopted April 16, 1974; Released April 25, 1974)

BY THE COMMISSION:

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

2. The Central Committee on Communications Facilities of the American Petroleum Institute (API) has filed a petition requesting an amendment of Part 91 of the Commission's Rules to incorporate into the rules governing the Petroleum Radio Service, procedures for the assignment and use of certain frequencies in connection with petroleum geophysical operations. The rule changes sought by API would codify practices and procedures that have been adhered to by both the Commission and the petroleum industry for more than 22 years.

3. In 1949, the National Petroleum Radio Frequency Coordinating Association (NPRFCA) initiated a plan to provide for the special communication requirements of petroleum licensees engaged in geophysical operations. According to the existing informal plan, the frequencies 1614, 1628, 1676, 1700 kHz, 25.02, 25.06, 25.10, 25.14 and 25.18 MHz are used in the Petroleum Radio Service exclusively for geophysical operations.[1] Certain other petroleum frequencies are made available to geophysical operations on a secondary basis subject to causing no interference to conventional base and mobile voice systems.[2] Also in the plan is the practice of issuing multiple frequency assignments to geophysical applicants so they could select the specific frequency which would result in the least amount of interference to base and mobile operations in any given area. However, even though the licensee may be assigned any number of frequencies, any given geophysical exploration party is limited to the use of only two frequencies at a time, using a simplex mode of operation. In addition, a power limitation of 100 watts input is imposed and A9 and F9 emissions are permitted on frequencies below 25 MHz.

[1] The frequencies 1628, 1652, and 1676 kHz are shared with other services.

[2] 2292, 2398, 4637.5 kHz; 25.22, 25.26, 25.30, 30.66, 30.70, 30.74, 30.78, 30.82, 153.05, 153.11, 153.17, 153.23, 153.29, 153.35, 158.31, 158.37, 158.43, 451.6, 451.65, 451.7, 451.75 MHz.

4. API contends that these practices and procedures have worked well over the years and should be formally incorporated into the Commission's Rules.

5. The frequencies concerned are allocated to the Petroleum Radio Service both exclusively and on a shared basis with other radio services. Any change in availability, however, will only affect licensees in the Petroleum Radio Service and then only on the ten channels proposed for exclusive allocation.[3] In addition, the geophysical procedures governing the frequencies have been used for twenty or more years without any problems to other land mobile licensees. For the foregoing reasons it appears that other land mobile licensees will not be affected by adopting the proposals. The Commission believes the public interest can be served by adopting provisions for petroleum geophysical operations. Accordingly, we propose to amend Part 91, of our Rules to include provisions for petroleum geophysical operations.

6. In following the NPRFCA plan, the Commission permitted geophysical operations the use of tone and impulse signalling on frequencies below 10 MHz. The rules presently limit tone signalling in the Petroleum Radio Service to frequencies above 25 MHz. For the same reasons as noted in paragraph 5, we are proposing to formally include in the Commission's Rules provisions for geophysical tone signalling on frequencies below 10 MHz. However, due to bandwidth limitations in this part of the spectrum, we are limiting all operations below 10 MHz to an amplitude modulation mode of operation. Therefore, API's request for F9 emission on frequencies below 25 MHz is denied.

7. Authority for the proposed amendments is contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules, interested persons may file comments on or before May 31, 1974, and reply comments on or before June 11, 1974. Relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice.

8. In accordance with the provisions of Section 1.419 of the Commission's Rules, an original and fourteen copies of all statements, briefs, or comments filed shall be furnished the Commission. Response 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.*

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[3] These frequencies are almost entirely used by licensees engaged in geophysical operations.

APPENDIX

Part 91 of the Commission's Rules and Regulations is amended as follows:

"1. In § 91.302, paragraph (e) is added to read as follows:

"§ 91.302 AVAILABILITY AND USE OF SERVICE.

* * * * * * *

"(e) Geophysical operations may use tone or impulse signalling for purposes other than indicating failure of equipment or abnormal conditions on those frequencies designated for such transmissions in § 91.304. Authorizations for multiple frequency operations will be granted upon request notwithstanding the provisions of § 91.8(c). Each geophysical exploration party, however, may only use a maximum of two frequencies at any given time. All such tone or impulse signalling shall be on a secondary basis subject to the following limitations:

"(1) That harmful interference is not caused to the primary operations of any other licensee on that particular frequency.

"(2) Maximum duration of a non-voice transmission, including automatic repeats, may not exceed two seconds.

"(3) The bandwidth utilized for secondary tone or impulse signalling shall not exceed that authorized to the licensee for voice emission on the frequency concerned.

"(4) Frequency loading resulting from the use of secondary tone or impulse signalling will not be considered in whole or in part, as a justification for authorizing additional frequencies in the licensees mobile service system.

"(5) The maximum power output of the transmitter shall not exceed 50 watts.

* * * * * * *

"2. In § 91.304(a) the table and par. (b) are amended to read as follows:

"§ 91.304 FREQUENCIES AVAILABLE.

"(a) * * *

"*Petroleum radio services frequency table*

"Frequency or band	Class of station(s)	Limitations
"*kHz*		
1614	Base or mobile	8, 41
1628	do	8, 41
1652	do	8, 41
1676	do	8, 41
1700	do	8, 41
2292	do	8, 43
2396	do	8, 43
4637.5	do	8, 43
MHz		
25.02	Base or mobile	42
25.04	do	
25.06	do	42
25.08	do	16
25.10	Base or mobile	16, 42
25.12	do	
25.14	do	42
25.16	do	
25.18	do	42
25.20	do	
25.22	do	44
25.24	do	
25.26	do	44
25.28	do	
25.30	do	44
25.32	do	
*	* * * * * *	*
30.66	Base or mobile	12, 44
30.70	do	44
20.74	do	12, 44
30.78	do	44
30.82	do	12, 44
*	* * * * * *	*

"*Petroleum radio services frequency table*—Continued

"Frequency or band	Class of station(s)	Limitations
MHz		
153.05	Base or mobile	11, 44
153.08	do	11, 44
153.11	do	11, 44
153.14	do	11, 44
153.17	do	11, 44
153.20	do	11, 44
153.23	do	11, 44
153.26	do	11, 44
153.29	do	11, 44
153.32	do	11, 44
153.35	do	11, 44
* * *	* * *	*
158.31	Base or mobile	11, 44
* * *	* * *	*
158.37	Base or mobile	11, 44
* * *	* * *	*
158.43	Base or mobile	11, 44
* * *	* * *	*
451.550	Base or mobile	10, 32, 44
* * *	* * *	*
451.600	Base or mobile	10, 32, 44
* * *	* * *	*
451.650	Base or mobile	10, 32, 44
* * *	* * *	*
451.700	Base or mobile	10, 32, 44
451.750	do	10, 32, 44
* * *	* * *	*

"(b) * * *

"(41) This frequency is available for assignment only to stations utilized for the transmission of geophysical data. Use on this frequency is limited to an amplitude modulation mode of operation.

"(42) This frequency is available for assignment only to stations utilized for the transmission of geophysical data.

"(43) This frequency is available for assignment to geophysical stations on a secondary, non-interference basis to other Petroleum licensees. Geophysical stations must cease operations on this frequency immediately upon receiving notice that interference is being caused to mobile service stations. Use on this frequency is limited to an amplitude modulation mode of operation.

"(44) This frequency is available for assignment to geophysical stations on a secondary, non-interference basis to other Petroleum licensees. Geophysical stations must cease operations on this frequency immediately upon receiving notice that interference is being caused to mobile service stations."

104-036—74——16

FCC 74-423

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
PINE TREE COMMUNICATIONS, INC., WOODRUFF, WIS.	CAC-2350 WI096
PINE TREE COMMUNICATIONS, INC., ARBOR VITAE, WIS.	CAC-2351 WI095
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted April 17, 1974; Released April 30, 1974)

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

1. Pine Tree Communications, Inc., has filed the above-captioned applications for certificates of compliance to serve the Wisconsin communities of Woodruff (population 900) and Arbor Vitae (population 745), both of which are within the smaller television market of Rhinelander, Wisconsin. The following signal carriage is proposed for these 20-channel systems:

WAEO-TV (NBC, Channel 12) Rhinelander, Wisconsin.
WAOW-TV (ABC, Channel 9) Wausau, Wisconsin.
WSAU-TV (CBS, Channel 7) Wausau, Wisconsin.
WNPB (Educ., Channel 13) Marquette, Michigan.
WLUC-TV (CBS, Channel 6) Marquette, Michigan.
WLUK-TV (ABC, Channel 11) Green Bay, Wisconsin.

Carriage of all of the above signals, with the exception of WLUC-TV and WLUK-TV, for which waiver is sought, is consistent with Section 76.59 of the Commission's Rules. WLUK-TV and WLUC-TV are distant network affiliates whose carriage requires a waiver of the Commission's smaller market signal carriage rules (Section 76.59). Under these rules, a smaller market cable television system is authorized to carry a sufficient number of local and distant television signals to provide three network and one independent television stations. Three network signals are available locally, but no independent signal can be obtained over the air. The applicant has determined that the cost of providing an independent signal via microwave is prohibitive. As a consequence, Pine Tree, pursuant to the provisions of Section 76.7 of the Rules, has requested a waiver of Section 76.59, seeking the Commission's authorization of its proposal to carry WLUK-TV and WLUC-TV as a substitute, contending that the non-network and syndicated programming carried by these stations is the equivalent of an independent station.

2. Pine Tree argues that the cost of utilizing microwave transmission to obtain an independent signal is prohibitive because its economic resources will be limited in these communities of less than a total of 2,000 persons, only a few hundred of whom are potential subscribers. Pine Tree has provided the Commission with a study that indicates that use of microwave would add more than $78,000 to its construction costs, and would call for monthly rental charges in excess of $300. Pine Tree reasons that with the carriage of two distant network-affiliated stations, enough syndicated or non-network programming will be available to substitute satisfactorily for the absence of a full-time independent station. Network program exclusivity will be extended to the local television stations to protect their network programming. Pine Tree's waiver request is based upon the following passage in *Reconsideration of Cable Television Report and Order:* "[I]n certain areas of the country, carriage of syndicated programming from full or partial network stations instead of from independents might be indicated because of inordinate costs involved in obtaining independent signals. In the event such a system later obtains independent distant signals, it would do so in accordance with the rules and may have to delete carriage of syndicated programs from network stations." [1]

3. In these circumstances, we believe the public interest will be served by granting Pine Tree's request for special relief, subject to the condition that the systems will extend network program exclusivity protection to the local stations (WSAU–TV, WAOW–TV, and WAEO–TV). Pine Tree has satisfied the requirements for special relief establishing the existence of good cause to waive our rules. It is not disputed that the predicted microwave costs of importing a distant signal would place a severe strain on the financial resources of cable systems which can hope to obtain only a few hundred subscribers. And since only a few hundred subscribers are involved, it is doubtful that local stations will be adversely affected by the carriage of additional signals, particularly in view of the extensive programming protection they will enjoy. We caution, however, that our decision today is limited to the factual context which compelled the applicant's resort to special relief. As in all matters involving special relief, we shall approach such requests on an *ad hoc* basis. Moreover, as we indicated in that section of the *Reconsideration* on which Pine Tree relies, if the circumstances which now require special relief should change with the passage of time, we may have cause to re-examine our action in the future.[2]

4. Although not raised as an issue in the pleadings, we feel it is appropriate to note certain variations from Section 76.31 in the franchise at Woodruff: there is no recitation in the franchise indicating it was awarded after a public proceeding in which Pine Tree's qualifications were considered, but the Town Chairman has submitted a letter so stating; Pine Tree is not required to complete significant construction

[1] Para. 18, *Reconsideration of Cable Television Report and Order,* FCC 72–530, 36 FCC 2d 326, 333 (1972).

[2] *Vilas Cable, Inc.,* FCC 73–379, 40 FCC 2d 637 (1973); *see also Micro-Cable Communications Corp.,* FCC 74–61, 45 FCC 2d 154 (adopted January 23, 1974), in which we permitted the carriage of the non-network programming of a Canadian signal in order to afford diversity of programming in achieving the authorized level of service.

within one year of certification, but Pine Tree asserts it will do so; there is no termination date of the franchise; there is no requirement of local approval of rates and rate changes, but Pine Tree states there will be no rate change except as authorized by the franchising authority; there is no requirement of keeping a local office for complaints, but Pine Tree assures us that the office in nearby Minocqua will function as such; and although there is no requirement of franchise amendment in the event of FCC modification of the Rules, Pine Tree states it will promptly seek incorporation of changes in that event.[3] 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 72–1005, 38 FCC 2d 10 (1972), *recons. 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 Woodruff application until March 31, 1977.[4]

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

Accordingly, IT IS ORDERED, That the "Application[s] for Certificate[s] of Compliance" filed by Pine Tree Communications, Inc., IS GRANTED, and the appropriate certificates of compliance will be issued.

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

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[3] The franchise for Arbor Vitae, granted August 2, 1972, and amended January 2, 1974, strictly complies with Section 76.31 of the Commission's Rules. Accordingly, that application will be granted until January 2, 1989.

[4] The Woodruff franchise was granted on November 9, 1971.

FCC 74-358

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of PORT ARTHUR CABLEVISION, INC., PORT ARTHUR, TEX. For Certificate of Compliance	CAC-721 TX223

MEMORANDUM OPINION AND ORDER

(Adopted April 9, 1974; Released April 22, 1974)

BY THE COMMISSION:

1. On June 23, 1972, Port Arthur Cablevision, Inc. (P. A. C.), operator of an existing cable television system at Port Arthur, Texas, filed the subject application for a certificate of compliance to add Stations KATC (ABC) and KLFY-TV (CBS), both from Lafayette, Louisiana, and KTRK-TV (ABC), Houston, Texas. Port Arthur lies within the Beaumont-Port Arthur market (# 98). The system, pursuant to CAC-485 granted on August 31, 1972, is presently carrying the following television signals:

KJAC-TV (NBC, Channel 4) Port Arthur, Texas.
KFDM-TV (CBS, Channel 6) Beaumont, Texas.
KBMT (ABC, Channel 12) Beaumont, Texas.
KPLC-TV (NBC, Channel 7) Lake Charles, Louisiana.
KUHT (Educ., Channel 8) Houston, Texas.
KHTV (Ind., Channel 39) Houston, Texas.
KVRL (Ind., Channel 26) Houston, Texas.

2. P. A. C. acknowledges that since its carriage complement is complete, Section 76.63 of the Rules would not accommodate the addition of the three requested signals, and therefore asks that we waive the Rules. In support of its request, P. A. C. argues that it should be permitted to carry the two Louisiana television stations (KATV and KLFY-TV) because of a strong community of interest between the Port Arthur viewers and the "Cajun programming" carried by these stations. Favoring the carriage of the Houston television station (KTRK-TV), P. A. C. argues that there is a strong community of interest between its viewers and the station's carriage of Houston professional sport events. P. A. C. further argues that all three stations are being carried on systems in neighboring communities, and that in denying the carriage of these signals, the Commission's Rules would unfairly discriminate between the Port Arthur viewers and their neighbors. Finally, P. A. C. argues that carriage of these signals would not harm the local broadcasters.

3. Timely objections were filed by Sabine Broadcasting Co., licensee of Station KBMT, Beaumont, Texas, Texas Goldcoast Television, Inc., licensee of Television Broadcast Station KJAC-TV, Port Arthur,

Texas, and Beaumont Television Corporation, licensee of Station KFDM–TV, Beaumont, Texas. All of the broadcasters argue that the system now has a full complement of signals under the signal carriage limitations of Section 76.63, and that P. A. C. has failed to adequately support its request for waiver of that rule.

4. P. A. C.'s signal carriage is clearly inconsistent with, and we deny its request for waiver of, Section 76.63 of the Rules. A waiver of the carriage rules places a heavy burden of proof upon the requesting party to show that it would serve the public interest. Para. 112, *Cable Television Report and Order*, 36 FCC 2d 143, 186–87 (1972). In the face of this burden, P. A. C. has failed to supply us with even the barest of factual details upon which we could base an affirmative decision. The record is devoid of any evidence of program content on the desired stations that would support its claims. There is furthermore no statistical analysis that would even suggest that there was any interest in "Cajun programming" in Port Arthur. In view of the foregoing, we find that a grant of the application of Port Arthur Cablevision, Inc. would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Opposition to Application for Certification and Relief" filed on August 3, 1972 by Sabine Broadcasting Co., licensee of Station KBMT, Beaumont, Texas, IS GRANTED.

IT IS FURTHER ORDERED, That the "Petition to Deny Application for Certification and Opposition to Request for Special Relief" filed on August 4, 1972 by Texas Goldcoast Television, Inc., licensee of Television Broadcast Station KJAC–TV, Port Arthur, Texas, IS GRANTED.

IT IS FURTHER ORDERED, That the "Opposition to Application of Port Arthur Cablevision, Inc., for Certification and Request for Special Relief" filed on August 7, 1972 by Beaumont Television Corporation, licensee of Station KFDM–TV, Beaumont, Texas, IS GRANTED.

IT IS FURTHER ORDERED, That the "Application for Certification and Request for Special Relief" filed on June 23, 1972, by Port Arthur Cablevision, Inc., Port Arthur, Texas, IS DENIED.

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

FCC 74-362

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of:	
POST-NEWSWEEK STATIONS OF FLORIDA, INC. (WPLG-TV), MIAMI, FLA. For Renewal of Broadcast License	Docket No. 20008 File No. BRCT-509
TROPICAL FLORIDA BROADCASTING CO., MIAMI, FLA. For Construction Permit for a New Television Broadcast Station	Docket No. 20009 File No. BPCT-4581

ORDER

(Adopted April 9, 1974; Released April 24, 1974)

BY THE COMMISSION:

1. The Commission has before it the mutually exclusive applications of Post-Newsweek Stations of Florida, Inc. (hereafter "Post-Newsweek"), for renewal of license (BRCT-509) for WPLG-TV, channel 10, Miami, Florida, and Tropical Florida Broadcasting Company (hereafter "Tropical Florida," or "Tropical"), for a construction permit (BPCT-4581) for a new television broadcast facility to operate on channel 10, Miami. Proposing as they do operation on the same channel in the same city, grant of both applications would result in mutually destructive interference. Therefore, the Commission is unable to make the required finding that grant of either application would serve the public interest, convenience and necessity without first designating both for hearing in a consolidated proceeding.

2. The Commission has before it also a variety of pleadings, including: a "Petition to Dismiss Incomplete Application," filed by Post-Newsweek on August 10, 1973 ("Opposition" filed by Tropical on August 23, 1973; "Reply" filed by Post-Newsweek on August 29, 1973); a "Petition for Pre-Designation Hearing or For an Initial Hearing Limited to Tropical Florida's Misrepresentations to the Commission," filed by Post-Newsweek on January 14, 1974; a "Motion to Dismiss Unauthorized Pleading," filed by Tropical on February 4, 1974 ("Reply" filed by Post-Newsweek on February 14, 1974); and a "Motion for a Protective Order," filed by Tropical on February 22, 1974.

3. In its original application, Tropical Florida proposed to operate from the present transmitter site of WPLG-TV, using WPLG-TV's tower. In its August 10, 1973, "Petition to Dismiss Incomplete Application," Post-Newsweek noted that Tropical had been informed in writing as of February 23, 1973, that Post-Newsweek had "no intention" of selling or leasing the land and transmitter tower of WPLG-TV to Tropical, in the event the new applicant prevailed in the comparative hearing. Post-Newsweek contended that Tropical Florida's

failure to forthwith amend its application to specify a new transmitter site rendered the application fatally defective and warranted its dismissal. Tropical Florida countered that the unavailability of the WPLG–TV site had not been proven and that it would prove the availability of the site in the hearing, if necessary, and that, in any event, it was entitled to amend its application as a matter of right at any time prior to designation of the applications for hearing. On February 7, 1974, Tropical amended its application to provide for mounting its antenna on the tower of WKID–TV, channel 51, Fort Lauderdale. While Tropical may have been unduly persistent in claiming the availability of the WPLG–TV transmitter site, its interpretation of the rule concerning amendments (section 1.522(a)) is correct. At the time of filing, Tropical acted in reasonable reliance on our previous statements in *United Television Co., Inc.*, 18 FCC 2d 363 (1969), and *Central Florida Enterprise, Inc.*, 22 FCC 2d 260 (1970), to the effect that it is reasonable to assume that the renewal applicant will be receptive to an offer to purchase its transmitter site and tower in the event the new applicant prevails. That situation may have changed when Post-Newsweek put Tropical on notice of the site's unavailability, but the application was not "fatally defective" at the time it was filed. It follows, therefore, that Tropical was entitled to amend its application as a matter of right prior to designation, which it has done.

4. On January 14, 1974, Post-Newsweek filed a "Petition for Pre-Designation Hearing or for an Initial Hearing Limited to Tropical Florida's Misrepresentations to the Commission." In this petition, Post-Newsweek asked that Tropical be disqualifed "from further pursuit of its application," alleging (and supporting its allegations by numerous affidavits) that Tropical had misrepresented in its application its efforts to ascertain community needs, and, in fact, had not interviewed many of the community leaders it claimed to have consulted, and, in other cases, had reported interviews not conducted by Tropical Florida's principals. Post-Newsweek requested that the Commission order a hearing on its allegations prior to designation of the applications for comparative hearing, and, if the allegations were sustained, dismiss Tropical Florida's application. Alternatively, Post-Newsweek suggested that the Order designating the applications for hearing direct the Administrative Law Judge to first try the issues raised by Tropical Florida's alleged misrepresentations, and then proceed to other issues, including the general comparative issue, only if Tropical Florida were not disqualified on that basis.

5. Although the extent of the alleged misrepresentations is perhaps unusual, the underlying issue—whether Tropical Florida and its principals have the requisite character qualifications to be a Commission licensee—is not. It is an issue routinely tried by our Administrative Law Judges in the course of comparative proceedings. Therefore, we see no reason for departing from our normal procedures solely for this case. Nor need we direct that the hearing be conducted in two phases. The order of giving evidence is ordinarily a matter for the sound discretion of the Administrative Law Judge. If he should conclude, after the presentation of evidence on the character qualifications issue, that there is no purpose in proceeding to the general comparison, there

is ample precedent for not doing so. See *WHDH, Inc., et al.*, 16 FCC 2d 1, at 7.

6. Tropical Florida apparently would have the Commission ignore Post-Newsweek's allegations concerning its ascertainment process at this time, leaving it to Post-Newsweek to file a post-designation petition to enlarge issues, to be disposed of by the Review Board, and, conceivably, the Commission on review of the Review Board's decision. We would hope that our decision to treat these issues in today's designation order, *infra*, will materially expedite resolution of these charges. Tropical asserts that Post-Newsweek's pleading is "analogous" to a petition to enlarge or a motion for summary decision, both matters of post-designation practice. We believe the proper analogy, if there is one, for treating the petition, is to a petition to deny. No matter whether a "petition to deny" is not timely filed, or does not properly lie against the subject application: if it raises substantial questions concerning the public interest, convenience and necessity, it is the Commission's obligation to treat those questions, treating the petition as an informal objection under the rules (section 1.587). See *Faulkner Radio, Inc.*, 15 FCC 2d 780 (1968): *Lebanon Broadcasting Co.*, 10 FCC 2d 936 (1967). Therefore, we will deal with the petition on that basis.

7. Tropical has not otherwise responded to Post-Newsweek's allegations, saying the charges will be "satisfactorily responded to and disposed of . . . at the appropriate time," which to Tropical appears to mean before the Review Board, on a motion to enlarge issues. While we do not intend to prejudge this case, we do not see any merit in postponing consideration of these charges.

8. Investigators retained by Post-Newsweek interviewed 185 persons identified by Tropical Florida in its application as community leaders with whom it had consulted during its ascertainment of community needs. Of this group, 49 executed affidavits—in the words of Post-Newsweek—"unequivocally denying, or stating that they have no recollection of, consultation by Tropical Florida." An additional 25 persons executed affidavits stating that they were interviewed concerning community problems, but do not believe the interview was by Tropical Florida or its representatives, and 30 persons have executed affidavits asserting that they did not know the purpose of the interview.

9. Affidavits of other ascertainees have been submitted which indicate they were interviewed by representatives of Tropical Florida other than the principals of the corporation, or were asked to complete a form, but did not discuss personally community problems with one of the principals of the applicant. These allegations, if true, would constitute practices inconsistent with the intention of our *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971). Interviews by persons other than principals and management are not as likely to stimulate a continuing dialogue between the community and the decision-making personnel of the applicant. See the *Primer*, *supra*, at 664. And the Primer makes quite clear, *supra*, at 668, that questionnaires do not constitute a substitute for consultations with community leaders. In addition, such interviews would, in this case, amount to a misrepresentation, inasmuch as Tropical has heretofore reported, as part of its

application, that all interviews with community leaders were conducted by subscribing stockholders in the corporation.

10. These allegations raise serious questions concerning Tropical Florida's ascertainment process, and its possible efforts to deceive the Commission with regard to its consultations of community leaders. In the absence of Tropical's explanation of these charges, an evidentiary inquiry is in order. In view of Tropical's apparent election not to respond at this time, we do not feel it unfair to require that it do so in hearing, rather than before the Review Board. If Tropical has evidence which it feels would meet these charges before the Review Board, evidence also exists that will enable it to meet the issue in a hearing. Accordingly, issues will be specified to inquire into the facts and circumstances surrounding Tropical Florida's consultations with community leaders, and to determine whether Tropical Florida has misrepresented facts to the Commission concerning those consultations, and whether, in view of the evidence on those issues, Tropical should be disqualified to be a licensee of the Commission, or a comparative demerit assessed.

11. Lastly, with respect to our procedural alternatives in this case, we consider—and reject—Post Newsweek's assertion in its February 14, 1974, pleadings that Tropical's failure to controvert the charges concerning its ascertainment representations warrants dismissal of its application. Post-Newsweek avers that "Court decisions confirm that the Commission is not required to hold a hearing where there are no factual issues to be resolved and the only question related to the conclusion to be drawn from the uncontested facts," citing *Hartford Communications Committee* v. *F.C.C.*, 467 F 2d 408, 411–12 (D.C. Cir. 1972). The case is totally inapposite. It involved the Commission's decision that objections to an assignment did not raise a "substantial" or "material" question requiring a hearing before grant of the assignment application. Quoting from *Stone* v. *F.C.C.*, 466 F. 2d 322, at 323, the Court said: "As Judge Wilkey recently observed, a hearing is required to resolve issues which the Commission finds are either 'substantial' or 'material,' *regardless of whether the facts are in dispute*." 467 F. 2d 408, at 412 (Emphasis added.) In the case now before us, the issue—regardless of the state of dispute—is "substantial" *and* "material," and therefore of the sort for which we are required to hold a hearing before we may deny the application, under section 309(a)(d)(2), and (e) of the Communications Act of 1934, as amended.

12. Where an applicant for a new station seeks the facilities of an existing station, we require, before making a finding that the applicant is financially qualified, the demonstration of the availability of sufficient funds to pay the costs of construction and three months' operating expenses, without relying on station revenues. *Orange Nine, Inc.*, 7 FCC 2d 788, 9 RR 2d 1157 (1967).[1] On the basis of data submitted in its application, Tropical Florida will require at least $2,433,691 itemized as follows:

[1] We apply this test in the knowledge that the Annual Financial Reports (FCC Form 324) of the Miami VHF television stations disclose, on the average, annual revenues in excess of the applicant's estimated first-year operating expenses ($3,650,000).

Downpayment on equipment	$635,250
3 months on equipment balance plus interest [1]	152,441
Miscellaneous items not covered by manufacturer's letter of credit	551,000
Tower space and transmitter building	45,000
5 months interest on bank loan at 11 percent	137,000
3 months working capital requirement	912,500
Total	2,433,191

[1] The first payment on the equipment contract is due 60 days after shipment of the transmitter. We assume this will roughly cover the period of installation prior to commencement of operations.

However, Tropical has not offered any evidence in support of its estimated expenditure of $140,000 per year for the rental of studio space. In light of Tropical's proposal for a studio location on a "site-to-be-determined" basis, we think it appropriate to inquire into the reasonableness of that estimate, and the impact of any additional expense on Tropical Florida's cash-needed figure.

13. To meet its anticipated expenses, Tropical Florida relies on a $3,000,000 bank loan, and stock subscriptions totalling $308,000. The instrument which purports to commit the bank loan is on the letterhead of the Florida National Bank and Trust Co. of Miami, over the signature of John H. Manry, Jr., President. While the letter satisfactorily sets forth the rate, collateral and terms of repayment, it specifically states that the loan is "subject to approval of our loan committee," based on "then current financial statements of the corporation and of the foregoing stockholders at the time a formal loan application is submitted." According to our understanding of banking practices, this language in no way represents a "commitment," or assures that the loan will be available. Therefore, an appropriate issue will be specified.

14. Post-Newsweek is qualified to own and operate television station WPLG–TV, and, except with regard to the matters discussed above, Tropical Florida is qualified to construct, own and operate a television broadcast station. Because the applications are mutually exclusive, the Commission is of the opinion they must be designated for hearing in a consolidated proceeding on the issues set forth below.

Accordingly, IT IS ORDERED, That pursuant to section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications of Post-Newsweek Stations of Florida, Inc., and Tropical Florida Broadcasting Company, ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified, upon the following issues: (1) To determine, with respect to the application of Tropical Florida Broadcasting Company:

(a) The facts and circumstances surrounding the applicant's consultations with community leaders to ascertain community problems.

(b) In the light of the evidence adduced on the above issue, whether the applicant has substantially complied with the Commission's *Primer on Ascertainment of Community Problems by Broadcast Applicants.*

(c) In the light of the evidence adduced on the above issues (a) and (b), whether the applicant has made misrepresentations to the Commission in its application.

(d) Whether, in the light of the evidence adduced on the above issue (c), the applicant should be disqualified from becoming a licensee of the Commission, or a comparative demerit assessed against it.

(e) Whether the applicant will have available a $3,000,000 loan from the Florida National Bank and Trust Company.

(f) Whether the applicant has reasonably estimated its expenses for rental of studio space, and, if not, the impact of any additional expense on the applicant's cash-needed figure, and whether any additional funds will be required.

(g) Whether, in the light of the evidence adduced on the above issues (e), (f), and (g), Tropical Florida is financially qualified.

(2) To determine, on a comparative basis, which of the above-captioned applications, if granted, would better serve the public interest.

(3) To determine, in the light of the evidence on issues (1) and (2) above, which of the applications should be granted.

IT IS FURTHER ORDERED, That the "Petition to Dismiss Incomplete Application" filed by Post-Newsweek Stations of Florida, Inc. IS DENIED.

IT IS FURTHER ORDERED, That the "Petition for Pre-Designation Hearing Or For An Initial Hearing Limited To Tropical Florida's Misrepresentations To The Commission," filed by Post-Newsweek Stations of Florida, Inc., IS DENIED.

IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants herein, pursuant to section 1.221(c) of the Commission's rules, in person or by attorney, shall, within 20 days of the mailing of this Order, file with the Commission in triplicate a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

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

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

FCC 74-350

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of THE DEVELOPMENT OF FREQUENCY ALLOCATIONS AND REGULATIONS APPLICABLE TO THE USE OF RADIO FOR THE REMOTE READING OF PUBLIC UTILITY METERS	Docket No. 20005 RM-1635 RM-1849 RM-2045

NOTICE OF INQUIRY

(Adopted April 9, 1974; Released April 24, 1974)

BY THE COMMISSION:

1. The Commission has the above-captioned matter under consideration and is requesting comments on certain matters discussed herein.

2. There are currently pending before the Commission two petitions requesting amendment of the Commission's Rules to provide for the regular licensing of radio stations for use in the remote reading of public utility meters. One of the petitioners, Readex Electronics, Inc. (Readex), is an electronics equipment manufacturer; the other petitioner, Sangamo Electric Company (Sangamo), is a manufacturer of electrical and electronics equipment with its main offices in Springfield, Illinois.

3. According to the petitioners, public utility industries have a growing need for faster, more reliable and more economical means of obtaining utility consumption data than is possible through the existing manual system. The manual method of reading meters has many shortcomings, not the least of which is difficulty in gaining access to the meters. Utilities have tried to overcome this problem by installing meters outdoors, but this has proved to be only a partial solution. The petitioners believe the ultimate answer lies in the implementation of some form of remote meter reading system using radio techniques.

4. The Readex proposal (RM-1635) is to establish a new radio service to be known as the Industrial Telemetry Radio Service, which would fall within the purview of Part 91 (Industrial Radio Services) of the Commission's Rules. Public Notice of the petition was issued on June 12, 1970. In October 1970, Readex filed a major amendment to its initial petition changing the proposed frequency of operation from 219.950 MHz to 462.475 MHz.

5. Readex's proposed meter reading system would utilize an interrogating transmitter in an aircraft and a large number of remotely controlled transmitters located on customers' premises. The remote units would be activated by the interrogating unit and return signals containing the meter information. The information received in the aircraft would be recorded on magnetic tape for subsequent processing. The remote units would be installed on or near the customers' prem-

ises. A single remote unit could be designed with enough storage capability for handling up to 30 different meters. The remote units would each have a unique address and would not transmit unless interrogated. The system's operation would be sequential, permitting only one remote unit to transmit at any given time.

6. Readex estimates the system will require a maximum bandwidth of 50 kHz. It hopes to verify this and other system parameters through its field test program, being carried out under FCC experimental authorizations on frequency 462.475 MHz. One discrete frequency in the 450–470 MHz band has been requested nationwide for regular operation of the Readex system. Frequency modulation would be employed in the system and effective radiated powers of 1 watt or less from the remote units and 50 watts or less from the command unit would provide the necessary range and coverage.

7. The Sangamo petition (RM–1849) was placed on public notice on August 27, 1971. A year later, Sangamo filed a major amendment to the original petition containing considerable additional information on the proposed system and recommended rule changes.[1] In the amended petition, Sangamo proposed that its automatic meter reading system, called "PURDAX" (Public Utility Revenue Data Acquisition and Collection System), operate on the harmonically related frequencies 927.95 MHz and 1855.90 MHz. In operation, the system would employ a van-mounted transmitter on 927.95 MHz used to interrogate reflective transponders which would emit signals on 1855.90 MHz. The transponders would be located on the customers' premises and derive their primary power from the radio frequency energy received from the interrogating transmitter. The transponder would use this energy to generate a signal on 1855.90 MHz which is modulated with the meter data and transmitted back to the van for storage and subsequent processing. According to Sangamo, any type of public utility meter could be read using this technique.

8. Currently, Sangamo has an experimental (developmental) authorization to operate on 929 MHz [2] and on 1858 MHz.[3] However, the Commission, at Sangamo's request, has withheld final action on the rule making petition pending completion of initial feasibility tests. Sangamo's current developmental authority will expire on September 1, 1975.

9. Awareness should be made of the fact that Sangamo's proposed 927.95 MHz frequency is in a portion of the spectrum allocated primarily for Government radio services and a more appropriate part of the spectrum for Sangamo's operation would be in the band above 928 MHz.

10. Under the Sangamo plan, the mobile interrogating transmitter could be licensed under Part 91 of the FCC's rules, and passive reflective transponders would operate on a non-licensed basis under authority of Part 15. The emission characteristic of the interrogating transmitter would be AO, and the unmodulated burst of radio frequency energy would use an effective radiated power of 200 watts. The passive

[1] The new petition was designated Rule Making 2045.
[2] In a band allocated currently for non-Government land mobile and industrial, scientific and medical (ISM) use.
[3] In a band allocated for non-Government fixed use.

transponders would employ PO emission with a maximum effective radiated power of 100 microwatts.

11. In addition to the above-described meter reading systems proposing the use of radio, the Commission is aware that wireline meter reading systems are being tested by the Bell Telephone Laboratories. One such system involves a number of customers in the Holmdel, New Jersey area and is operated by the New Jersey Bell Telephone Company. Bell, in fact, is conducting trials in several parts of the country involving a number of utilities. Present trials are directed toward utility meter reading only, but if the concept proves feasible, other possible uses may evolve, such as the monitoring of industrial operations. Although meter reading is not now being offered as a regular service by the Bell System, it may be in the future depending on the results of the ongoing trials. The wireline approach is obviously attractive from the standpoint of spectrum conservation. However in a given metropolitan area it is possible that all meters of interest may not be accessible by wirelines. Some radio may therefore be necessary to augment a predominantly wired system.

12. With regard to the general subject of meter reading, it is noted that a relationship may exist between this application and other non-voice communications being conducted or proposed in land mobile frequency bands. There has been greatly increased interest in such non-voice communications in recent years, and the Commission is presently considering how to best accommodate those requirements in an efficient and compatible manner. Results of those considerations may have an impact on eventual rule making with regard to meter reading. However, we believe that the subject of meter reading is itself of sufficient importance and immediacy to warrant the issuance of this separate exploratory proceeding.

13. Although automatic meter reading systems, whether totally reliant on radio telemetry, wireline techniques or combinations thereof, are in the developmental stage, it is believed that this technological development should be examined in a public proceeding to explore potential frequency requirements and other necessary regulations. This inquiry is therefore being initiated for that general purpose and specifically to elicit comments relative to the following questions:

(a) What information is available on automatic meter reading systems and techniques under development which have not been discussed herein?

(b) Is there a compelling need to standardize automatic meter reading systems?

(c) What are the comparative operational, technical, and administrative advantages/disadvantages of a total radio telemetry meter reading system, total wireline meter reading system, or a combined wireline/radio system?

(d) What potential compatibility problems exist between the proposed meter reading systems and other existing or proposed systems using similar portions of the spectrum?

(e) With secondary provisions for non-Government telemetering in the 216–220 MHz (Docket No. 18924) and 1427–1435 (Docket No. 19451) bands, what is the feasibility of accommodating automatic meter reading requirements within those bands

recognizing the constraints imposed by Government operations?

(f) What are the economic advantages, if any, of reading meters totally by wire, by radio, or combinations thereof?

(g) In addition to the economic aspects of the various types of automated meter reading techniques, as addressed in the preceding paragraph (f), what are probable sociological benefits to be derived from their employment (i.e., how would an automatic meter reading system improve customer service and relations?)

(h) Whether radio systems licensed in land mobile radio services should be used for meter reading purposes under the conditions and limitations now prescribed in the rules for non-voice communications. See, for example, § 91.103(b).

(i) If the proposals of the petitions were granted and specific frequencies were allocated for meter reading purposes, what entities should be licensed to conduct meter reading operations? If other than the utilities involved were to be the licensees, what other entities should be licensed and what problems, if any, would be raised by such arrangements?

14. Information filed in response to this Inquiry will be considered by the Commission in formulating specific rule making proposals, if appropriate, looking toward the regular accommodation of utility meter reading systems.

15. Authority for this proceeding is contained in Sections 4(i), 303 and 403 of the Communications Act of 1934, as amended.

16. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules, interested persons may file comments on this matter on or before May 23, 1974, and reply comments on or before June 3, 1974.

17. In accordance with the provisions of Section 1.419 of the Commission's Rules, an original and 14 copies of all statements, briefs or comments filed shall be furnished the Commission.

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

FCC 74R–158

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of RADIO DINUBA CO., DINUBA, CALIF.	Docket No. 19566 File No. BPH–7567
KORUS CORP., DINUBA, CALIF. For Construction Permits	Docket No. 19567 File No. BPH–7657

MEMORANDUM OPINION AND ORDER

(Adopted April 29, 1974; Released April 30, 1974)

BY THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Radio Dinuba Company (Radio Dinuba) and Korus Corp. (Korus) for a construction permit for a new FM broadcast station in Dinuba, California. The applications were designated for hearing by Order of the Chief of the Broadcast Bureau, acting under delegated authority (37 FR 16993, published August 23, 1972). The only issue to be resolved is the standard comparative issue.[1] In his Initial Decision (FCC 73D–38, released July 2, 1973), the Administrative Law Judge recommended a grant of Radio Dinuba's application and denial of Korus'. Exceptions to the Initial Decision were filed with the Review Board by both applicants. Korus also requested oral argument, which the Board first scheduled for April 25, 1974,[2] and then rescheduled for May 14, 1974.[3] Now before the Review Board is a joint request of Radio Dinuba and Korus, filed April 12, 1974, for approval of an agreement contemplating the dismissal of Korus' application and grant of Radio Dinuba's, and providing for the payment by Radio Dinuba of $15,000 as partial reimbursement of the legitimate and prudent expenses incurred by Korus during this proceeding.[4]

2. The petitioners have complied in all respects with the provisions of Section 1.525(a) of the Commission's Rules. They have furnished affidavits which set forth the exact nature of the consideration involved, the details of the initiation and history of the negotiations, and the reasons why approval of the agreement would be in the public interest.[5] In addition, they have substantiated the legitimate and prudent expenses incurred by Korus in the preparation, filing and prosecution of its application, which are in excess of the

[1] An air hazard issue originally designated against Radio Dinuba was deleted by the Review Board in a Memorandum Opinion and Order, 38 FCC 2d 573, 25 RR 2d 1190, released December 12, 1972.

[2] Order, FCC 74R–121, released April 2, 1974.

[3] Order, FCC 74R–133, released April 11, 1974.

[4] Also before the Board are the Broadcast Bureau's comments, filed April 22, 1974. The Bureau interposes no objection to the grant of the relief requested.

[5] Petitioners contend that approval of the agreement would resolve the expensive and time-consuming conflict between the applicants and facilitate the early institution of a first local FM broadcast outlet in Dinuba.

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amount to be reimbursed.[6] Under these circumstances, the Board concludes that the public interest, convenience and necessity will be served by an immediate grant of Radio Dinuba's appplication, the dismissal, pursuant to the joint request of the applicants, of Korus' application, and the approval of the parties' reimbursement agreement.

3. Accordingly, IT IS ORDERED, That the exceptions to the Initial Decision, and the pleadings related thereto, ARE DISMISSED; that the oral argument scheduled for May 14, 1974, IS CANCELLED; that the joint request for approval of agreement for dismissal of application, filed April 12, 1974, by Radio Dinuba Company and Korus Corp. IS GRANTED, and the agreement IS APPROVED; that the application of Korus Corp. (File No. BPH–7657) for a new FM broadcast station in Dinuba, California IS DISMISSED; that the application of Radio Dinuba Company (File No. BPH–7567) for the same facility IS GRANTED; and that this proceeding IS TERMINATED.

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

[6] These expenses are shown to exceed $19,500.

FCC 74-348

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 2 OF THE COMMISSION'S RULES TO PRESCRIBE REGULATIONS GOVERNING THE IDENTIFICATION OF RF DEVICES BEING MARKETED	Docket No. 19357

REPORT AND ORDER

PROCEEDING TERMINATED

(Adopted April 9, 1974; Released April 16, 1974)

BY THE COMMISSION:

1. Notice of Proposed Rule Making in this proceeding was adopted on November 24, 1971 (FCC 71-1195, 36 Fed. Reg. 23322), pursuant to Section 302 of the Communications Act of 1934, as amended, which authorizes the Commission to "make reasonable regulations governing the interference potential of devices which in their operation are capable of emitting radio frequency energy by radiation, conduction or other means in sufficient degree to cause harmful interference to radio communications. The purpose of the proposal was to amend Part 2 of the Commission's rules to prescribe regulations governing the identification of RF devices being marketed.

2. The proposed rule (§ 2.806) would have required the clear marking of a container in which an RF device was shipped as well as all inner containers including the final container with the legend: RF Device—THIS EQUIPMENT COMPLIES WITH APPLICABLE F.C.C. REGULATIONS. Since a blanket requirement would obviate the necessity for a separate rule relating to television receivers, the deletion of § 15.71(b), which requires television receiver containers to indicate compliance with the Commission's all-channel requirements, was also proposed.

3. In proposing § 2.806 the Commission intended to facilitate compliance with its marketing rules. Section 2.801 *et seq.* of the Commission's rules proscribe the marketing of RF devices for which type approval, type acceptance or certification is required unless such equipment authorization has been acquired from the Commission. See § 2.803. Section 2.805 requires compliance with any technical standards promulgated by the Commission before such RF devices may be marketed. Frequently such devices are marketed which do not comply with the Commission's rules. Part of the problem is that customs inspectors have been unable to identify devices needing Commission approval or, if able to identify them, do not know whether applicable Commission standards have been met. Intermediate dealers are prohibited from dealing in unapproved devices and consumers are pro-

hibited from using them. In view of the foregoing, a determination was made that an effective method by which each of these groups—enforcement personnel, intermediate dealers and consumers—could know with certainty that RF devices complied with the Commission's rules was to require the original purveyor to so indicate on the containers.

4. Comments were received from the following parties:

High Frequency Heating Committee of the Professional Group for Industrial Electronics and Control Instrumentation, a part of the Institute of Electrical and Electronics Engineers
Electronic Industries Association of Japan
GTE Sylvania, Incorporated and GTE Lenkurt, Incorporated
Land Mobile Section of the Communications and Industrial Electronics Division of the Electronics Industries Association
Consumer Electronics Group, Electronic Industries Association
Society of the Plastics Industry, Incorporated
Central Station Industry Frequency Advisory Committee
Mann-Russell Electronics, Incorporated

Of the parties commenting, the Central Station Industry Frequency Advisory Committee supports the Commission's proposal. All the other parties object to it in whole or in part and these objections are discussed in detail below.

5. The High Frequency Heating Committee of the Professional Group for Industrial Electronics and Control Instrumentation recognizes the possible need to identify shipping containers as containing RF devices, but expresses concern that the rule is ambiguous as it relates to large equipment that must be broken down into component parts for shipping purposes. The Committee suggests that the Commission may want to change the wording of the proposed rule.

6. The Electronic Industries Association of Japan objects to the rule as being impracticable for palletized containers and other containers used by common carriers, since the manufacturer of the RF devices has no control over the use of such containers.

7. GTE Sylvania, Inc. and GTE Lenkurt, Inc. object to the rule because it would lead to a rise in the number of cargo thefts. It was also suggested that if the rule were adopted, intra-company domestic shipments by the manufacturer and devices exempt under Section 302(c) of the Communications Act should be exempted. In addition the comment suggests that the term "market" be defined.

8. The Land Mobile Section of the Communications and Industrial Electronics Division of the Electronic Industries Association comments that labeling the containers would be an invitation to theft and suggests that alternatives such as placing the label on the equipment itself, in the literature or customs documentation accompanying the equipment, or on inner containers be considered.

9. The Consumer Electronics Group, Electronic Industries Association proposes a delay between the time the rule is adopted and the time it is effective in order to allow the industry to utilize existing inventories. It also suggests that the rule not apply to palletized containers and clearly exclude parts of RF equipment.

10. The Society of the Plastics Industry, Inc. views the proposed rule as essentially a consumer type regulation that should not be applicable to industrial heating equipment.

11. Mann-Russell Electronics, Inc. proposes that heavy duty RF Heating equipment be exempted from what it views as a rule oriented toward consumer type devices.

12. Subsequent to the adoption of the Notice of Proposed Rule Making, the Department of Justice, Law Enforcement Assistance Administration (LEAA) in conjunction with the Department of Transportation published, in October 1972, a pamphlet entitled *Cargo Theft and Organized Crime* (DOT P 52006). That pamphlet indicates that container identification could lead to increased cargo theft.

> The question of carton advertising or other markings, that identify contents is another packaging-related invitation to theft. Although experienced thieves frequently can determine the contents of a package by its shape, feel (as in the identification of registered air mail pouches) and/or name of consignee and shipper, there are numerous instances where removal of such identification has resulted in a marked decrease in cargo theft (pp 51–52).
>
> * * * * * * *
>
> 35. Use shipper's initials rather than full name on labels if the full name would tip off thieves to the nature of the carton's contents (p. 57).

Although the time for comments had expired, the Office of General Counsel informally solicited the views of LEAA and the Department of Transportation. In a letter to the Commission dated October 2, 1973, the Department of Justice (LEAA) stated that although "[w]e have no objection to the marking of 'inner' containers, the proposed rule would be inconsistent with the view of this matter by LEAA." In a letter to the Commission dated September 24, 1973, the Department of Transportation stated that "[p]romulgation of your proposed regulation would be counter-productive to the efforts of this Department, the Department of Justice, and other Federal agencies concerned with the problem of cargo theft."

13. On June 19, 1973 the Treasury Department, Bureau of Customs, in cooperation with the Commission, issued interim guidelines designed to reduce the importation of non-complying RF devices. The Commission requested manufacturers and others importing RF equipment to attach a copy of the Grant of Certification, F.C.C. Form 722–A, to the entry documents. The Bureau of Customs is "accepting" and "encouraging" the submission of the form.

14. The recommendations of the Department of Justice (LEAA) and the Department of Transportation make it clear that markings on outside containers which indicate contents are undesirable. In addition, the guidelines recently adopted by the Bureau of Customs which rely on the inclusion of the Commission's grant of certification (F.C.C. Form 722–A) with the entry documents accompanying imported RF devices will provide a continuing safeguard against the importation of television broadcast receivers which do not comply with the Commission's all-channel requirements. These factors militate against the adoption of proposed rule § 2.806, but support the deletion of § 15.71(b).

15. Although it was not contemplated in the Notice of Proposed Rulemaking, the deletion of the requirement found in § 15.66(b) of the rules that shipping cartons containing certain television receivers be

marked with the phrase FOR IN-SCHOOL USE ONLY would be consistent with the reasons for not adopting proposed rule § 2.806 and for deleting § 15.71(b) as outlined in paragraphs twelve through fourteen above.

16. In view of the foregoing, particularly the comments of the Department of Justice (LEAA) and the Department of Transportation, the Commission finds that the adoption of proposed rule § 2.806 could lead to an undesired result. However, the Commission also finds that the deletion of § 15.71(b) and the phrase "and the shipping carton is identified" contained in § 15.66(b) of the Commission's rules would serve the objectives outlined by the Department of Justice (LEAA) and the Department of Transportation. Accordingly, IT IS ORDERED that effective May 23, 1974, the text of paragraph (b) of § 15.71 and the phrase "and the shipping carton is identified" contained in § 15.66(b) of the Commission's rules ARE DELETED. (See Appendix). Authority for these amendments is contained in § 4(i), § 302, and § 303(r) of the Communications Act of 1934, as amended. The proceeding in Docket Number 19357 is hereby TERMINATED.

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

APPENDIX

Part 15 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

"1. Section 15.66(b) is amended to read as follows:

§ 15.66 EXEMPTIONS FROM ALL-CHANNEL REQUIREMENT.

* * * * * * *

"(b) The television receiver is permanently identified (through stenciling, etching, raised lettering or other similarly appropriate means), as follows:

"FOR IN-SCHOOL USE ONLY

"2. § 15.71 [Amended]

"In § 15.71, the text of paragraph (b) is deleted and designated [Reserved]."

FCC 74-372

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF RUST COMMUNICATIONS GROUP, INC., LICENSEE OF RADIO STATION WRNL, RICHMOND, VA.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted April 9, 1974; Released April 19, 1974)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture dated February 7, 1973, addressed to Rust Communications Group, Inc., the licensee of Radio Station WRNL, Richmond, Virginia and (2) the licensee's response of March 9, 1973 to the Notice of Apparent Liability.

2. The Notice of Apparent Liability for forfeiture issued in this proceeding indicated that in violation of Section 73.52(a) or 73.113 (a) (3) and (4) of the Rules, or both, Station WRNL was operated with excessive power and/or the operating logs were not maintained in accordance with the Rules as set forth below:

Date	Power	Excess over licensed power (percent)
Feb. 14, 1972	6043 W	20.9
Feb. 15, 1972	5612 W	12.2
Feb. 22, 1972	5506 W	10.1
Feb. 23, 1972	5934 W	18.7
Feb. 24, 1972	5612 W	12.2
Mar. 5, 1972	5506 W	10.1
Mar. 6, 1972	5506 W	10.1

3. In response to the Notice of Apparent Liability the licensee stated that it did not willfully or repeatedly violate the Rules and requested that its apparent forfeiture liability be remitted in full, arguing that the direct method of determining power does no reliably indicate actual power, that inherently inaccurate meters may have indicated overpower when actual power was within tolerance or that correctly indicating meters may have been carelessly logged, and that two of the three operators who logged meter readings which indicated overpower operation and the chief engineer who supervised them were no longer employed by the licensee when the Notice of Apparent Liability was issued. Further, licensee stated that it acquired the station less than five months prior to the date of the inspection and was con-

cerned with many matters involved in the regularization of operation of a new facility, including a number of technical problems.

4. Licensee's first argument in response to the Notice of Apparent Liability was that the direct method of determining antenna input power does not reliably indicate actual antenna input power. Licensee stated that, "During the seven days listed in your letter of February 7, 1973, based on 'indirect method' checks using the final stage operating efficiency of 66.5% specified by the transmitter manufacturer, there is not a single case where WRNL operated with power in excess of the licensed value of 5,000 watts." It further stated:

> The fact that Commission rules require logging both the common point current and the final stage input power is evidence that the Commission realizes that the "direct method" can be in serious error and that other "indirect method" data should be logged for corroborative or corrective purposes.
>
> It is a fact that the direct current meters used for determining power by the "indirect method" are more stable and reliable than radio frequency ammeters using either a thermocouple or current transformer and rectifier which are required for the "direct method." The "direct method" can be more accurate at times, but the metering is less reliable and stable, and can lead to serious error.

5. Antenna input power is defined by Section 73.14(g) of the Rules as ". . . the product of the square of the antenna current and the antenna resistance at the point where the current is measured." Section 73.51(a) states that, "Except in those circumstances described in paragraph (d) of this section, the antenna input power shall be determined by the direct method . . ." Section 73.51(d) prescribes determination of antenna input power ". . . on a temporary basis by the indirect method described in paragraphs (e) and (f) of this section in the following circumstances: (1) In an emergency, where the authorized antenna system has been damaged by causes beyond the control of the licensee or permittee (see Section 73.45), or (2) pending completion of authorized changes in the antenna system, or (3) if changes occur in the antenna system or its environment which affect or appear likely to affect the value of antenna resistance, or (4) if the antenna current meter becomes defective (see Section 73.58). Prior authorization for the indirect determination of antenna input power is not required. However, an appropriate notation shall be made in the operating log." The indirect method is clearly a secondary method of determining antenna input power to be used only temporarily when either the antenna resistance is likely to have changed or the antenna current cannot be determined because of a defective antenna current meter. Under normal circumstances antenna input power is determined by the direct method, and we expect stations to rely on the indicated antenna current to ascertain antenna input power except in those circumstances when the indirect method is required by Section 73.51 (d). Licensee did not contend that circumstances requiring use of the indirect method existed when the violations occurred. Nor did licensee indicate that its operating logs complied with the Rules governing determination of power by the indirect method (notation of efficiency factor and its derivation; and of the product of plate current, plate voltage and efficiency factor). Additionally, even if licensee's operators were relying on the indirect method, the efficiency factor stated by licensee in response to the Notice of Apparent Liability is derived by a less preferred method. Section 73.51(f)(1) states the preferred method

as follows: "If the transmitter and the antenna power utilized during the period of indirect power determination are the same as have been authorized and utilized for any period of regular operation, the factor F shall be the ratio of such authorized antenna input power to the corresponding plate input power of the transmitter for regular conditions of operation, computed with values of plate voltage and plate current obtained from the operating logs of the station for the last week of regular operation." Licensee's argument that the direct method is unreliable and should be disregarded when power computed by the indirect method is less, ignores potential variations in the efficiency factor. It also ignores our clear preference, expressed in the Rules, for use of the direct method. We are not persuaded that the argument has merit absent a showing that circumstances were such as to compel use of the indirect method under Section 73.51(d).

6. In its second argument in response to the Notice of Apparent Liability the licensee stated:

> During the seven days listed in your letter of February 7, 1973, based on "indirect method" checks using the final stage operating efficiency of 66.5% specified by the transmitter manufacturer, there is not a single case where WRNL operated with power in excess of the licensed value of 5,000 watts. There is only one apparent case of careless or inaccurate logging of common point current by the operator on duty. This was on February 14, 1972 . . .
>
> The apparent errors in indicated power output appear to be the result of erratic remote meter readings rather than of actual power variations. When indicated output power fluctuates without a corresponding variation in final stage input power, a truly competent engineer knows that adjustment of the output power may not be necessary or desirable.
>
> The "careless and incomplete work" mentioned in my letter of April 6, 1972,[1] now seems to apply more to the work of the former Chief Engineer than to the engineering staff.

In further response to the Notice of Apparent Liability the licensee stated:

> Inconsistencies in the Commission rules contribute to a general problem involving power output logging. Section 73.39 says that "indicating meters are to be accurate to 2% of full scale"—"for antenna current meters the full scale shall be not greater than three times the minimum normal reading." Thus, we might expect as much as a 6% error in reading common point current from a legal meter. Since output power is a current-squared function this would correspond to a power error of 12.4%.
>
> Section 73.52(a) says—"the operating power of each station shall be maintained as near as practicable to the licensed power and shall not exceed the limits of 5% above and 10% below the licensed power—."
>
> Presumably "operating power" means actual operating power and not apparent operating power as measured on a meter. How can you maintain an operating parameter within plus 5% or minus 10% with an instrument that has a permissible error of plus 12.4% or minus 12.4%?
>
> If other words, a legal meter might read 10.6 amperes when the actual current was 10.0 amperes. In the case of the WRNL night pattern, this would indicate a power output of 5612 watts (12.2% over the licensed power) when the station was operating at exactly the 5000 watts authorized.

[1] In response to the Official Notice of Violation, the licensee had stated that, "Based on 'indirect method' checks, it is likely that of the 21 listed dates [only seven of which fell within the one-year period prior to issuance of the Notice of Apparent Liability], only 5 involve overpower with 16 involving incorrect meter logging. We see no excuse for such careless work and incomplete work. In the event that we find there is not prompt and significant improvement in logging and other engineering routine we propose to make engineering staff changes and install automatic logging equipment with out-of-tolerance alarms."

In addition to the errors within the indicating meter itself there are unavoidable reading errors due to limited meter scale length, pointer width, and parallax effects. In the case of the actual WRNL remote common point current meter, which exceeds minimum Commission requirements, the variation between the licensed power of 5000 watts and the maximum permitted power of 5250 watts is about the minimum variation that can be reliably read, or the width of the meter pointer . . .

With a legal meter, operating at one-third the full scale reading, this reading error could be 3.75% which could be additive to the permissible meter error of 6%, giving a total error of 9.75% in reading common point current. This would correspond to a power output error of 20.5%, since power is a current-squared function.

The WRNL transmitters are remotely controlled and metered from a studio building located about 1000 feet away. In an effort to reduce meter reading errors, separate meters permanently connected with long wires were installed some years ago, so that all logged parameters are continuously displayed in the main control room on meters equipped with appropriate scales and labels. The calibrations of each of these remote meters are checked and readjusted during the daytime hours as required.

The seven instances of apparent excessive power all occurred during February and early March at night, and most occurred after midnight. It is possible that certain meters read higher than normal because of the cold night temperature. This would tend to reduce the resistance of the long small-gauge copper wires connecting the meters, which would make the meters read higher than the true values. Indirect method checks support this hypothesis. This is an error in addition to the instrument error and the reading error. It is a calibration error not detectable by a normal daytime check.

We are in the process of re-engineering and reinstalling the entire remote control and metering system at WRNL. We have noted some instability in the remote meter readings which we want to correct. In the meantime, we are trying to have the logs kept as accurately as possible so that we can study the characteristics of any metering errors. Any effort to keep logged readings between narrow limits must frustrate our efforts to get the remote meters as accurate as the state of the art permits. At present the transmitter output seems to be more stable than some of the associated remote meter readings.

7. In *Kalamazoo Broadcasting Co., Inc.*, 24 FCC 2d 441 (1970), a licensee answered a Notice of Apparent Liability for overpower operation as follows: ". . . this violation was very slight for it was the difference in reading a maximum current of 2.9 amps, which would have been permissible, and actual recorded readings which never exceeded 3.0 amps . . . [I]t is extremely difficult to read most RF ammeters to an accuracy of 0.1 ampere . . . [T]he difference between logging 2.9 amps and 3.0 amps is one of 'judgment . . .'" We held as follows:

A licensee's log entries are intended to be an accurate reflection of the meter readings taken at the time they are made and will be considered by the Commission as such when it subsequently reviews the licensee's logs. Absent clear evidence to the contrary, a licensee will not be heard later to assert that its operators were misreading the station's meters when they made the log entries. Moreover, a log entry of 3.0 amps would indicate that WKPR was being operated at more than 105 per cent above its authorized pre-sunrise power. In this respect, the station's operators should have taken immediate steps to see whether the station was, in fact, exceeding its authorized pre-sunrise power and, if so, should have corrected the situation.

Furthermore, if the remote antenna current meter indicated overpower, the WRNL operators could have checked its readings against the antenna current meter only "about 1000 feet away." They apparently did not. Licensee's explanation that cold weather possibly increased the remote antenna current meter indication is conjectural; licensee did not state whether other readings increased similarly, nor

did it offer any explanation why the remote plate voltage and remote plate current meter indications apparently did not increase under the same meteorological conditions. Licensee stated that the remote control and monitoring system is being re-engineered and reinstalled, but subsequent corrective action will not relieve a licensee of responsibility for violations of the Rules. *Executive Broadcasting Corp.*, 3 FCC 2d 699 (1966). Licensee's contention that, "Any effort to keep logged readings between narrow limits must frustrate our efforts to get the remote meters as accurate as the state of the art permits," disregards the purpose of Section 73.52(a) of the Rules,[2] which is to control station power so as to insure coverage in accordance with the terms of the station authorization while preventing unexpected interference to other stations. We expect licensees to comply with all our Rules. *J. C. Johnson tr/as Lowndes County Broadcasting Co.*, 23 FCC 2d 91 (1970). Having carefully reviewed the circumstances in this case, we find no clear evidence that the antenna currents logged were not those actually indicated by the remote antenna current meter.

8. Licensee's third argument in response to the Notice of Apparent Liability was that two of the three operators who logged meter readings which indicated overpower operation and the chief engineer who supervised them were no longer employed by the licensee when the Notice of Apparent Liability was issued. It is well established that licensees are responsible for the acts and omissions of their employees. *The McLendon Corporation*, 18 FCC 2d 224 (1969). We are not persuaded that this forfeiture should be remitted because some of the erring employees had left the licensee's employ in the twelve months following the violations.

9. We have considered all the reasons submitted by the licensee in support of its request for full remission of the forfeiture, including the fact that it acquired the station less than five months prior to the inspection. We find that Station WRNL repeatedly operated with excessive power in violation of Section 73.52(a) of the Commission's Rules, as set forth above. Having found the violations to be repeated, it is unnecessary to make any additional determination as to whether the violations were willful. *Paul A. Stewart*, 45 FCC 773 (1963).

10. In view of the foregoing, IT IS ORDERED, That Rust Communications Group, Inc., the licensee of Radio Station WRNL, Richmon, Virginia, FORFEIT to the United States the sum of one thousand dollars ($1,000) for repeated violation of Section 73.52(a) of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn payable 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 days of receipt of this Memorandum Opinion and Order.

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

[2] Section 73.52(a) of the Rules states, in pertinent part, that, "The actual antenna input power of each station shall be maintained as near as is practicable to the authorized antenna input power and shall not be less than 90 percent nor greater than 105 percent of the authorized power. . ."

FCC 74-388

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 13 OF THE COMMISSION'S RULES TO DELETE CERTAIN LIMITATIONS ON THE SCOPE OF OPERATING AUTHORITY OF SHIP RADIOTELEPHONE OPERATOR PERMITS	Docket No. 19856

REPORT AND ORDER

PROCEEDING TERMINATED

(Adopted April 16, 1974; Released April 25, 1974)

BY THE COMMISSION:

1. On November 5, 1973, we released a Notice of Proposed Rule Making in the above-entitled matter (38 FR 31018, November 9, 1973). The notice provided for the filing of comments and reply comments, and the time allowed, as extended, for such filings has expired.

2. The Notice proposed to delete the paragraphs (e)(2) and (f)(7) in Section 13.61 of our rules as obsolete, and to amend Section 13.61(h)(4), essentially, so as to permit the operation of a ship radiotelephone station by a person holding a restricted operator permit for a station with no more than 100 watts power (400 watts peak envelope power), and thus make Part 13 consistent with an existing provision in Part 83 of our rules. These changes were considered to be mostly noncontroversial and of an editorial, nonsubstantive nature.

3. Two comments were received in response to our Notice, one from the Northern California Marine Radio Council (NCMRC), and one from the Southern California Marine Radio Council (SCMRC). Both commentors concurred generally in the proposed amendments to Part 13 of the rules, but SCMRC suggested that the change in Section 13.61(h)(4) be further revised to include coast as well as ship stations. As we understand the SCMRC suggestion, it desires rule changes to provide that the specified maximum power output for a station that may be operated by a person holding a restricted operator permit be the same, generally, for both a coast and a ship station. In short, we understand that SCMRC desires that the operator requirements for a coast station not be greater by class than for a ship station. SCMRC stated that if this revision would be beyond the scope of the Notice of Proposed Rule Making, then it requested its comment to be treated as a Petition for Further Rule Making.

4. At present, our rules specify, with certain exceptions not relevant here (e.g. coast stations employing a frequency below 30 MHz) in Section 13.61(h)(4) as herein amended, and Section 83.159, that a ship station with power output up to 100 watts (400 watts PEP) may be operated by a person holding a restricted operator permit; whereas a

person holding that class of operator permit may operate a very high frequency (VHF) coast station on frequencies with a power output up to 250 watts (1,000 watts PEP) pursuant to Sections 13.61(h)(7) and 81.152(d) of the rules.

5. With respect to the request of SCMRC, concerning VHF operation, we point out that under our present rules a coast station with an output power up to 250 watts (1,000 watts PEP) may be operated by a person holding a restricted operator permit as provided for in Sections 13.61(h)(7) and 81.152(d) of the rules. To adopt the further change suggested by SCMRC to Section 13.61(h)(4) would, in that section, essentially, require that coast stations, if any, operating at more than 100 watts (400 watts PEP) and up to 250 watts (1,000 watts PEP) use an operator holding at least a third class operator permit, instead of a restricted operator permit as now allowed. Additionally, any such provision in subparagraph (4) of Section 13.61(h) would conflict with the existing provisions in subparagraph (7) and the provisions of Section 81.152(d) of the rules. We do not believe this is, substantively, what SCMRC desires, and it appears to us the relief requested by SCMRC for VHF coast stations already exists in the rules as herein explained. With respect to the SCMRC request as it applies to coast station operations on frequencies below 30 MHz, the potential for interference on these lower frequencies is much greater than in the VHF (156–162 MHz) maritime band. Consequently, we believe it is not advisable, at this time, for safety and operational reasons, to lower the operator requirements for these coast stations. Accordingly, we will not adopt the SCMRC suggestion or grant its request for a Further Notice of Proposed Rule Making, as they apply to coast stations operating on frequencies below 30 MHz.

6. In view of the foregoing, we find the proposed rule changes to be necessary and in the public interest.

7. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 303(l)(1) and 303(r) of the Communications Act of 1934, as amended, the Commission's rules ARE AMENDED effective May 31, 1974 as set forth in the attached Appendix.

8. IT IS FURTHER ORDERED, That the Petition for Further Rule Making filed by SCMRC IS DENIED.

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

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

APPENDIX

1. Part 13 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

"In § 13.61, paragraphs (e)(2) and (f)(7) are deleted and shown as reserved and paragraph (h)(4) is amended to read as follows.

"§ 13.61 OPERATING AUTHORITY.

* * * * * * *

"(h) * * *

"(4) Ship stations licensed to use telephony at which the power is more than 100 watts carrier power or 400 watts peak envelope power, or

* * * * * * *

FCC 74-446

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
SOUTHERN ILLINOIS CABLE TV CO., INC., JOHNSTON CITY, ILL.	CAC-240; CSR-482 IL119
SOUTHERN ILLINOIS CABLE TV CO., INC., CARTERVILLE, ILL.	CAC-242; CSR-484 IL121
SOUTHERN ILLINOIS CABLE TV CO., INC., HERRIN, ILL.	CAC-243; CSR-485 IL122
SOUTHERN ILLINOIS CABLE TV CO., INC., WEST FRANKFORT, ILL.	CAC-244; CSR-483 IL123
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted April 18, 1974; Released April 30, 1974)

BY THE COMMISSION:

1. Southern Illinois Cable TV Company, Inc., operator of cable television facilities at Johnston City, Carterville, Herrin, and West Frankfort, Illinois,[1] located within the Cape Girardeau, Missouri-Paducah, Kentucky-Harrisburg, Illinois, major television market (#69), has filed the above-captioned applications for certificates of compliance requesting certification for the following television broadcast signals:

WSIL-TV (ABC, Channel 3) Harrisburg, Illinois.
WSIU-TV (Educ., Channel 8) Carbondale, Illinois.
KFVS-TV (CBS, Channel 12) Cape Girardeau, Missouri.
WDXR-TV[2] (Ind., Channel 29) Paducah, Kentucky.
WPSD-TV (NBC, Channel 6) Paducah, Kentucky.
KPLR-TV (Ind., Channel 11) St. Louis, Missouri.
KDNL-TV (Ind., Channel 30) St. Louis, Missouri.

Carriage of these signals is consistent with Section 76.63 of the Rules. The applications are unopposed.

2. Southern Illinois proposes to provide an education access channel and a government access channel for each of the four communities; however, it requests a waiver of Section 76.251 of the Rules to allow it to provide one public access channel and production facilities to be shared by the four communities. In support of this request, Southern

[1] In *Southern Illinois Cable TV Co.*, FCC 73-1274, 44 FCC 2d 460 (1973), we found that Southern Illinois was not operating "cable television systems" within the meaning of the Commission's Rules. We directed Southern Illinois to supplement its applications for certificates of compliance; it has done so, and we now consider the amended applications.

[2] WDXR-TV, Inc., licensee of Station WDXR-TV, filed "Petition[s] for Special Relief and Request for Expedited Consideration," in which it seeks waiver of Section 76.11(a) of the Rules to the extent that Southern Illinois be directed to begin immediate carriage of WDXR-TV. In view of our action herein, these petitions (CSR-482, CSR-484, CSR-485, and CSR-483) will be dismissed as moot.

Illinois states that the four small rural communities [3] will be served from one headend providing 20-channel capacity. Seven channels will be used for carriage of television broadcast signals, one for automated program originations, eight for education and government access channels. Provision of four public access channels would exhaust the remaining channel capacity. Southern Illinois asserts that it is unlikely that there will be a demand for four public access channels in the near future, but that it will make these channels available for public access as demand develops and will provide additional studios if needed. Waiver of the requirements of Section 76.251, adds Southern Illinois, is consistent with Commission precedent.

3. We acknowledged in Paragraphs 147 and 148 of the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143 (1972), that there would be situations in which our access requirements would impose an "undue burden" and a waiver would be appropriate. We are satisfied that Southern Illionis' access proposal is consistent with the public interest. The sharing of the public access channel and production facilities under the conditions described above is consistent with our previous decisions concerning access waivers for new conglomerate systems.[4] Since these franchises were granted prior to March 31, 1972, and only substantially comply with our Rules (*see* Paragraph 4, *infra*), our certification will extend only until March 31, 1977, in accordance with Section 76.13(a)(4) of the Rules. We shall, at the time Southern Illinois applies for recertification, expect Southern Illinois to demonstrate the extent to which its access proposal has been successful and has operated in the public interest. If sufficient access demand should develop in the meantime, we expect Southern Illinois to make additional channels available.

4. Southern Illinois' franchises to operate in Johnston City, Carterville, Herrin, and West Frankfort are in compliance with Section 76.31 of the Rules, except that they contain no provisions: establishing that the franchises were awarded after full public proceedings; that require equitable extension of trunk cable to a substantial percentage of the franchise area each year; that require a local business office and a procedure for resolution of service complaints; or that require modifications of Section 76.31 to be incorporated into the franchise within one year of the adoption of such modifications. Southern Illinois has assured us that the franchises were issued after full public proceedings, applicant does maintain local offices, it has established complaint procedures, and it will seek any modifications necessary to bring the franchises into full compliance with the standards of Section 76.31. The systems are completely built in West Frankfort and Johnston City. Applicant will reasonably and equitably extend energized trunk cable to at least 20 percent of the franchise area in Herrin and Carterville each year. The

[3] The populations are:

Carterville	3,053
Herrin	9,342
West Frankfort	8,827
Johnston City	3,801
Total	25,023

[4] *See Universal Television Cable System, Inc.*, FCC 74–98, 45 FCC 2d 403 (1974); and *NewChannels Corp.*, FCC 74–62, 45 FCC 2d 161 (1974).

franchise fees vary between 4 and 7 percent; the franchises all exceed the maximum of 15 years allowed under our Rules. However, since these franchises were all granted prior to March 31, 1972,[5] only substantial consistency with Section 76.31 of the Rules must be demonstrated, and, measured by the criteria established in *CATV of Rockford, Inc.*, FCC 72–1005, 38 FCC 22d 10 (1972), *recons. denied*, FCC 73–293, 40 FCC 2d 493 (1973), we find that these franchises substantially comply with Section 76.31 of the Rules in a manner sufficient to justify a grant of the applications until March 31, 1977.

In view of the foregoing, the Commission finds that a partial waiver of Section 76.251 of the Rules and grant of the above-captioned applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the above-captioned applications for certificates of compliance (CAC–240, 242, 243, and 244) filed by Southern Illinois Cable TV Company, Inc., ARE GRANTED, and appropriate certificates of compliance will be issued.

IT IS FURTHER ORDERED, That the "Petition[s] for Special Relief and Request for Expedited Consideration," (CSR–482, CSR–484, CSR–485, and CSR–483) filed by WDXR–TV, Inc., ARE DISMISSED as moot.

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

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[5] The franchises were granted on the following dates:
Johnston City, Dec. 23, 1969.
Carterville, Oct. 5, 1971.
Herrin, Aug. 11, 1969, amended Aug. 25, 1969.
West Frankfort, Dec. 3, 1969.

FCC 74-438

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 2, 89, 91 AND 93 OF THE COMMISSION'S RULES AND REGULATIONS TO PROVIDE FOR THE SHARED USE OF CERTAIN FREQUENCIES BY THE SPECIAL INDUSTRIAL RADIO SERVICE IN PUERTO RICO AND THE VIRGIN ISLANDS	Docket No. 20042 RM-2139

NOTICE OF PROPOSED RULEMAKING AND NOTICE OF INQUIRY

(Adopted April 17, 1974; Released April 30, 1974)

BY THE COMMISSION:

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

2. The Special Industrial Radio Service Association (SIRSA) has filed a petition to amend Parts 89, 91, and 93 of the Commission's Rules to permit persons located in Puerto Rico and the Virgin Islands, and eligible in the Special Industrial Radio Service to share frequencies presently available to the Forestry-Conservation and Railroad Radio Services. Specifically, SIRSA proposes that 15 vacant frequencies which are allocated to the Forestry-Conservation Radio Service and 15 vacant frequencies which are allocated to the Railroad Radio Service should be made available for shared use by Special Industrial Radio Service users on Puerto Rico and the Virgin Islands. As proposed, fifteen 160 MHz Railroad Radio Service frequencies [1] and fifteen 159 MHz Forestry-Conservation Radio Service frequencies[2] would be assigned for shared use with the Special Industrial Radio Service. Since these two groups of fifteen frequencies are separated by approximately 1 MHz, they would meet the minimum pairing requirements needed for mobile relay operations.

3. In support of its request SIRSA notes that of the seventeen 159 MHz band frequencies presently allocated to the Forestry-Conservation Radio Service, none are in current use in Puerto Rico and the Virgin Islands. Similarly, in the Railroad Radio Service, of the forty-three VHF channels available to eligibles on these islands, only three are assigned in Puerto Rico and one in the Virgin Islands.

4. This proposal has resulted from the peculiar topographical, economic, and social conditions which exist in Puerto Rico [3] and which

[1] 160.410, 160.425, 160.440, 160.455, 160.470, 160.485, 160.500, 160.515, 160.530, 160.545, 160.560, 160.575, 160.590, 160.605, 160.620 MHz.

[2] 159.225, 159.240, 159.255, 159.270, 159.285, 159.300, 159.315, 159.330, 150.345, 159.360, 159.375, 159.390, 159.405, 159.420, 159.435 MHz.

[3] Because of the proximity of the Virgin Islands to Puerto Rico, and the effect on the Virgin Islands of assignments made in Puerto Rico, the relief sought herein is proposed jointly for Puerto Rico and the Virgin Islands.

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have resulted in the severe crowding of nearly all of the assignable Special Industrial 150 MHz frequencies. The problem is further compounded by the absence of standard frequency pairing arrangements in the Special Industrial Radio Service which makes mobile relay operations and frequency sharing extremely difficult.

5. While the newly authorized tertiary frequencies in the 150 MHz band are available to Special Industrial licensees, the geographical separation requirements [4] governing their use, and the limited dimensions of the island (105 miles long by 35 miles wide) combine to render them practically unusable.

6. The Commission recognizes the problem which exists in Puerto Rico, and to a lesser extent in the Virgin Islands, and agrees with the petitioner's argument that unused frequencies should not be permitted to continue lying fallow when licensees in other services have demonstrated a need for such frequencies. In this context, we would note, historically, that in Docket No. 14990,[5] released July 7, 1964, the Commission provided that certain land mobile service frequencies above 152 MHz should be made available to the Special Industrial Radio Service for use in Hawaii, Alaska, Puerto Rico and the Virgin Islands. The rationale at that time was that in Alaska, Hawaii, Puerto Rico, and the Virgin Islands, mobile frequencies above 152 MHz which were normally available on a three-way, co-equal priority sharing basis in the Petroleum, Forest Products, and Manufacturers Radio Services were not extensively used in these areas by licensees in these services, and therefore should be utilized by a service which has a pressing need for them. The same reasoning now motivates us to propose providing for additional shared use of certain other under-utilized frequencies.

7. However, the Commission notes that we have also recognized a similar need for additional frequencies in the Business Radio Service,[6] and that there may be other radio services which feel they have a similar need. Consequently, while we are tentatively proposing to make the frequencies in question available for shared use with the Special Industrial Radio Service, we are requesting information as to the following matters:

(a) Whether other radio services have a similar need in Puerto Rico and the Virgin Islands to share these Forestry-Conservation and Railroad frequencies; and

(b) What, if any, difficulties would be entailed by interservice sharing of these frequencies.

8. The proposed rules are shown in the Appendix and are issued pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended. Pursuant to the applicable procedures set forth in Section 1.415 of the Commission's Rules, interested parties may file comments on or before May 31, 1974, and

[4] The required separation is ten miles from the closest station operating on a 15 MHz adjacent channel. In Puerto Rico a significant geographic factor is the existence of two mountain ranges which cover half of the island. Because line of sight is a key to mobile relay operations, the few available mountain peaks which occupy advantageous positions have been covered by antenna supporting towers for mobile relay systems operating on almost all of the usable 150 MHz frequencies available to Special Industrial applicants.

[5] 42 FCC 1188.

[6] Docket 15534 amended Parts 2, 89, 91, and 93 of the Commission's Rules to provide additional frequencies for the Business Radio Service in Puerto Rico and the Virgin Islands.

reply comments on or before June 11, 1974. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this notice. In accordance with the provisions of Section 1.51 of the Commission's Rules and Regulations, an original and 14 copies of all statements, briefs, or comments filed shall be furnished the Commission. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room at its Washington, D.C. headquarters.

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

APPENDIX

Parts 2, 89, 91, and 93 of Chapter 1 of Title 47 of the Code of Federal Regulations are amended as follows:

"A. Section 2.106, the Table of Frequency Allocations, is amended in columns 7 through 11 for the bands 158.715–159.48 MHz and 159.48–161.575 MHz by adding footnote designator NG70 and will read as follows:

"*Federal Communications Commission*

"****	Band (MHz)	Service	Class of station	Frequency (MHz)	Nature of services of stations
	7	8	9	10	11
*	*	*	*	*	* *
***	158.715–159.48	Land mobile	Base Land mobile.		Public safety. (NG70).
***	159.48–161.575	do	do		Land transportation. (NG6), (NG26), (NG28), (NG70).
*	*	*	*	*	* *

"NG70 In Puerto Rico and the Virgin Islands only, the bands 159.225–159.435 and 160.410–160.620 MHz are also available for assignment to base stations and mobile stations in the Special Industrial Radio Service.

"B. Part 89—Public Safety Radio Services.

"Section 89.459(d) is amended by adding new limitation (17) to read as follows:

"§ 89.459 FREQUENCIES AVAILABLE TO THE FORESTRY-CONSERVATION RADIO SERVICE.

* * * * * * *

"(d)

"Frequency or band	Class of station(s)	Limitations
* * *	* * *	*
159.225	do	17
159.240	do	17
159.255	do	17
159.270	do	17
159.285	do	17
159.300	do	17
159.315	do	17
159.330	do	17
159.345	do	17
159.360	do	17
159.375	do	17
159.390	do	17
159.405	do	17
159.420	do	17
159.435	do	17

* * * * * * *

"(17) This frequency is shared with the Special Industrial Radio Service in Puerto Rico and the Virgin Islands. All applications for the assignment of a new frequency or to change existing facilities in such a manner as to require frequency coordination, as specified in Section 89.15 hereof, for stations in Puerto Rico or the Virgin Islands, shall be accompanied by evidence of interservice frequency coordination.

"C. Part 91—Industrial Radio Services.

"Section 91.504 is amended by modifying the language of paragraph (a) and adding new paragraph (d) to read as follows:

"§ 91.504 FREQUENCIES AVAILABLE.

"(a) The frequencies or bands of frequencies available for assignment to stations in this service are enumerated in the following table, together with the class of station(s) to which they are normally assigned, a general reference terminology, and the specific assignment limitations which are developed in paragraph (b) of this section. Special provisions relating to the availability and the assignment of certain frequencies above 152 MHz in Hawaii, Puerto Rico, and the Virgin Islands are contained in paragraphs (c) and (d) of this section.

* * * * * * *

"(d) The following frequencies are available only in Puerto Rico and the Virgin Islands for shared use by base and mobile stations licensed in the Forestry-Conservation, Railroad and Special Industrial Radio Services.

"Base and mobile:	*Mobile only*	"Base and mobile:	*Mobile only*
159.225	160.410	159.345	160.530
159.240	160.425	159.360	160.545
159.255	160.440	159.375	160.560
159.270	160.455	159.390	160.575
159.285	160.470	159.405	160.590
159.300	160.485	159.420	160.605
159.315	160.500	159.435	160.620
159.330	160.515		

"(1) A mobile station may be assigned the frequency of an associated base station. Such operation may, however, subject the single frequency system to interference that would not occur to a two-frequency system.

"(2) The foregoing 'Mobile Only' frequency may be assigned to a control station associated with a mobile relay system if it is also assigned to the associated mobile station.

"(3) The foregoing 'Base and Mobile' and 'Mobile Only' frequencies are available on a shared basis in the Forestry-Conservation and Railroad Radio Services, respectively. All applications for the assignment of a new frequency, or to change existing facilities in such a manner as to require frequency coordination, as specified in Section 91.8(a) hereof, shall be accompanied by evidence of frequency coordination with the sharing service.

"D. Part 93—Land Transportation Radio Services.

"Section 93.352 is amended by adding new limitation 4 to read as follows:

"§ 93.352 FREQUENCIES BELOW 952 MHz AVAILABLE FOR BASE AND MOBILE STATIONS.

* * * * * * *

"4	160.410	"4	160.530
4	160.425	4	160.545
4	160.440	4	160.560
4	160.455	4	160.575
4	160.470	4	160.590
4	160.485	4	160.605
4	160.500	4	160.620
4	160.515		

* * * * * * *

"(4) This frequency is shared with the Special Industrial Radio Service in Puerto Rico and the Virgin Islands. All applications for the assignment of a new frequency or to change existing facilities in such a manner as to require frequency coordination, as specified in § 93.9 hereof, for stations in Puerto Rico or the Virgin Islands, shall be accompanied by evidence of interservice frequency coordination."

FCC 74-449

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of TELCO CABLEVISION OF ASBURY PARK, INC., ASBURY PARK, N.J. For Certificate of Compliance	CAC-1756 NJ069

MEMORANDUM OPINION AND ORDER

(Adopted April 18, 1974; Released April 30, 1974)

BY THE COMMISSION:

1. On December 22, 1972, Telco Cablevision of Asbury Park, Inc., filed the above-captioned application for a certificate of compliance for a new cable television system at Asbury Park, New Jersey,[1] which is outside all television markets. Telco proposes to provide its subscribers with the following television broadcast signals:

WCBS-TV (CBS, Channel 2) New York, New York.
KYW-TV (NBC, Channel 3) Philadelphia, Pennsylvania.
WNBC-TV (NBC, Channel 4) New York, New York.
WNEW-TV (Ind., Channel 5) New York, New York.
WPVI-TV (ABC, Channel 6) Philadelphia, Pennsylvania.
WABC-TV (ABC, Channel 7) New York, New York.
WOR-TV (Ind., Channel 9) New York, New York.
WPIX (Ind., Channel 11) New York, New York.
WNET (Educ., Channel 13) Newark, New Jersey.
WPHL-TV (Ind., Channel 17) Philadelphia, Pennsylvania.
WNYE-TV (Educ., Channel 25) New York, New York.
WNYC-TV (Noncomm., Channel 31) New York, New York.
WXTV (Ind., Channel 41) Paterson, New Jersey.
WNJU-TV (Ind., Channel 47) Linden, New Jersey.
WKBS-TV (Ind., Channel 48) Burlington, New Jersey.
WNJT (Educ., Channel 52) Trenton, New Jersey.

Carriage of these signals is consistent with Section 76.57 of the Commission's Rules.

2. On December 20, 1973, Blonder-Tongue Broadcasting Corp., permittee of subscription television station WBTB-TV, Channel 68, Newark, New Jersey, filed a letter in opposition to the above-captioned application and Telco has replied. Blonder-Tongue's opposition results from Telco's proposal, as detailed to the Commission by letter dated December 19, 1973, to carry only the non-subscription portions of WBTB-TV's programming. In support of its opposition Blonder-Tongue states: (a) that if subscription television is to perform the

[1] The population of Asbury Park, New Jersey, is 16,533.

functions envisioned by the Commission, it should be entitled to the same cable television carriage rights as enjoyed by conventional television stations; (b) the Commission's decision in *B and F Broadcasting*, 43 FCC 2d 361 (1973), that cable television systems are not presently required to carry the scrambled subscription portion of a subscription television station, was incorrect because it was predicated upon language contained in the *Third Further Notice of Proposed Rule Making in Docket No. 11279*, 15 FCC 2d 601 (1968), and not on the *Cable Television Report and Order*, 36 FCC 2d 143 (1972), or the rules promulgated thereunder.

3. We note initially that Blonder-Tongue was granted a construction permit for Station WBTB–TV on April 10, 1970. This permit was reissued on March 29, 1973, and the Station is not yet in operation. Upon activation, Station WBTB–TV will place a predicted Grade B contour over the community of Asbury Park, New Jersey. At that time, Telco must carry the non-subscription programming, pursuant to the *Fourth Report and Order in Docket No. 11279*, 15 FCC 2d 466 (1968),[2] and Section 76.57(a)(1) of the Commission's Rules. We note that Telco has agreed to provide carriage of the non-subscription portions of WBTB–TV's programming. With respect to the carriage of subscription portions of WBTB–TV's programming, we stated in the *Fourth Report and Order* that such carriage is not required.[3] Contrary to Blonder-Tongue's assertion, we did not address ourselves to the required carriage of the subscription portion of STV programming in the *Cable Television Report and Order*, 36 FCC 2d 143 (1972). This issue was, and is still being considered as part of a separate rule making, *Third Further Notice of Proposed Rule Making*, *supra*. Our grant of certification to Telco shall be without prejudice to any future carriage rights of WBTB–TV that result from the rule making presently in progress. We note in this context that Telco has pledged immediate compliance with any such rule change.

4. The franchise awarded to Telco Productions on January 14, 1971, was amended and assigned subsequently to Telco Cablevision. It contains a 5 percent franchise fee, without any justification. The franchise was awarded for 15 years with a ten-year renewal and contains provisions stating that it was awarded pursuant to a public proceeding and specifying construction time limits and subscriber rates. In addition, the franchise provides that rate changes may be made only after a public hearing. Only substantial consistency with Section 76.31 of the Rules must be demonstrated for a franchise granted before March 31, 1972, according to the note following Section 76.13(a)(4) of the Rules. We find this franchise is substantially consistent with Section 76.31 of the Rules in a manner sufficient to justify a grant of a certificate of compliance until March 31, 1977.

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[2] In the *Fourth Report and Order, supra*, at p. 581, we stated in pertinent part: "To the extent that, under our new rules, STV stations will be required to broadcast at least the minimum number of hours of free TV programs required by Section 73.651 of our rules, such stations are conventional stations and, for their non-subscription programming, are entitled to the protection of our CATV rules, including the carriage and nonduplication provisions."

[3] Our decision in *B and F Broadcasting, supra*, restated this quite clearly.

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

Accordingly, IT IS ORDERED, That the opposition to the application filed by Blonder-Tongue Broadcasting Corporation, IS DENIED.

IT IS FURTHER ORDERED, That the above-captioned application filed by Telco Cablevision of Asbury Park, Inc., IS GRANTED, and an appropriate certificate of compliance will be issued.

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

FCC 74-399

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Application of TELENET COMMUNICATIONS CORP. FOR AUTHORITY UNDER SECTION 214(a) OF THE COMMUNICATIONS ACT, AS AMENDED, AND PURSUANT TO SECTION 63.01 OF THE COMMISSION'S RULES AND REGULATIONS TO INSTITUTE AND OPERATE A PUBLIC PACKET SWITCHED DATA COMMUNICATIONS NETWORK IN THE CONTIGUOUS UNITED STATES AND THE DISTRICT OF COLUMBIA BY LEASING TERRESTRIAL AND SATELLITE COMMUNICATIONS LINES FROM EXISTING CARRIERS	File No. P-C-8750

MEMORANDUM OPINION, ORDER, AND CERTIFICATE

(Adopted April 16, 1974; Released April 30, 1974)

BY THE COMMISSION:

1. The Commission has before it for consideration the above-captioned application, filed October 9, 1973, and amended on November 16, 1973, February 21, 1974 and March 12, 1974, by Telenet Communications Corporation (Telenet),[1] 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 in the contiguous United States and District of Columbia providing terminal-computer and computer-computer communications utilizing technology known as "packet-switching." [2]

2. Telenet plans to establish central office facilities containing Interface Message Processors (IMP) or Terminal Interface Processors (TIP) or Satellite IMPs (SIMP) to which customer's computers and terminals can be connected, and to interconnect these facilities by means of high speed transmission facilities leased from existing carriers. Telenet's application requests authority to establish its packet switching facilities initially in 18 cities. However, within four years Telenet plans to expand its network through the installation of packet switching facilities in an additional 44 cities. Appropriate applications will be filed as the network is expanded. The transmission facilities required for the initial 18 city network include 22 leased terrestrial lines operating at 50 kilobits and 100 kilobits per second and a 1.544 Megabits per second multiaccess "broadcast" communications

[1] Telenet is a subsidiary of Bolt, Beranek and Newman, Inc.
[2] "Packet-switching" is described at 43 FCC 2d 922 (1973) at page 922.

satellite channel serving four earth stations, Los Angeles, Dallas, Chicago and New York. The use of satellite facilities is contingent upon the anticipated availability of suitable multi-point satellite service from one or more domestic satellite carriers.

3. Public notice of the application was given October 23, 1973 (Common Carrier Information Report No. 671, Mimeo #08807) and correction of notice on November 13, 1973. Statutory notice of the filing of the application was given as required by Section 214(b) of the Communications Act.

4. Letters in support of the application were submitted by The National Library of Medicine, Interuniversity Communications Council, Inc., the Center for Advanced Computation, the University of Illinois, and Computer Corporation of America. Also, comments were received from American Satellite Corporation urging that the Telenet application be accorded like treatment to that afforded *Packet Communications, Inc.* (43 FCC 2d 922 (1973)).

5. The Western Union Telegraph Company (Western Union) filed a Petition to Deny the Telenet application on November 14, 1973. Basically, the Petition to Deny alleges that the Telenet application does not fall within the Commission's "open-entry" provision for specialized common carriers and that the application fails to meet the requirements of Section 214 of the Act and Section 63.01 of the Commission's Rules. This petition to deny was filed before we released our decisions setting forth our basic policies concerning applications of new carriers to engage in "packet-switching" technology. (*Packet Communications, Inc.*, supra and *Graphnet Systems, Inc.*) (44 FCC 2d 800 (1974)). We recognized in these decisions that the entry of "packet-switching" carriers into the market for communications services would have an impact upon the structure of the industry. However, we held that such entry should be permitted because it would introduce new and improved means of satisfying the needs of the public not otherwise available from generalized or specialized carriers, and we adopted a policy of liberalized "open entry" in this area. We therefore reject Western Union's contention that the "open entry" policy is not appropriate in this instance. We also find that Western Union's allegations are unsupported insofar as the claim is made that Telenet's application fails to meet the requirements of Section 214 of the Act and Section 63.01 of the Rules.

6. On the basis of the information submitted by the applicant, we find that Telenet has substantially complied with the applicable provisions of Section 214 and part 63 of our Rules and has made the requisite showing of public interest to warrant our granting Telenet's application to authorize it to lease and operate the facilities set forth in the application 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 the Telenet application to that extent. However, for the reasons stated in our *Packet* and *Graphnet* decisions, we shall limit our authorization herein to the provision of terminal-computer and computer-computer communications by "packet-switching" as proposed by the applicant in the application before us.

7. Accordingly, IT IS HEREBY CERTIFIED, That the present or future public convenience and necessity require the leasing and operation by Telenet of the channels for the purposes and between the 18 cities in the contiguous United States and the District of Columbia as set forth in Table 2 of the captioned application (File No. P–C–8750).

8. IT IS ORDERED, That Telenet is authorized to lease and operate facilities and to provide the services as described in said application subject to the condition that Telenet shall not expand its service offerings to data processing, hybrid data processing or any other service other than the terminal-computer and computer-computer communication by "packet-switching" as proposed by the applicant in said application without prior approval of the Commission.

9. IT IS FURTHER ORDERED, That, the Petition to Deny filed by Western Union IS DENIED.

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

FCC 74-403

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
TELEPROMPTER CONNECTICUT CATV CORP.	
MIDDLETOWN, CONN.	CAC-1582/CSR-316 (CT044)
MIDDLEFIELD, CONN.	CAC-1583/CSR-317 (CT045)
CROMWELL, CONN.	CAC-1584/CSR-318 (CT046)
EAST HAMPTON, CONN.	CAC-1585/CSR-319 (CT047)
PORTLAND, CONN.	CAC-1586/CSR-320 (CT048)
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted April 16, 1974; Released May 1, 1974)

BY THE COMMISSION:

1. TelePrompTer Connecticut CATV Corporation has filed applications for certificates of compliance to begin cable television service at the above-captioned communities, which are located within the Hartford-New Haven-New Britain-Waterbury television market (#19). The systems propose to offer subscribers the following television broadcast signals:

WHNB-TV (NBC, Channel 30) New Britain, Connecticut.
WTIC-TV [1] (CBS, Channel 3) Hartford, Connecticut.
WHCT-TV (Ind., Channel 18) Hartford, Connecticut.
WEDH (Educ., Channel 24) Hartford, Connecticut.
WTNH-TV (ABC, Channel 8) New Haven, Connecticut.
WTVU (CP, Channel 59) New Haven, Connecticut.
WATR-TV (NBC, Channel 20) Waterbury, Connecticut.
WEDW (Educ., Channel 49) Bridgeport, Connecticut.
WEDN (Educ., Channel 53) Norwich, Connecticut.
WNEW-TV (Ind., Channel 5) New York, New York.
WOR-TV (Ind., Channel 9) New York, New York.
WPIX (Ind., Channel 11) New York, New York.
WWLP (NBC, Channel 22) Springfield, Massachusetts.
WHYN-TV (ABC, Channel 40) Springfield, Massachusetts.

Carriage of these signals is consistent with the Commission's Rules. Objections or petitions for special relief have been filed by Broadcast Plaza, Inc., licensee of Station WTIC-TV, and Capital Cities Broadcasting Corporation, licensee of Station WTNH-TV. TelePrompTer

[1] Now WFSB-TV.

has replied. Metromedia, Inc., licensee of Station WNEW–TV, has filed an opposition to Capital Cities' petitions for special relief.

2. In its opposition, Broadcast Plaza argues that TelePrompTer's franchises fail to comply with Section 76.31 of the Commission's Rules. In *Valley Cable Vision, Inc.*, 38 FCC 2d 959, *recons. dénied*, 40 FCC 2d 191 (1973), we held that franchises granted by the State of Connecticut are in substantial compliance with our franchise standards. Although the subject cable television systems were not parties to that decision, the franchises are identical to, and were issued at the same time as, the franchises considered in *Valley Cable Vision, supra.* Therefore, these objections will be denied.

3. In its petition for special relief, Capital Cities asks the Commission to direct TelePrompTer to afford syndicated program exclusivity protection to "local" stations as against the grandfathered WHYN–TV and WWLP signals and the significantly viewed WNEW–TV signal. Capital Cities argues that WHYN–TV and WWLP, although grandfathered for carriage purposes, should not be grandfathered with respect to syndicated exclusivity because the systems were not in operation prior to March 31, 1972. Capital Cities cites as support Paragraph 66 of the *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, 351 (1972), in which we pointed out that signals authorized to be carried on systems that were not operating prior to March 31, 1972, would not be grandfathered for the purpose of syndicated program exclusivity. It is argued that the grandfathering provision of Section 76.159 of the Rules reflects this judgment, for it exempts from the exclusivity requirements of Section 76.151 ". . . any signal *that was carried* prior to March 31, 1972 . . ." (emphasis added). Section 76.151, however, subjects to the syndicated exclusivity rules only those signals carried pursuant to Sections 76.61 (b), (c), (d), (e), or 76.63(a) (as it refers to Section 76.61(b), (c), (d), or (e)). Signals carried only by virtue of their grandfathered status are carried pursuant to Section 76.65, and thus it is alleged that there is a gap in the rules. TelePrompTer, in its reply, argues that the language of Section 76.151 and the record-keeping requirements of Section 76.305 (the purpose of which is to assure that the syndicated exclusivity rules are properly complied with) suggest that grandfathered signals are not subject to the syndicated exclusivity requirements.

4. We must reject TelePrompTer's arguments. To the extent that our rules may be imprecise, Paragraph 66 of the *Reconsideration, supra*, and Section 76.159 of the Rules make it clear that only those signals actually carried prior to March 31, 1972, will be exempt from the syndicated exclusivity requirements. Where signals not actually carried prior to the March 31 grandfathering date are proposed to be carried solely pursuant to Section 76.65 of the Rules, they will be subject to the syndicated exclusivity provisions of Section 76.151 *et seq.* of the Rules. Thus, WHYN–TV and WWLP will be subject to the exclusivity provisions of our rules on the Middletown and Middlefield systems. However, we note that because Portland, Cromwell, and East Hampton are wholly or partially within the Springfield television market, WHYN–TV and WWLP may be carried on systems

in those communities pursuant to Section 76.61(a) of the Rules, and therefore, syndicated program exclusivity does not apply there.

5. With respect to WNEW–TV, Capital Cities concedes that the Commission's Rules do not provide syndicated exclusivity protection against significantly viewed signals. However, it argues that such protection in favor of "local" stations is necessary here to preserve the exclusivity rights for which WTNH–TV has bargained in the program distribution market, and it challenges the "assumption that WNEW–TV's programs are 'generally available' in Middlesex County 'even without cable' ". We have previously considered similar requests by Capital Cities for specialized exclusivity rules in this market and have denied them. *Telesystems Corporation*, 45 FCC 2d 546 (1974). For the reasons discussed in that Memorandum Opinion and Order, we will deny the subject petitions for special relief.

6. TelePrompTer seeks a waiver of Section 76.251 of the Commission's Rules proposing to maintain initially one set of public, governmental, educational, and leased access channels for shared use by the East Hampton and Portland systems and one set of access channels to be shared by the Middletown, Middlefield, and Cromwell systems. For reasons of economy, technology, and the small size of the communities, the systems have been designed to operate as an integrated unit served from an LDS transmitting site at East Hampton with two receiving sites at Portland and Middletown. TelePrompTer will maintain a studio at each receiving site. Most residents live in Middletown, and the total population of each of the two groups of communities is relatively small.[2] All the communities to be served are located within the immediate vicinity of Middletown, and have a political, social, and economic community of interest with that city. It is argued that access needs can readily be met by the proposal for shared use.

7. We believe the access proposal offered by TelePrompTer is reasonable and consistent with our previous decisions concerning the sharing of access channels in new conglomerate systems. *See e.g., Saginaw Cable TV Co.*, 39 FCC 2d 496 (1973), and *NewChannels Corporation*, 45 FCC 2d 161 (1974). In granting the requested waiver, we note that TelePrompTer will be providing 14 television broadcast signals on its 30-channel systems, and, thus, the remaining 16 channels will be available for access services should the demand arise.[3]

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[2] Population figures are as follows:

Community:	*Population*
Middletown	36,924
Middlefield	4,132
Cromwell	7,400
Total	48,456
Portland	8,812
East Hampton	7,078
Total	15,890

[3] On April 1, 1974, Mr. William M. Kuehn, Municipal Development Coordinator for the City of Middletown, filed belated objections to TelePrompTer's shared access proposal. On April 10, 1974, TelePrompTer replied. We believe that the subject proposal adequately meets the access goals expressed by Mr. Kuehn, particularly in view of TelePrompTer's undertaking to provide additional access channels should the demand arise. To the extent that the Kuehn letter constituted a request by the City of Middletown for deferral of processing of the subject applications pending the outcome of possible proceedings before the Connecticut Public Utilities Commission to transfer the subject franchises, we deny this request. It is our position that the Connecticut PUC is the only appropriate body to request a delay on this ground. No such request has been made.

In view of the foregoing, we find that a grant of the subject applications and waiver of Section 76.251 of the Rules would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the objections to the captioned applications filed by Broadcast Plaza, Inc. ARE DENIED.

IT IS FURTHER ORDERED, That the "Petition[s] for Special Relief" (CSR–316, 317) filed by Capital Cities Broadcasting Corporation directed against TelePrompTer's Middletown and Middlefield systems ARE GRANTED to the extent reflected in Paragraph 4 above, and in all others respects ARE DENIED.

IT IS FURTHER ORDERED, That the "Petition[s] for Special Relief" (CSR–320, 318, 319) filed by Capital Cities Broadcasting Corporation directed against TelePrompTer's Portland, Cromwell, and East Hampton systems ARE DENIED.

IT IS FURTHER ORDERED, That the applications for certificates of compliance (CAC–1582, 1583, 1584, 1585, 1586) filed by TelePrompTer Connecticut CATV Corporation ARE GRANTED and appropriate certificates of compliance will be issued.

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

FCC 74-379

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
TELEPROMPTER CORP., NEWARK, SANTA CLARA, CALIF.	CAC-2179, CA496 CAC-2180, CA455 CAC-2965, CA455
TELEPROMPTER OF MILPITAS, INC., MILPITAS, CALIF.	CAC-2181, CA169
TELEPROMPTER CORP., D.B.A. TELEPROMPTER OF LOS GATOS, LOS GATOS, MONTE SERENO, CALIF., UNINCORPORATED PORTIONS OF SANTA CLARA COUNTY CONTIGUOUS TO LOS GATOS, CALIF.	CAC-2183, CA240 CAC-2187, CA514 CAC-2188, CA379
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted April 10, 1974; Released April 19, 1974)

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

1. TelePrompTer Corporation, TelePrompTer of Milpitas, Inc., and TelePrompTer Corporation, d/b/a TelePrompTer of Los Gatos, (TPT), have filed applications for certificates of compliance to add television signals to cable television systems operating in each of the above-named communities, all located within the San Francisco-Oakland-San Jose, California, major television market (#7). Each of the systems is presently carrying the following signals:

KTVU (Ind., Channel 2) Oakland, California.
KCRA-TV (NBC, Channel 3) Sacramento, California.
KRON-TV (NBC, Channel 4) San Francisco, California.
KPIX (CBS, Channel 5) San Francisco, California.
KCSM-TV (ETV, Channel 14) San Mateo, California.
KGSC-TV (Ind., Channel 36) San Jose, California.
KBHK-TV (Ind., Channel 44) San Francisco, California.
KTEH (ETV, Channel 54) San Jose, California.
KGO-TV (ABC, Channel 7) San Francisco, California.
KSBW-TV (NBC, Channel 8) Salinas, California.
KQED (ETV, Channel 9) San Francisco, California.
KXTV (CBS, Channel 10) Sacramento, California.
KNTV (ABC, Channel 11) San Jose, California.
KOVR (ABC, Channel 13) Stockton, California.
KEMO-TV (Ind., Channel 20) San Francisco, California.
KQEC* (Educ., Channel 32) San Francisco, California.
KMST [1] (CBS, Channel 46) Monterey, California.

*Currently dark.

[1] The signal of KMST is not presently carried in Santa Clara, California. A separate application for certificate of compliance has been filed (CAC-2695) requesting the addition of KMST to the Santa Clara system, and will be dealt with herein.

TPT seeks to add the following signals to each of the systems:

KTLA (Ind., Channel 5) Los Angeles, California.
KTXL (Ind., Channel 40) Sacramento, California.
KTSF–TV [2] (Ind., Channel 26) San Francisco, California.
KUDO [3] (Ind., Channel 38) San Francisco, California.

Continental Urban Television Corporation, licensee of KGSC–TV, Channel 36, San Jose, California, has filed an opposition to the proposed carriage of KTLA and KTXL, and TPT has replied. Carriage of KTSF–TV and KUDO is consistent with Section 76.61(a)(1) of our Rules.

2. Continental opposes TPT's carriage of the two distant independent signals (KTLA, KTXL) because the cable systems already carry four distant network signals (KCRA–TV, KSBW–TV, KXTV, and KOVR) on a grandfathered basis.[4] Continental argues that the "grandfathered" distant network signals should be counted against the two distant independent signals allowed by Section 76.61(c) of the Commission's Rules. Continental contends that the intent of Section 76.61(c) is to allow carriage of two distant signals, either network or independent, and since TPT's cable systems are already carrying more than two distant network signals, the proposed carriage cannot be justified under Section 76.61(c).

3. We reject Continental's arguments. Section 76.61(c) of the Rules provides cable television systems with two distant independent signals. Distant network signals are involved only insofar as they are added to a system to fill out its "minimum service" capability pursuant to Section 76.61(b). In that case, the number of distant independent signals permitted by Section 76.61(c) would be reduced accordingly. However, in the present situation, TPT's cable systems are already carrying the distant network signals on a grandfathered basis. They have not added them in order to fill out their "minimum service" capability. Faced with a similar argument in *Sammons Communications, Inc.*, FCC 73–363, 40 FCC 2d 461 (1973), we held that distant network signals proposed to be carried on the basis of their grandfathered status "do not count against the 'bonus' distant independent signals of Section 76.61(c) of the Rules." *Id.*, at 462. *See People's Cable Corp.*, FCC 74–123, —— FCC 2d —— (1974); *Cable TV Company of York*, FCC 73–459, 40 FCC 2d 927 (1973).

4. TPT's application [5] for Los Gatos, California (CAC–2183) contains a request for authority to share access channels among the communities of Los Gatos, Monte Sereno, and the unincorporated areas of Santa Clara County contiguous to Los Gatos. Section 76.251(c) of our

[2] KTSF–TV is currently a construction permittee. Signal carriage will commence when it begins broadcasting.

[3] KUDO is presently off the air. Its carriage is requested only by Newark (CAC–2179) and Santa Clara (CAC–2180). It has previously been carried by the systems serving Milpitas (CAC–2181), Los Gatos (CAC–2183), Monte Sereno (CAC–2187), and the unincorporated portions of Santa Clara County contiguous to Los Gatos, California (CAC–2188). Its carriage will resume in these communities when it returns to the air.

[4] In its reply to the opposition, TPT states that the cable systems, with the exception of Santa Clara, carry a fifth grandfathered distant network signal (KMST).

[5] The application for Los Gatos, California (CAC–2183) constitutes TPT's lead application for its system serving Los Gatos, Monte Sereno, and unincorporated portions of Santa Clara County contiguous to Los Gatos.

Rules requires a major market cable television system operating prior to March 31, 1972, to add one access channel for each new distant independent signal that it plans to carry. Thus, in this case, a total of six access channels would be required—one public and one educational for each of the three systems. TPT requests that the three communities be allowed to share a public and an educational access channel. In support of its request, TPT states that the areas are served by a common headend, are geographically contiguous, and, it is argued, have common political, social, and economic interests. TPT also contends that because of the small population of the areas,[6] the communities would not be able to make full use of separate access channels. In any event, TPT assures us that if two shared access channels are insufficient to meet the access demands of the three communities, it will provide greater access capacity.[7]

5. The sharing of access channels under these circumstances was specifically envisoned in the *Reconsideration of the Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 359 (1972), and we have, in the past, permitted the practice upon proper showing. *See, e.g., Coldwater Cablevision, Inc.*, FCC 73–281, 40 FCC 2d 58 (1973); *Halifax Cable TV, Inc.*, FCC 73–679, 41 FCC 2d 887 (1973). We are satisfied that TPT has made such a showing and, accordingly, we will allow the request for the communities to share access channels.

6. TPT's Santa Clara, California, system has filed a separate application (CAC–2965) for certificate of compliance to add the following signal:

KMST (CBS, Channel 46) Monterey-Salinas, California.

This application is unopposed. Carriage of KMST is proposed on the basis of its grandfathered status. On March 8, 1971, pursuant to Section 74.1105 of our former rules, TPT sent letters of notification to the appropriate parties informing them of its intention to carry KMST. Copies of these notices were received by the Commission and no oppositions were filed. Thus, the signal is authorized and may be carried pursuant to Section 76.65 of our Rules.

In view of the foregoing, we find that grant of the above-captioned applications and request for partial waiver of Section 76.251(c) would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the opposition filed by Continental Urban Television Corporation IS DENIED.

IT IS FURTHER ORDERED, That the applications for certificates of compliance (CAC–2179–81, 2183, 2187–88, and 2695) filed by TelePrompTer ARE GRANTED, and the appropriate certificates of compliance will be issued.

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

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[6] TPT lists the population figures for the communities as follows:

Los Gatos	23,735
Monte Sereno	3,089
Unincorporated portions of Santa Clara County contiguous to Los Gatos	3,000
Total	29,824

[7] The subject systems have 27-channel capacity; only 16 channels are currently being used for broadcast signal carriage.

104–036—74——19

FCC 74-447

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
TELEPROMPTER OF FLORIDA, INC., CLERMONT, FLA.	CAC-1962 FL266
TELEPROMPTER OF FLORIDA, INC., MASCOTTE, FLA.	CAC-1963 FL267
TELEPROMPTER OF FLORIDA, INC., SOUTH LAKE COUNTY, FLA.	CAC-1964 FL268
TELEPROMPTER OF FLORIDA, INC., GROVELAND, FLA.	CAC-1965 FL269
TELEPROMPTER OF FLORIDA, INC., MINNEOLA, FLA.	CAC-1966 FL270

MEMORANDUM OPINION AND ORDER

(Adopted April 18, 1974; Released April 30, 1974)

BY THE COMMISSION:

1. On February 15, 1973, TelePrompTer of Florida, Inc., filed the above-captioned applications for certificates of compliance to operate 30-channel cable television systems in five Florida communities, all located within the Orlando-Daytona Beach, Florida, major market (#55). TelePrompTer proposes to offer the following television broadcast signals:

WTVT (CBS, Channel 13) Tampa, Florida.
WEDU (Educ., Channel 3) Tampa, Florida.
WFLA-TV (NBC, Channel 8) Tampa, Florida.
WTOG (Ind., Channel 44) St. Petersburg, Florida.
WESH-TV (NBC, Channel 2) Daytona Beach, Florida.
WDBO-TV (CBS, Channel 6) Orlando, Florida.
WFTV (ABC, Channel 9) Orlando, Florida.
WSWB-TV (Ind., Channel 35) Orlando, Florida.
WMFE-TV (Educ., Channel 24) Orlando, Florida.
WUSF-TV (Educ., Channel 16) Tampa, Florida.
WTCG (Ind., Channel 17) Atlanta, Georgia.
WLTV (Ind., Channel 23) Miami, Florida.

The applications are unopposed, and carriage of these signals is consistent with the Commission's Rules.

2. TelePrompTer seeks a waiver of Section 76.251 of the Commission's Rules insofar as it requires cable television systems operating in major markets to maintain separate public, governmental leased, and educational access channels for each system. It states that it proposes to serve these five communities from the same headend, and provide one public, one governmental, one educational access, and one leased channel to be shared by all the communities. TelePrompTer also

states that in the event demand for use of the shared access channels warrants, additional access channels will be made available.

3. Each of the communities to be served is small, and, taken as a group, the total population is less than ten thousand.[1] Each of these communities is under the jurisdiction of the same school board, Lake County School Board. The applicant states that these communities have in general a common political, social, and economic community of interest.

4. We believe the access proposal offered by TelePrompTer is reasonable and consistent with our previous decisions concerning the sharing of access channels in conglomerate systems. In *Saginaw Cable TV Co.*, FCC 73–121, 39 FCC 2d 496 (1973), the Commission permitted new systems to share three access channels among four communities having an aggregate population of 129,681, noting that the systems had the capacity and intention to expand the number of access channels, if necessary. The showing in that case was similar to the showing made here by TelePrompTer. In approving TelePrompTer's access proposal, we do so only until March 31, 1977. Upon application for recertification at that time, we expect TelePrompTer to demonstrate to us the extent to which its proposal has been successful and has operated in the public interest.

5. We note the following variations from Section 76.31: none of the franchises contains express recitations that it was awarded in the context of public proceedings; none of the franchises requires significant construction within one year of FCC certification, although TelePrompTer states it will perform accordingly; none of the franchises provides for local offices or complaint procedures, but TelePrompTer states that it will provide a local telephone number for maintenance purposes; and all of the franchises provide for a fee of 6 percent of subscriber revenues. As all of these franchises were awarded prior to March 31, 1972,[2] and only substantial compliance with Section 76.31 of the Rules must be demonstrated for franchises granted before March 31, 1972, measured by the criteria established by *CATV of Rockford, Inc.*, FCC 72–1005, 38 FCC 2d 10 (1972), *recons. denied*, FCC 73–293, 40 FCC 2d 493 (1973), we find that the franchises substantially comply with Section 76.31 of the Rules in a manner sufficient to justify a grant of the above-captioned applications until March 31, 1977.

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

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[1] See the following:

Community:	*Population*
Clermont	3,661
Groveland	1,928
Mascotte	966
Minneola	878
South Lake County	2,000
Total	9,433

[2] See the following:

Community:	*Date of franchise award*
Clermont	Mar. 24, 1970.
Groveland	Aug. 17, 1970.
Mascotte	July 13, 1970.
Minneola	Apr. 8, 1970.
South Lake County	Apr. 6, 1970.

Accordingly, IT IS ORDERED, That the "Application[s] for Certificate[s] of Compliance" filed by TelePrompTer of Florida, Inc., for the Florida communities of Clermont, Mascotte, South Lake County, Groveland, and Minneola ARE GRANTED, and appropriate certificates of compliance will be issued.

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

FCC 74-421

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
TULSA CABLE TELEVISION, TULSA, OKLA.	CAC-2265 (OK061)
SAPULPA CABLE TELEVISION, SAPULPA, OKLA.	CAC-2266 (OK074)
SAND SPRINGS CABLE TELEVISION, SAND SPRINGS, OKLA.	CAC-2267 (OK064)
BROKEN ARROW CABLE TELEVISION, BROKEN ARROW, OKLA.	CAC-2268 (OK065)
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted April 17, 1974; Released April 26, 1974)

BY THE COMMISSION:

1. On March 22, 1973, the above-captioned cable television systems filed applications for certificates of compliance to add the signal of Station KBMA-TV (Ind., Channel 41) Kansas City, Missouri, to the proposed cable systems located at Tulsa, Sapulpa, Sand Springs, and Broken Arrow, Oklahoma. These communities are all situated within the Tulsa, Oklahoma major television market (#54).[1] The systems have previously received certificates of compliance authorizing carriage of the following television signals:

KTEW (NBC, Channel 2) Tulsa, Oklahoma.
KOTV (CBS, Channel 6) Tulsa, Oklahoma.
KTUL-TV (ABC, Channel 8) Tulsa, Oklahoma.
KOED-TV (Educ., Channel 11) Tulsa, Oklahoma.
KTVT (Ind., Channel 11) Fort Worth, Texas.
KDTV (Ind., Channel 39) Dallas, Texas.

An objection was filed on May 3, 1973, by Corinthian Television Corporation, licensee of Television Broadcast Station KOTV, Tulsa, Oklahoma, but, as a result of a private settlement agreement, Corinthian has requested that its objection be withdrawn.

2. In the settlement agreement, the applicants stipulate that the two Dallas-Fort Worth independents will initially be carried. However, the systems will delete one of the Dallas-Fort Worth signals upon completion of microwave facilities enabling them to begin carriage of KBMA-TV. We are assured that at no time will the systems be carry-

[1] The communities have the following populations: Tulsa, 328,209; Supulpa, 14,300; Sand Springs, 10,400; Broken Arrow, 6,500.
When the systems commence operations each will have a 30-channel capacity. Of these channels, six are to be used for television signal carriage. In addition to the required access channels, three automated and three non-automated program origination channels will be provided. All-band FM will also be carried.

ing in excess of their quota of two independent signals.[2] The applicants have chosen this approach because, they argue, microwave facilities for carriage of the Dallas-Fort Worth stations will become available substantially in advance of those for KBMA–TV. In the interim, the applicants wish to offer their subscribers a full complement of authorized services.

3. It is our view that the arrangement presented above does not violate our signal carriage rules, because at no time will more than the maximum allotment of two independent signals be carried simultaneously on the systems, and carriage of any two of the KTVT, KDTV, and KBMA–TV signals would be consistent with our Rules. We will grant the subject applications but will delay the issuance of certificates of compliance until such time as the cable television systems notify the Cable Television Bureau that they are prepared to commence carriage of KBMA–TV and specify the signal to be deleted.

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

Accordingly, IT IS ORDERED, That the "Objection of Corinthian Television Corporation pursuant to Section 76.27" filed on May 3, 1973, IS DISMISSED.

IT IS FURTHER ORDERED, That the above-captioned applications (CAC–2265, 2266, 2267, 2268) filed by Tulsa Cable Television, Sapulpa Cable Television, Sand Springs Cable Television, and Broken Arrow Cable Television ARE GRANTED, and appropriate certificates of compliance will be issued in accordance with Paragraph 3 herein.

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

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[2] Section 76.63(a) of our Rules (as it applies to Section 76.61(b)) provides that a cable television system operating in a community located in a second-fifty major television market shall be permitted to carry two additional independent television signals.

FCC 74-448

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of UNITED CABLEVISION, INC. DUNLOP, CALIF. GRAND TERRACE, CALIF. BRYN MAWR, CALIF. CALIMESA, CALIF. For Certificates of Compliance	CAC-2602; CA395 CAC-2603; CA489 CAC-2604; CA333 CAC-2605; CA331

MEMORANDUM OPINION AND ORDER

(Adopted April 18, 1974; Released April 30, 1974)

BY THE COMMISSION:

1. United Cablevision, Inc., has filed applications for certificates of compliance to commence cable television service at the four above-captioned California communities, all located within the Los Angeles-San Bernardino-Corona-Fontana, California, major television market (#2). United proposes to offer the following television broadcast signals:

KNXT (CBS, Channel 2) Los Angeles, California.
KNBC (NBC, Channel 4) Los Angeles, California.
KTLA (Ind., Channel 5) Los Angeles, California.
KABC-TV (ABC, Channel 7) Los Angeles, California.
KHJ-TV (Ind., Channel 9) Los Angeles, California.
KTTV (Ind., Channel 11) Los Angeles, California.
KCOP (Ind., Channel 13) Los Angeles, California.
KWHY-TV (Ind., Channel 22) Los Angeles, California.
KCET (Educ., Channel 28) Los Angeles, California.
KMEX-TV (Ind., Channel 34) Los Angeles, California.
KLXA-TV (Ind., Channel 40) Fontana, California.
KVCR-TV (Educ., Channel 24) San Bernardino, California.
KHOF-TV (Ind., Channel 30) San Bernardino, California.
KCST (ABC, Channel 39) San Diego, California.
KPBS-TV (Educ., Channel 15) San Diego, California.
KTVU (Ind., Channel 2) Oakland, California.
KBSC-TV (Ind., Channel 52) Corona, California.

The applications are unopposed, and the carriage of the proposed signals is consistent with Sections 76.61 and 76.65 of the Commission's Rules. The systems will be built with a 54-channel capacity.

2. United seeks a waiver of Section 76.251 of the Rules insofar as it requires cable television systems operating in major television markets to maintain separate public, governmental, educational, and leased access channels for each system. It states that it proposes to serve these four communities in the following manner: (a) Headend

one is to be composed of three communities.[1] They will share the use of production facilities and four access channels—one public, one leased, one educational, and one local government. In support of its waiver request, United argues the following: total population of the three communities indicates a relatively small demand for public access; the geographic proximity of the communities is such that it supports this proposal; the schools of all three communities are under the control of a central school system based at the headend community (the secondary school for all three communities is located in the headend community); none of the communities has its own separate local governing body—they are all under the common government of the County of San Bernardino. Furthermore, United states that at such time as the common nature of these three communities changes and demand grows for more access facilities, it will add to the availability of these facilities: (b) Headend two is to be composed of three communities.[2] They will similarly share the use of a complete set of access services. In support of this position, United advances arguments similar to the above—total population is low; geographically, the communities are closely related; Bryn Mawr has no schools, and Grand Terrace has only three pre-secondary schools administered by a school district in another community; neither Bryn Mawr nor Grand Terrace has its own local governing body—all are under the common government of the County of San Bernardino. Also, United states that at such time as the common nature of the communities changes and the demand grows for more access facilities, it will add to the availability of these facilities.

3. We believe the access proposal offered by United is reasonable and consistent with our previous decisions concerning the sharing of access channels in new conglomerate systems.[3] We shall, at the time United applies for recertification, expect it to demonstrate the extent to which its proposal has been successful and has operated in the public interest.

4. Although not at issue, we believe it appropriate to note the following variations from Section 76.31 in the franchises held by United: United holds a single franchise issued by the County of San Ber-

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[1] The communities and their populations are:

Community:	*Population*
Yucaipa	19,284
Dunlop	2,467
Calimesa	2,000
Total	23,751

CAC–1270 was granted for the community of Yucaipa on November 9, 1973, by the Chief, Cable Television Bureau, pursuant to delegated authority. This certificate expires on March 31, 1977. Accordingly, its certification is not involved in this Memorandum Opinion and Order.

[2] The communities and their populations are:

Community:	*Population*
Loma Linda	13,000
Bryn Mawr	318
Grand Terrace	5,901
Total	19,219

CAC–455 was granted for the community of Loma Linda on April 19, 1973, by the Chief, Cable Television Bureau, pursuant to delegated authority. This certificate expires on March 31, 1977. Accordingly, its certification is not involved in this Memorandum Opinion and Order.

[3] *See Universal Television Cable System, Inc.*, FCC 74–98, 45 FCC 2d 403 (adopted January 30, 1974), footnote 6.

nardino for the communities of Dunlop, Grand Terrace, Bryn Mawr, and Calimesa, wherein there is contained none of the requirements of Section 76.31(a)(1), (a)(2), (a)(5), and (a)(6); however, United has provided specific assurances that these requirements have been or will be met.[4] 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 72–1005, 38 FCC 2d 10 (1972), *recons. denied*, FCC 73–293, 40 FCC 2d 493 (1973), we find that these franchises substantially comply with Section 76.31 of the Rules in a manner sufficient to justify a grant of these applications until March 31, 1977.

In view of the foregoing, the Commission finds that a grant of the above-captioned applications and waiver of Section 76.251 of the Rules would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Application[s] for Certificate[s] of Compliance" filed by United Cablevision, Inc., for the California communities of Dunlop, Grand Terrace, Bryn Mawr, and Calimesa ARE GRANTED, and appropriate certificates of compliance will be issued.

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

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[4] The date of this franchise award was March 14, 1969.

FCC 74-386

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of UNITED TELEVISION CO., INC. (WFAN-TV), WASHINGTON, D.C. For Renewal of License	Docket No. 18559 File No. BRCT-585
UNITED TELEVISION CO., INC. (WFAN-TV), WASHINGTON, D.C. For Construction Permit	Docket No. 18561 File No. BPCT-3917
UNITED BROADCASTING CO., INC. (WOOK), WASHINGTON, D.C. For Renewal of License	Docket No. 18562 File No. BR-1104
WASHINGTON COMMUNITY BROADCASTING CO., WASHINGTON, D.C. For Construction Permit for New Standard Broadcast Station	Docket No. 18563 File No. BP-17416

APPEARANCES

Robert J. Buenzle (Smith and Pepper) on behalf of United Television Company, Inc. (WFAN-TV); and *Joseph Stirmer* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted April 16, 1974; Released April 26, 1974)

BY COMMISSIONER HOOKS FOR THE COMMISSION:

1. This proceeding involves, *inter alia*, the applications of United Television Company, Inc. for renewal and modification of its license for television station WFAN-TV, Washington, D.C., which was originally designated for hearing by our Memorandum Opinion and Order, 18 FCC 2d 363, released June 13, 1969. The matters under consideration also concern the application of United Television Company of Eastern Maryland, Inc. for renewal of its license for television station WMET, Baltimore, Maryland, which was designated for hearing in Docket Nos. 19336-19338 by our Memorandum Opinion and Order, FCC 71-1112, released November 4, 1971.[1]

2. Prior to the start of the WMET hearing, United filed a petition for reconsideration of that designation order. At the same time, United filed requests to discontinue operation of WMET and WFAN-TV pending consideration of its petition for reconsideration. By our Orders, FCC 72-112, released February 14, 1972, and FCC 72-185, released February 24, 1972, we authorized WMET and WFAN-TV to

[1] For simplicity, we shall refer to both applicants, collectively, as United.

discontinue operation until 15 days after the release of our action on the petition for reconsideration. After full consideration of United's petition for reconsideration, it was denied, 38 FCC 2d 400 (1972). Within 15 days thereafter, United filed requests for authority to continue to suspend operation of both WMET and WFAN–TV pending action on applications for assignment of the licenses.

3. Although United claimed that it had suffered substantial financial losses from the operation of the stations, we held that the circumstances did not warrant the type of unlimited relief sought by United, 40 FCC 2d 472 and 474 (1973). Since United could not assign its licenses until all of the questions concerning its qualifications in this and other proceedings had been resolved, we noted that a grant of United's requests would allow these channels to lie fallow for an indefinite period of time contrary to the public's right to have the facilities returned to operation at the earliest possible time. We also stated that, while licensees can operate or not, they have no right to control access to a channel which they do not intend to use.

4. United then filed petitions for reconsideration of our actions.[2] In denying reconsideration and again directing United to resume its operations of WFAN–TV and WMET, we stated that Section 73.651(a) of our Rules requires all television stations to maintain a regular minimum schedule of operation and that Section 73.667 requires a licensee, upon permanent discontinuance of operation to forward the license to us for cancellation. In spite of the provisions of these Rules, we noted that United refused to resume operation of its stations or to return its licenses so that these channels could be made available to persons interested in providing service for the communities of Washington and Baltimore. Accordingly, United was directed to resume operation of WFAN–TV and WMET by no later than 12:01 a.m., December 1, 1973, 42 FCC 2d 390 and 397 (1973).

5. On November 30, 1973, United, noting that it would not be possible to resume operation of WFAN–TV and WMET by December 1, 1973,[3] requested issuance of an Order to Show Cause under Section 312 of the Communications Act to provide an opportunity for United to explain and mitigate its failure to comply with our orders. Since United had stated that it wished to have an opportunity to explain why it has not resumed operation of its stations, we scheduled oral argument before the Commission, *en banc*, on March 29, 1974,[4] and directed United to show cause why its licenses should not be cancelled under the terms of Section 73.667 of our Rules, relating to a permanent discontinuance of operation, or revoked pursuant to Section 312(a)(3) of the Communications Act for failure to operate substantially as set forth in the licenses. FCC 74–83 and 84, released February 4, 1974.

6. In support of its contentions at the oral argument, United offered several exhibits, indicating that the Grade B service areas of WFAN–TV and WMET are much smaller than other stations in their respective markets and that, using their specified facilities, neither WFAN–

[2] United also filed petitions for stay of our directions for WFAN–TV and WMET to resume operation, which were granted, 41 FCC 2d 228 and 230 (1973).

[3] United's requests for stay of this direction to resume operation were denied by us, FCC 73–968 and 969, on September 19, 1973, and by the United States Court of Appeals for the District of Columbia Circuit on November 28, 1973.

[4] United agrees that this oral argument provides it with the full rights to which it is entitled. See Tr. 6241.

TV nor WMET was able to compete effectively with other stations.[5] United urges that, in view of these limitations upon the presently authorized operations of WFAN–TV and WMET, it is not feasible to resume operation of those stations and that the public interest would be best served by authorizing WFAN–TV to commence operation immediately with the modified and improved facilities requested in this proceeding. In this respect, United suggests that the applications of WFAN–TV should be severed from the remaining aspects of this proceeding, that those applications should be considered and granted on an expedited basis, and that WMET should be allowed to remain silent until such time as it may be sold without profit.

7. As we have stated previously, a licensee in hearing on character qualifications issues cannot dispose of a facility, such as WMET, until those questions are favorably resolved. See 38 FCC 2d 400, at 402, and 40 FCC 2d 472 and 474. Thus, United's suggestion would continue to deprive viewers in Baltimore of any service from WMET's facilities without any assurance as to when such service might become available. More importantly, however, it is clear that there is no basis for a severance of the applications of WFAN–TV from the remaining aspects of this proceeding. We have previously denied such a request in connection with United's present contentions, 42 FCC 2d 390, at 393–394, and the Review Board denied an earlier request for essentially similar relief, 31 FCC 2d 794 (1970). In view of the facts that United never filed an application for review of the Board's action, that there are issues and evidence of alleged misconduct intertwining all of United's applications in this proceeding, and that there is no meaningful way to separate our review of those matters concerning United's qualifications as a licensee of WFAN–TV from the other aspects of this proceeding, we are convinced that United's continuing request for a severance must be denied.

8. That being the case, the question is simply whether these channels should be allowed to lie fallow until United decides that its operation on them may be resumed. In such a determination, it is fundamental that the authorizations in question here were granted to permit the operation of television stations. Under the Communications Act, we have a responsibility to ensure that available broadcast channels are used to serve the public interest, and any prolonged period of silence is inconsistent with the efficient utilization of broadcasts facilities. See *Palladium Times, Inc.* (*WOPT, WOPT–FM*), 43 FCC 546, 6 RR 846 (1950). Section 73.651(a)(1) of our Rules specifically requires that every television station maintain a minimum regular program operating schedule; in the event that causes beyond the control of the licensee make it impossible to adhere to such a schedule, Section 73.651(a)(3) provides that leave must be sought to remain silent in excess of ten days; and Section 73.667 requires the licensee to forward his authorization to the Commission for cancellation immediately upon permanent discontinuance of operation.[6]

[5] United's exhibits were admitted without any objection by the Broadcast Bureau. See Tr. 6211.

[6] United's licenses, which are attached as an Appendix, specifically state that they are "[s]ubject to the provisions of the Communications Act of 1934, subsequent acts, and treaties, and all regulations heretofore or hereafter made by this Commission." See *Functional Music, Inc.* v. *F.C.C.*, 107 U.S. App. D.C. 34, 274 F. 2d 543, *cert. den.* 361 U.S. 813, 17 RR 2152 (1958).

9. While United asserts that the present facilities of WFAN–TV and WMET are not competitive with other stations in their markets, it must be noted that the stations were authorized with the technical characteristics originally deemed appropriate and requested by United. Moreover, United's earlier experience cannot be given controlling weight at this time, since the UHF conversion rate now is much higher than at the time WFAN–TV and WMET began operation. Without deciding whether the present circumstances are sufficient to constitute a permanent discontinuance of operation under Section 73.667 of our Rules, we are convinced that United's conduct reflected here can only be considered a serious failure to operate substantially as set forth in its licenses.[7] In light of the facts that United has not operated either WFAN–TV or WMET for a substantial period of time, that no showing has been made which would warrant authorizations for these stations to remain silent for an extended and indefinite period of time,[8] and that United has not made any unconditional commitment to resume operation of these stations within the foreseeable future, we are persuaded that the licenses for WFAN–TV and WMET must be revoked so that other persons desirous of operating in the public interest will have an opportunity to file new proposals for these channels which would provide service for viewers in Washington, D.C., and Baltimore, Maryland, at the earliest possible time.

10. Accordingly, IT IS ORDERED:

(a) That the license of United Television Company, Inc. for television station WFAN–TV, Washington, D.C., IS REVOKED pursuant to Section 312(a)(3) of the Communications Act of 1934, as amended, for failure to operate substantially as set forth in the license;

(b) That the applications of United Television Company, Inc. for renewal of the license (File No. BRCT–585) and for a construction permit (File No. BPCT–3917) for WFAN–TV, Washington, D.C., ARE DISMISSED; and

(c) That the call letters WFAN–TV ARE DELETED.

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

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[7] United's licenses also provide: "This license is issued on the licensee's representation that the statements contained in the licensee's application are true and that the undertakings therein contained so far as they are consistent herewith, will be carried out in good faith. The licensee shall, during the term of this license, render such broadcasting service as will serve public interest, convenience, or necessity *to the full extent* of the privileges herein conferred" (Emphasis supplied).

In this connection, it is clear that the holdover provisions of the Communications Act are intended only to permit continuity of operation while a renewal application is being processed, *cf., Transcontinent Television Corporation* v. *F.C.C.*, 113 U.S. App. D.C. 384, 308 F. 2d 339, 23 RR 2064 (1962).

[8] United claims that *Channel 16 of Rhode Island, Inc.* v. *F.C.C.* 142 U.S. App. D.C. 238, 440 F. 2d 266, 21 RR 2d 2001 (1971), supports its refusal to resume operation of these stations. However, examination of that case reveals that the Court considered only matters relating to the proper standards for grant of extensions of construction permits. Here construction has been completed and the stations have been put into operation. If such stations were permitted to terminate operation at their own discretion, it would make a mockery of the Communications Act's requirement that available broadcast channels are to be used to serve the public interest. Furthermore, the delays concerning the renewals of the licenses for WFAN–TV and WMET are a product of United's voluntary conduct which required evidentiary hearings under Section 309(e) of the Communications Act, whereas the CATV matters in *Channel 16* were initiated exclusively by the Commission. Finally, the absence of other available television channels in Washington and Baltimore also distinguishes this case from *Channel 16*. In sum, *Channel 16* provides no justification for United's refusal to use its authorizations to provide service to the public.

FCC 74-387

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of REVOCATION OF LICENSE OF UNITED TELEVISION CO. OF NEW HAMPSHIRE FOR TELEVISION STATION WMUR, MANCHESTER, N.H.	Docket No. 19336
In Re Applications of UNITED TELEVISION CO. OF EASTERN MARYLAND, INC., FOR TELEVISION STATION WMET, BALTIMORE, MD. For Renewal of License	Docket No. 19337 File No. BRCT-635
KECC TELEVISION CORP. FOR LICENSE TO COVER CONSTRUCTION PERMIT (BPCT-3079) AS MODIFIED, AUTHORIZING A NEW TELEVISION STATION (KECC-TV) AT EL CENTRO, CALIF.	Docket No. 19338 File No. BLCT-2099

APPEARANCES

Robert J. Buenzle (Smith and Pepper) on behalf of United Television Company of Eastern Maryland, Inc. (WMET); and *Joseph Stirmer* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted April 16, 1974; Released April 26, 1974)

BY COMMISSIONER HOOKS FOR THE COMMISSION:

1. This proceeding involves, *inter alia*, the application of United Television Company at Eastern Maryland, Inc. for renewal of its license for television station WMET, Baltimore, Maryland, which was designated for hearing by our Memorandum Opinion and Order, FCC 71-1112, released November 4, 1971. The matters under consideration also involve the applications of United Television Company, Inc. for renewal and modification of its license for television station WFAN-TV, Washington, D.C., in Docket Nos. 18559, 18561-18563. Due to the interrelationship of these two proceedings, we have fully considered all of the relevant questions in our Decision in the WFAN-TV proceeding, Docket Nos. 18559, 18561-18563, which we have adopted concurrently with this Decision and which we hereby incorporate by reference.

2. Accordingly, IT IS ORDERED:

(a) That the license of United Television Company of Eastern Maryland, Inc. for television station WMET, Baltimore, Maryland, IS REVOKED pursuant to Section 312(a)(3) of the Com-

munications Act of 1934, as amended, for failure to operate substantially as set forth in the license;

(b) That the application of United Television Company of Eastern Maryland, Inc. for renewal of the license for WMET, Baltimore, Maryland (File No. BRCT-635) IS DISMISSED; and

(c) That the call letters WMET ARE DELETED.

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

FCC 74-402

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
U.S. CABLEVISION CORP., COMPLAINANT
v.
NEW YORK TELEPHONE CO., DEFENDANT

MEMORANDUM OPINION AND ORDER

(Adopted April 16, 1974; Released April 23, 1974)

BY THE COMMISSION:

1. The Commission has before it for consideration a formal complaint filed on April 27, 1972, by the U.S. Cablevision Corporation, complainant, against the New York Telephone Company (hereinafter "NYTelco"), complainant's Motion to Make Answer More Definite and Certain, and NYTelco's Answer and Motion to Dismiss the subject complaint. Complainant is the operator of a cable television system in Hyde Park, New York and successor in interest to U.S. Cablevision Corporation whose corporate name complainant retained (hereinafter all references to "complainant" refer to both the present and prior U.S. Cablevision Corp.). Complainant began subscribing to cable television channel distribution service as offered by NYTelco in its Tariff F.C.C. No. 34 on June 21, 1967. Cable television channel distribution service is a communications service provided by telephone companies whereby cable television channel distribution facilities are constructed and owned by the telephone company but used to serve subscribing cable television operators. This contrasts with cable television channel distribution provided by cable television operators themselves through pole attachment agreements, i.e. the cable television operator owns the cable television channel distribution facilities but contracts with the telephone company so that it may attach its cables to telephone company poles for distribution purposes. On June 26, 1968 we released our decision in Docket No. 17333, *General Telephone Company of California, et al.*, 13 FCC 2d 448, wherein we decided, among other things, that Section 214 of the Communications Act was applicable to the construction and operation of cable television channel distribution facilities by a common carrier.[1] Thereafter, on November 12, 1968, NYTelco filed an application for a Section 214 certificate of public convenience and necessity with respect to the Hyde Park cable television channel distribution facili-

[1] Section 214(a) of the Communications Act provides, in pertinent part: "No carrier shall undertake the construction of a new line or of an extension of any line, or shall require or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line. . ." 47 U.S.C. 214(a)

ties.[2] Subsequently, on October 7, 1971, in Docket No. 17441, *Better T.V. Inc. of Duchess County, New York*, 31 FCC 2d 939, we released our decision which denied NYTelco's Section 214 application because we found that in Hyde Park NYTelco had followed an unreasonable course of conduct toward cable television operators who desired to construct their own cable television systems, attempting to either induce independent cable television operators to take unwanted cable television channel distribution service from NYTelco, or to impede their construction of cable television systems until a tariff customer could be obtained and cable television channel distribution facilities constructed. In view of this misconduct by NYTelco we ordered, among other things, that NYTelco cease providing cable television channel distribution service to complainant in Hyde Park and in compliance therewith such service was wholly terminated as of June 28, 1972.

2. Complainant now contends that NYTelco constructed and operated the cable television channel distribution facilities in Hyde Park for five years without ever obtaining from the Commission a Section 214 certificate of public convenience and necessity, that NYTelco was never lawfully authorized to provide cable television channel distribution service to complainant at any time during the five year period and that, therefore, NYTelco's Tariff F.C.C. No. 34 as it relates to Hyde Park was at all times during the five year period improperly on file with the Commission and ineffective since it purported to offer a communications service which NYTelco could not lawfully provide. Accordingly, complainant alleges that NYTelco's collection of monthly and termination charges from complainant as specified in Tariff F.C.C. No. 34 constituted a violation of Sections 201 (b), 203 (c) and 214 of the Communications Act.[3] Therefore, complainant requests, among other things, reimbursement of approximately $195,000 in monthly and termination charges paid from June 21, 1967 to June 28, 1972. Complainant further contends that even if NYTelco was lawfully authorized at all times during the five year period to provide cable television channel distribution service in Hyde Park, it would be inequitable to allow NYTelco to retain the collected tariff charges in view of NYTelco's prior unlawful conduct in Hyde Park and therefore such charges should be reimbursed to complainant. NYTelco alleges in its responsive pleading, among other things, that it was at all times during the five year period in question lawfully authorized to provide cable television channel distribution services in Hyde Park, that the charges collected were lawful charges for a lawful communications service provided to complainant under a lawful tariff, and that if the requested relief were granted it would result in a pure windfall to complainant, allowing complainant to enjoy a valuable communications service at no charge for five years.

[2] F.C.C. Docket No. 18525, File No. P–C–7271

[3] Section 201(b) provides in pertinent part: "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful. . ." 47 U.S.C. 201(b).

Section 203(c) provides, in pertinent part: "No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published . . . and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation, for such communication, or for any service connected therewith, between the points named in any such schedule than the charges specified in the schedule then in effect. . ." 47 U.S.C. 203(c). Also see n. 1.

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3. We shall dismiss in part and otherwise deny this complaint for the reasons that (a) NYTelco was authorized by specific Commission orders to provide cable television channel distribution service in Hyde Park from June 26, 1968 to June 28, 1972 and therefore acted lawfully in collecting charges for such service under its properly filed and then effective tariff; (b) complainant's claim for reimbursement with respect to the one year period when service was provided prior to June 26, 1968 is barred by Section 415(b) of the Communications Act and the same is true regarding a substantial portion of the time period following June 26, 1968 and (c) in any event, complainant has failed to allege sufficient facts to show that it is equitably entitled to the requested relief.

4. NYTelco provided complainant cable television channel distribution service in Hyde Park for five years, from June 21, 1967 to June 28, 1972. Contrary to the allegations of complainant, NYTelco was lawfully authorized by our specific orders to provide such service in Hyde Park for four of the five years, i.e., from June 26, 1968, the release date of our *General Telephone* decision, to June 28, 1972, when service was wholly terminated. In regard to the one year period when service was provided prior to our *General Telephone* decision, i.e., from June 21, 1967 to June 26, 1968, NYTelco was not authorized to provide service in Hyde Park. Section 214 was enacted and applicable long before NYTelco began construction and operation of the uncertified facilities in Hyde Park in mid-1967 and, therefore, NYTelco was in violation of Section 214's provisions the moment it began construction and operation of the uncertified facilities in Hyde Park. *Ashtabula Cable T.V., Inc.* v. *Ashtabula Telephone Company*, 18 FCC 2d 193, 194 (1969). Further, as previously noted NYTelco's application for a Section 214 certificate was expressly denied in our October 7, 1971 *Better T.V.* decision. Finally, no specific orders were issued by us during the June 21, 1967 to June 26, 1968 period such as would constitute authorization to construct and operate the Hyde Park facilities during such period. On the contrary, we expressly placed carriers on notice as early as March 1967 that any construction without prior approval might be the subject of appropriate action including the issuance of cease and desist orders. 7 FCC 2d 571 and 7 FCC 2d 575. However, this does not mean that complainant is entitled to an order directing NYTelco to reimburse tariff charges collected during the June 21, 1967 to June 26, 1968 period. On the contrary, such an order would be inappropriate because complainant's claim for such reimbursement, even if otherwise valid, is barred by Section 415(b) of the Communications Act since complainant did not file the subject complaint until April 27, 1972.[4] Section 415 also bars complainant's claim for reimbursement of tariff charges collected from June 26, 1968 to on or about May 1, 1971.

5. We believe Section 415(b) is properly applicable in this case. We indicated in *Bunker Ramo Corporation* v. *Western Union Telegraph Company*, 31 FCC 2d 449, 454 (1971), that a statute of limitations does not begin to run until discovery of the right or wrong or of

[4] Section 415(b) of the Communications Act provides that "All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within one year from the time the cause of action accrues, and not after . . ." 47 U.S.C. 415(b).

the facts on which such knowledge is chargeable by law and that the running of the period of limitations may be suspended or tolled by various causes; for example, although mere ignorance will generally not toll the statute, active fraudulent concealment by a defendant will generally do so. In our opinion, knowledge of the basic facts complainant cites as supporting its claim for reimbursement, namely, that Section 214 was applicable to the construction and operation of cable television channel distribution facilities and that NYTelco's construction and operation of such uncertified facilities in Hyde Park from June 21, 1967 to June 26, 1968 and thereafter was in violation of the provisions of Section 214, was chargeable by law upon complainant at or near the time it began taking service from NYTelco (mid-1967). As noted earlier, Section 214 was enacted long before any of the events we are here concerned with occurred. Even if such knowledge was not chargeable by law upon complainant in mid-1967, as we believe it was, it is obvious that doubts as to the applicability of Section 214 to the construction and operation of cable television channel distribution facilities by NYTelco should have been put to rest on June 26, 1968 when we released our *General Telephone* decision. Notwithstanding our *General Telephone* decision, complainant waited until April 27, 1972 before filing the subject complaint. In addition, we cannot hold that the statute of limitations was tolled in view of complainant's failure to allege any facts whatsoever indicating that fraud or deceit was practiced by NYTelco upon complainant to prevent complainant from becoming aware of the basic facts upon which its claim for reimbursement is based. In view of the foregoing, it is clear that Section 415(b) is properly applicable in this case and complainant's claim for reimbursement of tariff charges collected from June 21, 1967 to June 26, 1968 (as well as June 26, 1968 to on or about May 1, 1971) is barred.

6. We shall now relate the reasons why NYTelco was authorized to provide service in Hyde Park for four of the five years that service was provided. After our *General Telephone* decision was released, NYTelco was obligated to take steps to obtain Section 214 authorization from the Commission with respect to the cable television channel distribution facilities in Hyde Park in order to continue providing the cable television channel distribution service to complainant in Hyde Park.[5] Our June 26, 1968 *General Telephone* decision provided that cease and desist orders against continued operation of cable television channel distribution facilities would not be stayed unless common carriers then operating such facilities filed applications for Section 214 authorization or filed pleadings containing certain specified information and any other public interest factors which might justify the granting of relief from cease and desist orders. At that time NYTelco was operating such facilities in Hyde Park. On July 5, 1968, FCC 68–715, we temporarily stayed the effectiveness of our *General Telephone* decision in order to give the carriers time to prepare their objections. On July 26, 1968, 14 FCC 2d 170, after reviewing carrier objections, we stayed *pendente*

[5] The Bell companies had previously been given notice that they were required to file appropriate tariffs under Section 203(a) of the Communications Act before providing any cable television channel distribution service by our April 6, 1966 Letter Order, FCC 66–293. Petitions for Reconsideration of such Letter Order were denied, (4 FCC 2d 257 (1966)). NYTelco complied with this requirement by filing its Tariff FCC No. 34 on September 27, 1966, and by later making timely provision therein for the service provided to complainant in Hyde Park.

lite the effectiveness of that portion of our *General Telephone* decision pertaining to cease and desist orders but only insofar as cable television channel distribution facilities constructed and in operation on or before June 26, 1968 were concerned. Thus, common carriers providing cable television channel distribution service prior to the June 26, 1968 release date of our decision, such as NYTelco in Hyde Park, could continue providing such service pending appellate review of our *General Telephone* decision. Subsequently, the courts affirmed that decision and NYTelco, in compliance therewith, duly filed a Section 214 application with respect to the cable television channel distribution facilities in Hyde Park.[6] By filing its Section 214 application, NYTelco stayed the effect of our cease and desist order with respect to the operation of the Hyde Park facilities pending action upon the application. This also meant that NYTelco was authorized to continue providing cable television channel distribution service to complainant in Hyde Park pending Commission action on its application. We had ample statutory authority under Sections 4(i) and 214(a) of the Communications Act to issue our orders allowing common carriers such as NYTelco to provide cable television channel distribution service even though their Section 214 applications were not yet filed or if filed, not yet acted upon. Section 4(i) of the Communications Act provides that ". . . The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions". 47 U.S.C. 154(i). Section 214(a) provides in pertinent part that ". . . *the Commission may, upon appropriate request being made, authorize temporary or emergency service . . . without regard to the provisions of this section . . .*" (our emphasis). 47 U.S.C. 214(a). A reasonable interpretation of the above quoted statutory language is that a common carrier, which may be required to obtain a Section 214 certificate in order to construct and provide or continue to provide a particular communications service on a permanent basis, as in the case of NYTelco in Hyde Park, may still be lawfully authorized to provide that particular communications service on a temporary or emergency basis even though the carrier's application for a certfiicate has not been filed, has not been acted upon, or has even been denied by the Commission. In view of the foregoing, it is clear that NYTelco was authorized by our *General Telephone* decision and the related orders following that decision to provide cable television channel distribution service to complainant in Hyde Park from June 26, 1968 until such time as action was taken on its Section 214 application.

7. As already noted, our October 7, 1971 *Better T.V.* decision denied NYTelco's Section 214 application and ordered NYTelco to cease providing cable television channel distribution service in Hyde Park. However, in order to avoid an abrupt disruption of cable television service to cable television subscribers in Hyde Park and provide for a transition period during which the subscribers could obtain other cable television service, we permitted NYTelco to continue operation of the cable television channel distribution facilities in Hyde Park for a period of 180 days from the October 7, 1971 released date, until April 10, 1972 (31 FCC 2d 968). On March 30, 1972, we extended this per-

[6] *General Telephone, et al.* v. *FCC*, 413 F. 2d 390 (D.C. Cir. 1969), cert. denied 396 U.S. 888 (1969). See n. 2.

mission for 90 more days to June 28, 1972 (34 FCC 2d 153), by which date the cable television channel distribution service in Hyde Park was wholly terminated. Sections 4(i) and 214(a) of the Communications Act provide ample statutory authority for the issuance of these orders. Thus, even after our denial of NYTelco's Section 214 application on October 7, 1971, NYTelco had our express authority to provide cable television channel distribution service to complainant in Hyde Park until such service could be terminated in an orderly manner, i.e., until June 28, 1972.

8. Since, contrary to the allegations of complainant, NYTelco was lawfully authorized to provide cable television channel distribution service in Hyde Park from June 26, 1968 to June 28, 1972, it follows that NYTelco's tariff, effective during such period, was binding on the carrier and its customer alike, and that NYTelco therefore acted lawfully in collecting the charges as specified in its tariff for the provision of service to complainant. Moreover, even if NYTelco was not lawfully authorized to provide the service during the entirety of the aforementioned period, as it was, complainant still would not be entitled to an order directing reimbursement of the collected tariff charges for the greater portion of such period, June 26, 1968 to on or about May 1, 1971, because Section 415(b) of the Communications Act bars complainant's claim. Accordingly, complainant is not entitled to an order directing reimbursement of tariff charges collected from June 26, 1968 to June 28, 1972.

9. Finally, in addition to our above reasons for our conclusion that an order directing reimbursement of collected tariff charges is inappropriate, there is still another reason supporting such conclusion. This relates to complainant's remaining contention that even if NYTelco was lawfully authorized at all times to provide cable television channel distribution service to complainant in Hyde Park it would be inequitable, in view of NYTelco's prior unlawful conduct in Hyde Park, to allow NYTelco to retain the collected charges for the Hyde Park service and so such charges should thus be refunded to complainant. We do not agree. We have already imposed appropriate sanctions against NYTelco for the misconduct we found in *Better T.V.* Not only did we deny NYTelco's Section 214 application for permanent authorization to operate the Hyde Park facilities but we ordered that NYTelco cease and desist from providing cable television channel distribution service in Hyde Park, we denied NYTelco the undepreciated cost of the Hyde Park facilities in its rate base, and we ordered that no sale could be made of the facilities without prior Commission approval. 31 FCC 2d 967, 968. Granting the relief requested by complainant would amount to the imposition of an additional sanction on NYTelco, an action which we do not believe is warranted under the facts and circumstances of this case. Complainant has also failed to allege sufficient facts that would equitably entitle it to a reimbursement of all tariff charges it paid during a five year period during which it was receiving a valuable communications service.

10. In view of the foregoing, IT IS ORDERED, That complainant's Motion to Make Answer More Definite and Certain is DENIED and, IT IS FURTHER ORDERED, That complainant's formal complaint is hereby DISMISSED in part and otherwise is DENIED.

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

FCC 74-360

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of WARNER CABLE OF KERN COUNTY, INC., BAKERSFIELD, CALIF. For Certificate of Compliance	CAC-2218 (CA143)

MEMORANDUM OPINION AND ORDER

(Adopted April 9, 1974; Released April 22, 1974)

BY THE COMMISSION:

1. Warner Cable of Kern County, Inc.[1] has filed an application for certificate of compliance to add the signal of Television Broadcast Station KMPH (Ind., Channel 26), Tulare, California, to its existing cable television system at Bakersfield, California, a smaller television market.[2] Warner currently carries the following television broadcast signals:

KERO-TV (NBC, Channel 23) Bakersfield, California.
KBAK-TV (CBS, Channel 29) Bakersfield, California.
KJTV (ABC, Channel 17) Bakersfield, California.
KNXT (CBS, Channel 2) Los Angeles, California.
KNBC (NBC, Channel 4) Los Angeles, California.
KTLA (Ind., Channel 5) Los Angeles, California.
KABC-TV (ABC, Channel 7) Los Angeles, California.
KHJ-TV (Ind., Channel 9) Los Angeles, California.
KCET (Educ., Channel 28) Los Angeles, California.
KMEX-TV (Spanish Language, Channel 34) Los Angeles, California.
KCOP (Ind., Channel 13) Los Angeles, California.
KTTV (Ind., Channel 11) Los Angeles, California.

The Commission has received numerous letters from residents of the Bakersfield area, school officials, and city and county authorities expressing opposition to the proposed addition of the KMPH signal.[3] Warner has replied.

2. KMPH is licensed to a community (Tulare) in a smaller television market and places a predicted Grade B contour over Bakersfield, a community in another smaller television market. Because Pappas Television Inc., licensee of KMPH, has requested carriage, Warner is required to carry KMPH pursuant to Section 76.59(a)(3) of the Rules. In order to provide space for KMPH on its 12-channel system, Warner plans to delete "all programs of KABC-TV . . . during such time that

[1] Formerly Cypress Cable TV of Kern County, Inc.
[2] Warner serves 1459 subscribers within the City of Bakersfield (population is approximately 69,000).
[3] We have treated these letters as informal objections to the subject applications.

KMPH is on the air so as to provide full carriage of KMPH". Warner plans to continue carriage of that KABC–TV programming broadcast before KMPH sign-on and after KMPH sign-off. Although KABC–TV is currently carried on the system, substantial amounts of its programming must be deleted to provide network program exclusivity to *KJTV*. The objectors view this "black out" time as potentially available for access cablecasting services, which would be lost if KMPH were to replace KABC–TV. Some of the objectors request the Commission to hold public hearings in Bakersfield to allow interested persons an opportunity to express their views on the application.

3. There is no question as to the carriage of KMPH. Its carriage is clearly mandatory. Whether Warner meets this carriage obligation by channel expansion, deletion of a signal or composite carriage is a matter for its own decision. See *Hoosier Telecable Corp.*, 43 FCC 2d 248 (1973). Warner apparently has made a business judgment that its obligation will be met by the partial deletion of KABC–TV. Although smaller market cable television systems may voluntarily provide access services (and we note that Warner apparently is providing and will continue to provide some access services during black out time on another channel), the Commission's Rules require access availability only on major market systems. Similarly, our minimum channel capacity requirements apply only to systems within major television markets. Warner's proposal is consistent with the Rules. We will require no more.

In view of the foregoing, the Commission finds that a grant of the subject application would be in the public interest.

Accordingly, IT IS ORDERED, That the informal objections to the subject application ARE DENIED.

IT IS FURTHER ORDERED, That the application for certificate of compliance (CAC–2218) filed by Warner Cable of Kern County, Inc. IS GRANTED and an appropriate certificate of compliance will be issued.

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

FCC 74-359

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Cease and Desist Order Directed Against WELCH ANTENNA CO., WELCH, W. Va.	Docket No. 20007 CSC-74 (WV196)

ORDER TO SHOW CAUSE

(Adopted April 9, 1974; Released April 24, 1974)

BY THE COMMISSION:

1. On February 8, 1974, Daily Telegraph Printing Company, licensee of Station WHIS-TV, Bluefield, West Virginia, filed a "Petition for Issuance of Cease and Desist Order against Welch Antenna Company, Welch, West Virginia." The petition asked that an Order to Show Cause be directed against the captioned cable television system for its alleged failure to provide simultaneous network program exclusivity protection in accordance with the Commission's Rules.[1] Welch Antenna Company's system at Welch, West Virginia, located in the Bluefield, West Virginia smaller television market, provides approximately 1,500 subscribers with the following television broadcast signals:

WHIS-TV (NBC) Bluefield, West Virginia.
WHTN-TV (ABC) Huntington, West Virginia.
WSAZ-TV (NBC) Huntington, West Virginia.
WCHS-TV (CBS) Charleston, West Virginia.
WOAY-TV (ABC) Oak Hill, West Virginia.
WDBJ-TV (CBS) Roanoke, Virginia.

It is undisputed that the predicted Grade A contour of WHIS-TV wholly encompasses the town of Welch, while the predicted Grade B contour of Station WSAZ-TV, the station against which WHIS-TV asks protection, falls short of the subject cable community.

2. Daily Telegraph relies on the exclusivity priorities assigned its signal by Sections 76.91 of the Rules, a previous Commission determination (in *Docket No. 17855*) that it was entitled to exclusivity protection *vis a vis* WSAZ-TV, and Welch Antenna's alleged failure to accord its programming appropriate protection.

[1] Relevant Section 76.91 of the Commission's Rules provides, in pertinent part, as follows:

"§ 76.91 STATIONS ENTITLED TO NETWORK PROGRAM EXCLUSIVITY.

"(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 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; (3) Third, all television broadcast stations within whose Grade B contours the community of the system is located, in whole or in part.

3. In 1967, following Welch Antenna's failure to comply with repeated requests for exclusivity protection, Daily Telegraph filed a request for Order to Show Cause directed against Welch Antenna. Subsequent to the Commission's issuance of this Order (see *Welch Antenna Co. (Docket No. 17855)*, 10 FCC 2d 675 (1967)), Welch Antenna and Daily Telegraph reached agreement in their dispute and then filed a "Joint Petition for Dismissal of Show Cause Proceeding and Continuance of Procedural Dates Pending Action" with the presiding Administrative Law Judge. This joint pleading summarized a formal "agreement" which provided, *inter alia*, that Welch Antenna would furnish exclusivity protection to Station WHIS–TV in accordance with the Commission's Rules.[2] Following the parties' submission of a copy of this agreement, the Commission, in its *Memorandum Opinion and Order* adopted on March 6, 1968 (see *Welch Antenna Co.*, 12 FCC 2d 162) concluded ". . . that the terms of the agreement are not inconsistent with the public interest and that no purpose would be served by a hearing in the show cause proceeding," and accordingly terminated the proceeding in *Docket No. 17855*.

4. Daily Telegraph states that it regularly provided the Welch system with appropriate program notifications and only recently learned of Welch Antenna's alleged discontinuance of exclusivity protection. Reference is made to an affidavit of Mr. Scott Shott, station manager of WHIS–TV, who states that he met with Mr. William Turner, owner and operator of the Welch system, on January 17, 1974. At that time, Mr. Turner allegedly told him that the Welch system was not affording exclusivity protection to Station WHIS–TV and had not done so "for many years." Petitioner contends that this failure to provide exclusivity protection violates the Commission's Rules and the joint agreement submitted to the Commission in connection with the earlier proceedings[3] and is also contrary to statements made in Mr. Turner's affidavit of October 28, 1968, certifying that exclusivity protection was being provided Station WHIS–TV.[4]

5. On February 14, 1974, the Commission received a letter from Mr. William Turner stating that Daily Telegraph's request for Order to Show Cause ". . . is not needed." Mr. Turner refers to his January 17, 1974, meeting with Mr. Scott Shott at which, it is alleged, Shott solicited a written statement as to Welch Antenna's position on the matter of the system's exclusivity obligations. Shortly after receipt of this statement WHIS–TV sent a reply which: a) disagreed with Mr. Turner's position on the matter of exclusivity protection; b) alleged

[2] In *Welch Antenna Company* 12 FCC 2d 162 (1968), the agreement was described thusly: "Under the terms of the agreement, the CATV system will commence providing nonduplication protection to WHIS–TV by April 1, 1968, or as soon thereafter as automatic switching equipment can be delivered and installed. In lieu of having the signal of WHIS–TV carried on only one channel of the CATV system as provided in Section 74.1103(d)(3) of the rules, Daily Telegraph has agreed to permit the CATV system to carry the signal of WHIS–TV on the channel from which the duplicating distant signal is deleted in addition to the channel regularly assigned to WHIS–TV."

[3] By its terms, the agreement, dated January 20, 1968, was for a period of five years and automatically renewable for periods of one year unless notice of termination was sent by either party thirty days prior to the termination date of the initial five year period or a subsequent one-year period. Daily Telegraph states that it has never received any notification from Welch Antenna that the agreement had terminated and that Station WHIS–TV has sent no such notice to Welch Antenna.

[4] As part of the agreement, Welch Antenna agreed that it would provide certification to the American Research Bureau and other rating services that it was affording Station WHIS–TV with exclusivity protection.

that for many years Welch Antenna had been operating in violation of the Commission's regulations and the aforementioned "agreement;" and c) stated that Daily Telegraph was directing its Washington counsel to bring the matter to the Commission's attention. Mr. Turner's February 14, 1974, letter to the Commission protests Shott's prompt notification of Washington counsel, without giving Welch Antenna ". . . at least 30 days in which to comply . . ." The letter concludes with Turner's request for a 30 day period in which to a) repair the system's existing switching equipment, b) buy a new switcher, or c) totally delete Station WSAZ–TV for the Welch system.[5]

6. On March 25, 1974, the Commission received a two-sentence letter from Mr. Turner requesting a waiver of the Commission's exclusivity rules *vis a vis* Station WHIS–TV. While such a "petition" is procedurally defective in many respects (see section 76.7 of the Commission's Rules which specifies the procedural requirements of a "petition for special relief"), it also serves to place in doubt Mr. Turner's stated intent to abide by the exclusivity rules. Furthermore, Mr. Turner has sent the Commission a copy of his letter to Mr. Shott, dated March 13, 1974; a letter which Mr. Turner calls his "second notice" that Daily Telegraph send Welch Antenna a list of all programs to which protection is sought ". . . eight days in advance by registered mail." The letter states that exclusivity protection will not be forthcoming until a list is received ". . . in accordance with [Welch Antenna's] request . . . "[6]

7. Pursuant to Section 76.91 of the Rules, Station WHIS–TV is entitled to simultaneous network program exclusivity on the system operated at Welch, West Virginia, by Welch Antenna Company. It is apparent that such protection is not now being afforded and may not have been afforded for several years. The Commission's decision, in *Welch Antenna Company*, 12 FCC 21 162 (1968), to terminate the proceedings in *Docket No. 17855*, was made in reliance on the nonduplication agreement between Daily Telegraph and Welch Antenna. We believed that the agreement was filed in good faith and would be binding, by its terms, on the parties. However, this agreement and the Commission's Rules appear to have been disregarded by Welch Antenna. For these reasons, we believe it is appropriate to issue the requested Order to Show Cause.

Accordingly, IT IS ORDERED, That pursuant to Sections 312 (b) and (c) and 409(a) of the Communications Act of 1934, as amended, 47 U.S.C. 312 (b) and (c) and 409(a), Welch Antenna Company IS DIRECTED TO SHOW CAUSE why it should not be ordered to cease and desist from further violation of Section 76.91 of the Commission's Rules and Regulations on its cable television systems at Welch, West Virginia.

IT IS FURTHER ORDERED, That Welch Antenna Company, IS DIRECTED to appear and give evidence with respect to the

[5] We note that Station WSAZ–TV is listed as "significantly viewed" in the county of the system (see Appendix B of the *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326 (1972)), such that its licensee could properly request carriage of all WSAZ–TV programs not simultaneously duplicating those presented by Station WHIS–TV.

[6] The Commission has not received a copy of any "first notice" concerning program notification and we are aware of no requirement in our Rules that such program notification need be sent by registered mail.

matters described above at a hearing to be held at Washington, D.C. at a time and place before an Administrative Law Judge to be specified by subsequent Order, unless the hearing is waived in which event a written statement may be submitted.

IT IS FURTHER ORDERED, That Daily Telegraph Printing Company and Chief, Cable Television Bureau ARE MADE parties to this proceeding.

IT IS FURTHER ORDERED, That the Secretary of the Commission shall send copies of this Order by Certified Mail to Welch Antenna Company.

IT IS FURTHER ORDERED, That the petition for waiver submitted by Welch Antenna IS DISMISSED as procedurally defective.

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

FCC 74-453

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
WEST HAWAII CABLE VISION, LTD.	
CAPTAIN COOK, HAWAII	CAC-3207 (HI023)
WAIKOLOA, HAWAII	CAC-3208 (HI024)
KAWAIHAE-PUAHO, HAWAII	CAC-3209 (HI025)
HONAUNAU, HAWAII	CAC-3210 (HI026)
KEALAKEKUA, HAWAII	CAC-3211 (HI027)
HOLUALOA, HAWAII	CAC-3212 (HI028)
KAILUA-KONA, HAWAII	CAC-3213 (HI029)
KAMUELA, HAWAII	CAC-3214 (HI030)
KEAUHOU, HAWAII	CAC-3215 (HI031)
KALAOA, HAWAII	CAC-3216 (HI032)
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted April 18, 1974; Released April 30, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. On November 1, 1973, West Hawaii Cable Vision filed applications (CAC-3207 through CAC-3216) for certificates of compliance for new cable television systems to serve the ten above-captioned communities located outside all major and smaller television markets.[1] West Hawaii proposes to carry the following television broadcast signals on all of its Hawaii systems:

KAII-TV (NBC, Channel 7) Wailuhu, Hawaii.
KMAU-TV (CBS, Channel 3) Wailuhu, Hawaii.
KMVI-TV (ABC, Channel 12) Wailuhu, Hawaii.
KIKU-TV (Ind., Channel 13) Honolulu, Hawaii.
KMEB-TV (Educ., Channel 10) Wailuhu, Hawaii.

Carriage of these signals is consistent with Section 76.57 of the Rules. The applications are unopposed.

2. West Hawaii received its franchise from the Director of Regulatory Agencies on September 14, 1973.[2] Incorporated by reference into the franchise was Section 440 G-8(d) of the Hawaii Cable Television Law, which requires a twenty-year franchise period, and Chapter 3 of the Hawaii cable television rules and regulations, which requires a

[1] The approximate populations of the West Hawaii systems are: Captain Cook, 3,265; Wailocoloa, 25; Kawaihae-Phako, 425; Honaunau, 875; Kealakekua, 740; Holualoa, 800; Kailua-Kona, 4,970; Kamuela, 2,285; Keahou, 350; Kalaoa, 375.

The proposed systems will have a 26-channel capacity. Four channels will be dedicated for non-automated program origination. One channel will carry the signals of four Honolulu, Hawaii radio stations.

[2] Section 440 G-8(d) of the Hawaii Cable Television Law gives the Director of Regulatory Agencies the authority to grant cable television franchises.

franchise fee to be paid the State of the greater of $5,000 or 5% of estimated gross income for a system's first calendar year, and 5% of annual gross revenues thereafter. Although the franchises comply with our franchise standards in all other respects, they are not in accord with Section 76.31(a)(3) of the Commission's Rules which allows a fifteen-year maximum franchise duration and Section 76.31(b), which, without a special showing, limits franchise fees to three percent of gross subscriber revenues.

3. West Hawaii contends that although the franchise documents themselves were granted in 1973, they are inseparable from the above-mentioned laws and regulations which were adopted prior to March 31, 1972. Therefore, it is argued, the franchise taken as a whole should be considered as having been granted before the Commission's new cable rules were promulgated and should be judged on the basis of substantial compliance with those rules. We find this argument unpersuasive. The Commission has in the past applied the doctrine of substantial compliance only to franchises granted prior to March 31, 1972. In the present case we appreciate the amount of time and energy that the Hawaii legislature and Department of Regulatory Agencies must have devoted to their very complete body of regulations. Nevertheless, it would be inconsistent with our expressed policies in this area to treat the franchises in question as having been granted before March 31, 1972, when it is only the enabling legislation and implementing rules that were adopted at that time.

4. West Hawaii, in an amendment to its applications dated March 15, 1974, assures the Commission that it will seek renewal of its franchise in fifteen years. This good faith declaration is in lieu of a showing than the twenty-year term is reasonable. The Commission in the past has accepted such assurances (see *Cablecom-General of Topeka*, 44 FCC 2d 544 (1973)), and we will do so here.

5. With regard to the 5% franchise fee, West Hawaii, pursuant to our requirements in Section 76.31(b) of the Rules, has submitted a showing that the fee is reasonable in light of the planned regulatory program and will not adversely affect the systems. Financial data submitted indicates that sufficient funds can be generated in each of the first three years of service to meet the operating expenses (which include the 5% state franchise fee), debt service, and capital expansion requirements. The applicant submits, therefore, that the Hawaii franchise fee requirement will not impair its ability to effectuate federal regulatory goals. Further information submitted shows that the State of Hawaii has established a comprehensive regulatory program. Included in this program are procedures for investigations and hearings concerning subscriber complaints, and the enforcement of system technical standards and access obligations imposed by the State. There will also be procedures for amending or repealing provisions of the Hawaii cable rules and regulations. The Director of Regulatory Agencies will be assisted by a five-member board and a team of hearing examiners. Compensations for this staff will be drawn from system franchise fees. Further, Hawaii law states that no part of a franchise fee may be used for general revenue, but rather must be used only to offset the costs of regulation.

6. We must note that the franchise fees in the instant applications are based on gross revenues. Section 76.31(b) of the Rules permits such fees to be based only on gross subscriber revenues. As a matter of policy, the Commission is concerned that the potential for auxiliary cable services not be inhibited. At this stage of cable development we believe that systems should be not assessed on revenues derived from advertising, leased services, pay cable, etc. Furthermore, while reasonable projections permit a fairly accurate estimate of subscriber revenues, amounts derived from auxiliary services are unknown. No system or franchising authority can predict what revenues may be earned from such services. *A fortiori* it is equally impossible at this time to justify a local regulatory program financed by a percentage of revenues unknown.

7. From all the information presented it appears that the Hawaii franchise fee, if based on subscriber revenues, is justified and will not unduly burden these applicants. Further it is clear that for at least a short period the system involved will be deriving no revenues from auxiliary services. In fact, for most of the next year, the systems will be under construction and earning no revenues at all. During this initial period the effect of a fee based on gross revenues is academic. The applicant has requested expedited consideration of this matter, however, in order that it may meet several state-imposed deadlines for the posting of bonds and completion of construction. The Commission is disposed, therefore, to grant the subject applications at this time, but with the condition that the franchise fee requirement be amended to reflect a base of gross subscriber revenues. We take note of the fact that within a year the Hawaii Department of Regulatory Agencies must hold a public proceeding to review cable television franchise fees.[3] We shall therefore require that the applicant inform the Commission within 15 months that the systems' franchises have been amended consistent with the Rules.

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

Accordingly, IT IS ORDERED, That the above-captioned applications for certificates of compliance, filed by West Hawaii Cablevision, Ltd., ARE GRANTED, with the condition expressed in paragraph 7 above, and appropriate certificates of compliance will be issued.

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

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[3] Department of Regulatory Agencies, Title VIII, Cable Television Division, Chapter 3.